COMMENTS

Relation Back of Amendments Adding Plaintiffs Under Rule 15(c)

Introduction

In 1998, Cary Cliff brought suit against OSI Collection Services, Inc., on behalf of himself and other similarly situated Florida residents.[1] After the statute of limitations had run, Cliff filed an amendment, adding a *nationwide* class of plaintiffs.[2] Suddenly, OSI found itself facing a potentially massive class action lawsuit and dramatically increased liability, and the court was faced with the decision of whether to allow the class complaint to relate back to the original time of filing for statute of limitations purposes, or to declare that the nationwide plaintiffs were time-barred from bringing their action.[3]

When a complaint is amended to add new plaintiffs after the statute of limitations has passed, allowing the amendment to relate back enables the new plaintiff to circumvent the statute of limitations.[4] As a result, potentially massive class actions may be brought against defendants who were not expecting to defend against such claims.

This comment examines the legal and policy concerns with allowing amendments adding plaintiffs to relate back. Part I introduces the concepts underlying the relation back doctrine by explaining that the policies behind the Federal Rules of Civil Procedure conflict with the policies underlying statutes of limitations, and shows how Federal Rule of Civil Procedure 15(c) seeks to reconcile these policies. It also explains that because amendments adding plaintiffs are not explicitly addressed in the rule, courts must adapt the rule to apply to such amendments. Part II analyzes the three different approaches courts have taken when determining whether to allow relation back of amendments adding plaintiffs: (1) the literal Rule 15(c) approach requiring mistake of identity; (2) the liberal approach focused on the absence of prejudice; and (3) the approach requiring notice of the

1. Cliff v. Payco Gen. Am. Credits, Inc., 363 F.3d 1113, 1118-19 (11th Cir. 2004).
2. *See id.*
3. *See id.* at 1131-33.
4. Under the legal fiction of relation back, a court treats the untimely amendment as if it had been included in the timely-filed original complaint. *See* Krupski v. Costa Crociere, S.p.A., 130 S. Ct. 2485, 2489 (2010) ("[A]n amended pleading 'relates back' to the date of a timely filed original pleading and is thus itself timely even though it was filed outside an applicable statute of limitations.").

existence and involvement of new plaintiffs. Part III focuses on the uncertainty surrounding this issue in the Tenth Circuit, surveying the district court cases and suggesting what approach the Tenth Circuit is likely to take if squarely confronted with the issue.

Parts IV and V explore some of the complexities of relation back of amendments adding plaintiffs. Specifically, Part IV examines the potential application of state relation back law in federal courts, and Part V discusses the significant impact the relation back of plaintiffs can have in the class action context and considers the implications of various approaches in class action cases. Finally, Part VI proposes a standard for relation back of amendments adding plaintiffs.

This comment maintains that in order to properly adapt Rule 15(c) to amendments adding plaintiffs, courts should impose requirements that respect the policies behind statutes of limitations. Thus, amendments adding plaintiffs should only relate back narrowly, when the defendant had notice that the plaintiff to be brought in by amendment previously asserted or attempted to assert a claim in court during the limitations period. Amendments adding plaintiffs should relate back only when (1) the original plaintiff had the legal capacity to assert claims on behalf of the new plaintiff, and (2) circumstances indicate that the new plaintiff intended to assert those claims. This approach upholds the policies behind statutes of limitations while furthering the principle that cases should be decided on their merits.

I. Concepts Underlying Relation Back

Relation back doctrine embodies the interplay between two conflicting policy choices: the policy behind the Federal Rules of Civil Procedure and the policies underlying statutes of limitations.[5] This section establishes several premises that are necessary to understand this policy conflict and how the conflict applies to the relation back of amendments adding plaintiffs. First, the Federal Rules of Civil Procedure seek to promote adjudication of conflicts on the merits. This policy requires that parties have wide latitude to correct and clarify pleadings. Second, statutes of limitations set a time period after which claims may not be brought, ensuring that

5. *See id.* at 2494 ("[T]he purpose of relation back [is] to balance the interests of the defendant protected by the statute of limitations with the preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits."); *see also* 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 15.15 (3d ed. 2011).

lawsuits are brought in a timely manner and that defendants are not called to defend themselves from stale claims. Third, Rule 15(c) attempts to balance the conflicting policies, and the requirements it imposes restrict relation back to those situations when the policies behind the statute of limitations are not violated. Finally, because amendments adding plaintiffs are not directly addressed in Rule 15(c), courts must apply the rule by analogy. Because allowing untimely plaintiffs to join an action technically violates the statute of limitations, amendments adding plaintiffs should only relate back in narrow circumstances that respect the policies underlying the statute of limitations.

A. Policies Underlying the Federal Rules of Civil Procedure

One of the primary policies underlying the Federal Rules of Civil Procedure is to facilitate the adjudication of conflicts on the merits.[6] This principle is particularly clear in the attitude the rules take to pleadings. The rules "reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome."[7] Pleading is not an end in itself, but is simply intended to facilitate the presentation of a case, providing a defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests."[8] Therefore, a party should not prevail simply because the opponent's pleading did not effectively state an otherwise meritorious claim.[9] As the Supreme Court noted in *Foman v. Davis*, cases should not be dismissed "on the basis of such mere technicalities."[10] Therefore, the rules allow parties to amend the pleadings, instructing courts to give parties leave to amend whenever "justice so

6. *See* Conley v. Gibson, 355 U.S. 41, 48 (1957), *abrogated on other grounds by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

7. *Id.*

8. *Id.* at 47; *see also Twombly*, 550 U.S. at 555 (summarizing pleading standards); 2 MOORE ET AL., *supra* note 5, § 8.10 ("[P]leadings should not be dismissed for technical defects. The pleading should be construed as a whole, to determine whether adequate notice of the claim or defense is presented.").

9. Foman v. Davis, 371 U.S. 178, 181 (1962) ("It is . . . entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities."); *Conley*, 355 U.S. at 47-48; *see also* Staren v. Am. Nat'l Bank & Trust Co., 529 F.2d 1257, 1263 (7th Cir. 1976) ("It is well settled that the Federal Rules of Civil Procedure are to be liberally construed to effectuate the general purpose of seeing that cases are tried on the merits and to dispense with technical procedural problems.").

10. 371 U.S. at 181.

requires."[11] The liberal attitude the rules take toward allowing pleadings to be amended is well-recognized.[12]

Parties often seek leave to amend pleadings after the statute of limitations has run. Although claims or amendments made after the limitations period has expired are presumed to be time-barred,[13] a strict application of this doctrine may yield unjust results where cases are decided on the basis of inconsequential mistakes instead of on the merits.[14] One oft-cited example is *Kerner v. Rackmill*, a 1953 case in which the plaintiff designated the defendant as an individual doing business as "Malibu Dude Ranch" when the proper defendant was "Malibu Dude Ranch, Inc.," a corporation.[15] An amendment was offered after the statute of limitations had run to correct this error, but the court held that the amendment would not relate back, even though the individual named in the complaint was an agent authorized to receive service on behalf of the corporation.[16] The *Kerner* decision has been roundly criticized as contrary to the policy of deciding claims on their merits, rather than on technicalities.[17]

Such decisions illustrate the need for some mechanism to amend pleadings, even once the statute of limitations has run, in order to enable a meritorious claim to go forward. Therefore, to allow pleadings to be clarified and corrected, the rules allow an amendment to relate back to the original date of filing when certain conditions are met.[18] The original version of Rule 15(c) allowed relation back when the claim asserted in the

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11. FED. R. CIV. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires.").

12. *See, e.g.*, *Staren*, 529 F.2d at 1263; Williams v. United States, 405 F.2d 234, 237 (5th Cir. 1968); Am. Fid. & Cas. Co. v. All Am. Bus Lines, Inc., 190 F.2d 234, 236 (10th Cir. 1951).

13. *Williams*, 405 F.2d at 237 ("[T]he rule is generally stated to be that relation back will not apply to an amendment that substitutes or adds a new party for those named initially in the earlier timely pleadings. The reasoning apparently is that such an addition amounts to the assertion of a 'new cause of action,' and if an amendment were allowed to relate back in that situation, the purpose of the statute of limitations would be defeated." (citation omitted)).

14. *See* 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1498 (3d ed. 2012).

15. 111 F. Supp. 150, 151 (M.D. Pa. 1953); *see also* 6A WRIGHT ET AL., *supra* note 14, § 1498 n.4; Lawrence A. Epter, *An Un-Fortune-Ate Decision: The Aftermath of the Supreme Court's Eradication of the Relation-Back Doctrine*, 17 FLA. ST. U. L. REV. 713, 720 (1990) (discussing the *Kerner* decision).

16. *Kerner*, 111 F. Supp. at 151-52.

17. *See, e.g.*, 6A WRIGHT ET AL., *supra* note 14, § 1498; Epter, *supra* note 15, at 720.

18. FED. R. CIV. P. 15(c).

amendment arose out of the same transaction or occurrence stated in the original pleading.[19] Thus, parties were able to clarify the original claim, expand or modify the facts alleged, increase the amount of relief sought, and even assert new theories of recovery.[20] This rule has been gradually expanded, and the current version of Rule 15(c) allows amendments to relate back to the original filing date in three circumstances.[21] First, an amendment may relate back if the applicable statute of limitations provides for relation back.[22] Second, an amendment may relate back under Rule 15(c)(1)(B) when it asserts a claim or defense that arises out of the same transaction or occurrence as that stated in the original pleading.[23] Third, Rule 15(c)(1)(C) allows an amendment changing or adding defendants to relate back under certain conditions.[24] Although Rule 15(c) does not explicitly provide for amendments adding new plaintiffs, the Advisory Committee Notes suggest the rule may be applicable to amendments adding plaintiffs as well, stating that the "attitude" toward changing defendants "extends by analogy" to changing plaintiffs.[25]

B. Policies Underlying Statutes of Limitations

As the Supreme Court has observed, statutes of limitations "represent a public policy about the privilege to litigate."[26] By barring claims after a certain amount of time has passed, statutes of limitations compel plaintiffs to file claims within a specified period.[27] "They are by definition arbitrary, and their operation does not discriminate between the just and the unjust

19. *See* FED. R. CIV. P. 15(c) (1938) (amended 1966, 1991, 1993).

20. 6A WRIGHT ET AL., *supra* note 14, § 1497.

21. *See* FED. R. CIV. P. 15(c).

22. *Id.* Rule 15(c)(1)(A).

23. *Id.* Rule 15(c)(1)(B).

24. *Id.* Rule 15(c)(1)(C) ("An amendment to a pleading relates back to the date of the original pleading when: . . . the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment: (i) received such notice of the action that it will not be prejudiced in defending on the merits; and (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.").

25. *Id.* Rule 15(c) advisory committee's note (1966) ("[T]he attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs.").

26. Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945).

27. *Id.* at 313 (considering whether a statute of limitations extinguishes the underlying claim or merely the right to assert the claim in court); Wood v. Carpenter, 101 U.S. 135, 139 (1879) ("Mere delay, extending to the limit prescribed, is itself a conclusive bar.").

claim, or the voidable and unavoidable delay."[28] They represent the notion that "the right to be free of stale claims in time comes to prevail over the right to prosecute them."[29]

Two policies underlie limitations statutes.[30] First, statutes of limitations are founded on the concept that "at some point, claims should be laid to rest so that security and stability can be restored to human affairs."[31] The uncertainty created by pending litigation prevents defendants from moving forward and may "hinder the flow of commerce."[32] If potential defendants are freed from the concern of perpetually unsettled claims, both individuals and society are able to function more efficiently. Thus, one of the primary purposes of statutes of limitations is to provide a measure of certainty and repose for defendants.[33] Second, the statutes relieve the court system of stale claims[34] and prevent prejudice to defendants by requiring that plaintiffs bring actions before "evidence has been lost, memories have faded, and witnesses have disappeared."[35] By enacting statutes of

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28. *Chase*, 325 U.S. at 314.

29. Burnett v. N.Y. Cent. R.R., 380 U.S. 424, 428 (1965) (quoting Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348-49 (1944)) (internal quotation marks omitted).

30. *See, e.g.*, Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 352 (1983); *Burnett*, 380 U.S. at 428; *Wood*, 101 U.S. at 139; *see also Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185-86 (1950); Laurie Helzick, Note, *Looking Forward: A Fairer Application of the Relation Back Provisions of Federal Rule of Civil Procedure 15(c)*, 63 N.Y.U. L. REV. 131, 140-41 (1988).

31. Nelson v. Cnty. of Allegheny, 60 F.3d 1010, 1014 (3d Cir. 1995) (quoting Cunningham v. Ins. Co. of N. Am., 530 A.2d 407, 409 (Pa. 1987)) (internal quotation marks omitted).

32. Safeway Stores, Inc. v. Certainteed Corp., 710 S.W.2d 544, 545 (Tex. 1986) ("Society's interest in repose is to have disputes either settled or barred within a reasonable time. It is based on the theory that the uncertainty and insecurity caused by unsettled claims hinder the flow of commerce."); *see* Pappion v. Dow Chem. Co., 627 F. Supp. 1576, 1581 (W.D. La. 1986) ("[D]efendants can stop worrying about prospective claims and can continue in the normal administration of their affairs."); Yorden v. Flaste, 374 F. Supp. 516, 520 (D. Del. 1974) (stating that statutes of limitations ensure that "the defendant will be protected from the insecurity generated by the fear of litigation pending in perpetuity," and "the marketplace will be free from the uncertainty of long pending and unsettled claims"); *see also Wood*, 101 U.S. at 139.

33. United States v. Kubrick, 444 U.S. 111, 117 (1979) ("[Statutes of limitations] are statutes of repose."); *see also Wood*, 101 U.S. at 139 ("They promote repose by giving security and stability to human affairs.").

34. Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) ("[Statutes of limitations] are practical and pragmatic devices to spare the courts from litigation of stale claims . . . .").

35. Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974).

limitations, legislatures recognize that it would be unjust to require a defendant to defend such a claim.[36]

Statutes of limitations function by requiring plaintiffs to file timely suits and by punishing delay.[37] Thus, the statutes are undermined if late-coming plaintiffs are given wide latitude to take advantage of the diligence of others by joining existing actions.[38] The Supreme Court has made clear that "a plaintiff who 'has slept on his rights'" should generally be barred from asserting those rights once the limitations period has passed.[39]

C. Relation Back Rules Must Balance the Conflicting Policies

As the Supreme Court has stated, "the purpose behind relation back [is] to balance the interests of the defendant protected by the statute of limitations with the preference expressed in the Federal Rules of Civil Procedure . . . for resolving disputes on their merits."[40] However, this balance creates a tension between relation back and statutes of limitations.[41] Because statutes of limitations prohibit bringing a claim after a certain amount of time has passed, defendants may ordinarily assert a limitations defense against an untimely amendment.[42] Allowing an amendment to relate back after the limitations period deprives the defendant of a

36. *Kubrick*, 444 U.S. at 117 ("Statutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time . . . .").

37. *Wood*, 101 U.S. at 139 ("[Statutes of limitations] stimulate to activity and punish negligence.").

38. Young v. Lepone, 305 F.3d 1, 15-16 (1st Cir. 2002) (rejecting a liberal relation-back rule and declaring that "[s]uch a rule would undermine applicable statutes of limitations and make a mockery of the promise of repose").

39. *Am. Pipe & Constr. Co.*, 414 U.S. at 554 (quoting Burnett v. N.Y. Cent. R.R., 380 U.S. 424, 428 (1965)); *see* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 352 (1983) ("Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights . . . ."); *Burnett*, 380 U.S. at 428 (distinguishing a situation in which a plaintiff has slept on his rights and should be time-barred from situations in which the plaintiff should not be time-barred because he was prevented from bringing his suit by fraud or war).

40. Krupski v. Costa Crociere S.p.A., 130 S. Ct. 2485, 2494 (2010).

41. *E.g.*, Yorden v. Flaste, 374 F. Supp. 516, 520 (D. Del. 1974) ("The problem is the tension between the Rule 15 relation back provisions and the statute of limitations."); *see also Krupski*, 130 S. Ct. at 2494; Nelson v. Cnty. of Allegheny, 60 F.3d 1010, 1014 (3d Cir. 1995).

42. *See, e.g.*, Sokolski v. Trans Union Corp., 178 F.R.D. 393, 397 (E.D.N.Y. 1998).

limitations defense and allows the plaintiff to assert a new claim even after the statute of limitations has expired.[43]

However, the rules dictate that parties have wide latitude to correct and clarify pleadings.[44] Without relation back, an attempt to correct a good-faith mistake or clarify a crucial point could be arbitrarily barred by a limitations defense.[45] As the Supreme Court noted in *Kruspski v. Costa Crociere S.p.A.*, while "[a] prospective defendant who legitimately believed that the limitations period had passed without any attempt to sue him has a strong interest in repose," it would be unfair to allow a defendant to avoid liability "only because the plaintiff misunderstood a crucial fact about [the defendant's] identity" during the limitations period.[46] Thus, as Justice Stevens observed, "[T]he principle purpose of Rule 15(c) is to enable a plaintiff to correct a pleading error after the statute of limitations has run if the correction will not prejudice his adversary in any way."[47] In other words, relation back allows a party to amend a meritorious claim, so long as the policies behind the statute of limitations are respected.[48]

As noted, the liberal approach of the rules allows wide latitude for pleadings to be amended.[49] However, in an effort to allow parties wide latitude in amending their pleadings, some courts not only liberally allow for amendments, but also seek to liberally allow amendments changing parties to relate back to the original filing date when they would otherwise be time-barred by the statute of limitations.[50] While courts should liberally allow amendments to be *made* to avoid adjudication based on technicalities, amendments changing parties should *relate back* only in particular circumstances. Rule 15(c) addresses this issue by allowing relation back only when the policies behind the statute of limitations are not violated.[51]

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43. *Id.*

44. *See* Andujar v. Rogowski, 113 F.R.D. 151, 154 (S.D.N.Y. 1986) ("[A]mendments as a general matter are favored in order 'to facilitate a proper decision on the merits.'" (quoting Conley v. Gibson, 355 U.S. 41, 48 (1957))).

45. *Krupski*, 130 S. Ct. at 2494.

46. *Id.*

47. Schiavone v. Fortune, 477 U.S. 21, 38 (1986) (Stevens, J., dissenting).

48. *E.g.*, Yorden v. Flaste, 374 F. Supp. 516, 520 (D. Del. 1974).

49. *See supra* notes 11-12 and accompanying text.

50. *See* Olech v. Vill. of Willowbrook, 138 F. Supp. 2d 1036, 1043 (N.D. Ill. 2000).

51. *See, e.g.*, Young v. Lepone, 305 F.3d 1, 14 (1st Cir. 2002) ("[T]he rule strikes a carefully calibrated balance."); *Yorden*, 374 F. Supp. at 520 ("Rule 15 has been carefully drafted to defer to the policies underlying such statutes.").

D. How Rule 15(c) Addresses Statute of Limitations Considerations

The rules distinguish between amendments adding new claims, which are addressed in Rule 15(c)(1)(B), and amendments changing parties, which are addressed by Rule 15(c)(1)(C).[52] Prior to 1966, Rule 15(c) focused only on amending claims and did not address amendments changing parties.[53] However, some federal courts relied on the rule to allow amendments pertaining to the parties to relate back to avoid injustice.[54] Such situations included the correction of misnomers[55] and the addition of defendants who had an identity of interest with the original defendant, and thus had sufficient notice of the action prior to the running of the limitations period.[56] Other courts, however, adopted a strict interpretation of the rule and refused to allow relation back of amendments changing parties, even to correct the slightest mistakes.[57] One recurrent problem was with individuals who attempted to bring lawsuits against the federal government challenging the denial of Social Security benefits, but failed to designate the proper defendant: the Secretary of the Department of Health, Education, and Welfare.[58] These plaintiffs were subsequently barred from correcting the mistakes when they were discovered because the statute of limitations had expired in the meantime.[59] In direct response to these and similar cases, the rule was amended in 1966 to specifically allow for the relation back of amendments changing parties.[60]

Because the relation back of amendments changing claims and the relation back of amendments changing parties are related, it is tempting to apply the rationale behind the former to cases involving the latter.[61] However, the two types of amendments are distinct, and each implicates different statute of limitations considerations. A discussion of this distinction is necessary to highlight the specific purpose each Rule 15(c)(1)(C) requirement serves.

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52. *Compare* FED. R. CIV. P. 15(c)(1)(B), *with id.* Rule 15(c)(1)(C).
53. 6A WRIGHT ET AL., *supra* note 14, § 1498.
54. *Id.*
55. Jackson v. Duke, 259 F.2d 3, 6-7 (5th Cir. 1958).
56. Meltzer v. Hotel Corp. of Am., 25 F.R.D. 62, 65-66 (N.D. Ohio 1960).
57. 6A WRIGHT ET AL., *supra* note 14, § 1498.
58. FED. R. CIV. P. 15(c) advisory committee's note (1966).
59. *Id.*
60. *Id.*
61. *See, e.g.*, Williams v. United States, 405 F.2d 234, 236 (5th Cir. 1968) (drawing on cases involving amendments changing claims in determining whether to allow relation back of amendment adding plaintiff).

1. Rule 15(c)(1)(B)

When a plaintiff seeks to amend a complaint to modify the claim once the limitations period has expired, notice is the primary consideration.[62] This is because the pleading rules require only that a pleading put the defendant on notice to prepare a defense.[63] Pleadings are not required to state specific legal theories or causes of action.[64] Thus, amendments asserting or clarifying transactionally related claims logically relate back to the original filing date.[65] "[S]o long as the different theories introduced by the amendment fuse together within the 'conduct, transaction, or occurrence' set forth in the complaint,"[66] the newly asserted claims can be considered encompassed by the original complaint, and the policy behind the statute of limitations is satisfied.[67]

Therefore, Rule 15(c)(1)(B) allows an amendment to relate back if "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading."[68] By allowing a plaintiff to amend the complaint to clarify the claim or modify the facts alleged, this rule ensures the pleading is able to serve its purpose of bringing the "real issues of the case" before the court.[69]

The requirement that the defendant had notice of the conduct, transaction, or occurrence underlying the claim is also sufficient to ensure that the policies behind the statute of limitations are satisfied.[70]

By filing the original complaint, the plaintiff places the defendant on notice that the plaintiff is trying to enforce a claim arising out of the alleged

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62. *Id.*; *accord* Staren v. Am. Nat'l Bank & Trust Co., 529 F.2d 1257, 1263 (7th Cir. 1976).

63. *See* Conley v. Gibson, 355 U.S. 41, 47 (1957), *abrogated on other grounds by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

64. *Id.*

65. 6A WRIGHT ET AL., *supra* note 14, § 1497 ("The fact that an amendment changes the legal theory on which the action initially was brought is of no consequence if the factual situation upon which the action depends remains the same and has been brought to defendant's attention by the original pleading.").

66. Zagurski v. Am. Tobacco Co., 44 F.R.D. 440, 442 (D. Conn. 1967).

67. N.Y. Cent. & Hudson River R.R. v. Kinney, 260 U.S. 340, 346 (1922) ("The amendment 'merely expanded or amplified what was alleged in support of the cause of action already asserted . . . and was not affected by the intervening lapse of time.'" (alteration in original) (quoting Seaboard Air Line Ry. v. Renn, 241 U.S. 290, 293 (1916))).

68. FED. R. CIV. P. 15(c)(1)(B).

69. 2A MOORE ET AL., *supra* note 5, § 8.02.

70. *Zagurski*, 44 F.R.D. at 442-43.

transaction, and therefore "[i]t is not unreasonable to require [the defendant] to anticipate all theories of recovery and prepare its defense accordingly."[71] Requiring notice in this way avoids prejudice to the defendant. At the same time, the rule furthers the statute of limitations policy of precluding claims by plaintiffs "who have sat on their rights,"[72] because any claims allowed under the rule were encompassed by the transactionally related facts in the original complaint.[73]

2. Rule 15(c)(1)(C)

While Rule 15(c)(1)(B) addresses amendments to claims, Rule 15(c)(1)(C) deals with changing parties.[74] Specifically, the rule allows amendments adding or changing defendants to relate back when certain conditions are met.[75] While the amendment must satisfy the 15(c)(1)(B) requirement that it asserts a claim or defense arising out of the conduct, transaction, or occurrence set out in the original pleading, Rule 15(c)(1)(C) imposes two additional requirements.[76] First, the new defendant must have had "such notice [of the institution] of the action that [he] will not be prejudiced in defending on the merits."[77] Second, the new defendant must have known, or should have known, that he would have been named originally if not for a mistake concerning the identity of the proper party.[78]

By allowing misnomers and mistakes to be corrected, even once the statute of limitations has run, Rule 15(c)(1)(C) ensures that meritorious claims will not be dismissed on technical pleading errors.[79] However, the rule effectively addresses statute of limitations considerations as well, as the two requirements it imposes for adding parties speak directly to the two policies underlying statutes of limitations.[80] Assuming the amendment states a claim that is transactionally related to the pleading, Rule 15(c)(1)(C) allows relation back when: (1) notice was provided so as not to prejudice the new party from defending on the merits, and (2) the new party

71. *Id.* at 443.
72. *See* Nelson v. Cnty. of Allegheny, 60 F.3d 1010, 1015 (3d Cir. 1995).
73. *See supra* notes 65-67 and accompanying text.
74. *Compare* FED. R. CIV. P. 15(c)(1)(B), *with id.* Rule 15(c)(1)(C).
75. *Id.* Rule 15(c)(1)(C).
76. *Id.*
77. *Id.*
78. *Id.*
79. Schiavone v. Fortune, 477 U.S. 21, 38 (1986) (Stevens, J., dissenting).
80. Nelson v. Cnty. of Allegheny, 60 F.3d 1010, 1014 (3d Cir. 1995).

"knew or should have known" that it would have been included initially, if not for a mistake of identity.[81]

First, the two requirements of the rule ensure that the defendant has not been prejudiced by the delay of an untimely claim.[82] As the Northern District of Illinois pointed out in *Olech v. Village of Willowbrook*, if the new defendant "was aware all along that it would have been named in the original complaint but for a mistake, then it is fair to say that the newly added party had a real opportunity (and reason) to begin a defense even though not originally named in the lawsuit."[83] When both requirements of the rule are met, the newly added party has notice that a claim is being asserted against it.

Second, the "mistake of identity" requirement in 15(c)(1)(C)(ii) protects defendants' interests in repose by ensuring that plaintiffs have not sat on their rights.[84] While the exact nature of what constitutes a "mistake" has been a subject of much debate,[85] the Supreme Court has directly stated that the Rule 15(c)(1)(C) requirements are not met unless a mistake of identity occurs.[86] The mistake requirement limits the relation back of amendments adding defendants to those cases where the plaintiff believed he or she had filed a timely lawsuit against the proper party.[87] Thus, the requirement obliges plaintiffs to bring their suits in a timely fashion whenever they are able, while preventing tardy plaintiffs from using relation back as an avenue for springing untimely suits on unsuspecting defendants.[88] As the First Circuit noted, "[p]roperly construed, [Rule 15(c)(1)(C)] allows some claims that otherwise might be dismissed on the basis of procedural technicalities

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81. FED. R. CIV. P. 15(c)(1)(C).

82. *Nelson*, 60 F.3d at 1014; *see also* Yorden v. Flaste, 374 F. Supp. 516, 520 (D. Del. 1974).

83. 138 F. Supp. 2d 1036, 1043 (N.D. Ill. 2000).

84. Brever v. Federated Equity Mgmt. Co., 233 F.R.D. 429, 435 (W.D. Pa. 2005) ("The requirement to demonstrate a mistake . . . is concerned with protecting a defendant's interest in repose where a dilatory complainant has simply sat on his or her rights . . . .").

85. *See, e.g.*, Krupski v. Costa Crociere S.p.A., 130 S. Ct. 2485, 2492 & n.2 (2010) (collecting cases summarizing the "tension among the Circuits" on the issue).

86. *Id.* at 2496 (stating that the Rule 15(c) requirements are not met when "the failure to name the prospective defendant in the original complaint was the result of a fully informed decision as opposed to a mistake concerning the proper defendant's identity"); *see also* Nelson v. Adams USA, Inc., 529 U.S. 460, 467 n.1 (2000).

87. *Krupski*, 130 S. Ct. at 2494.

88. *See* Nelson v. Cnty. of Allegheny, 60 F.3d 1010, 1015 (3d Cir. 1995).

to prosper while at the same time keeping the door closed to other claims that have been allowed to wither on the vine."[89]

E. Applying Relation Back to Amendments Adding Plaintiffs

Rule 15(c)(1)(C) does not expressly cover amendments adding plaintiffs. The text of the rule refers only to amendments changing "the party *against whom a claim is asserted*"—that is, defendants.[90] However, the accompanying Advisory Committee Notes state that "the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs."[91] Therefore, most courts have approached this problem by attempting to ascertain in what form the rule should be applied to plaintiffs.[92]

The "attitude" taken in Rule 15(c) is a nuanced approach that carefully balances the conflicting policies behind the Federal Rules of Civil Procedure with the policies behind statutes of limitations.[93] The rule not only avoids prejudice to defendants, it also protects defendants' "strong interest in repose" except in cases where defendants are aware they have avoided liability only because of a mistake.[94] More fundamentally, by imposing the mistake requirement, the rule respects statutes of limitations by limiting relation back to those cases where the plaintiff did not sit on his rights, but legitimately asserted or attempted to assert the claim in the original complaint.[95] Thus, a truly effective application of the rule to plaintiffs will not focus merely on prejudice to the defendant. It will also impose some standard to restrict relation back to those instances where the plaintiff to be brought in by amendment asserted or attempted to assert a claim in the original complaint.

Three primary approaches have developed among the federal circuits regarding how to apply the "attitude" of Rule 15(c) to amendments seeking

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89. Young v. Lepone, 305 F. 3d 1, 14 (1st Cir. 2002).

90. FED. R. CIV. P. 15(c)(1)(C) (emphasis added).

91. FED. R. CIV. P. 15(c)(1)(C) advisory committee's note (1966).

92. *See* 1 STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY, 315 nn.178-81 (2012) (collecting cases). *But see* Newell v. Harrison, 779 F. Supp. 388, 392 (E.D. La. 1991) (holding that the plain language of Rule 15(c) does not apply to amendments changing or adding plaintiffs).

93. *Young*, 305 F.3d at 14; Yorden v. Flaste, 374 F. Supp. 516, 520 (D. Del. 1974).

94. Krupski v. Costa Crociere S.p.A., 130 S. Ct. 2485, 2494 (2010); Powers v. Graff, 148 F.3d 1223, 1226 (11th Cir. 1998) (citing Wells v. HBO & Co., 813 F. Supp. 1561, 1567 (N.D. Ga. 1992)).

95. *Wells*, 813 F. Supp. at 1566 ("Rule 15(c) serves to ensure that amendments relate back only if the original pleading gave adequate notice of the subject of the amendment.").

to add untimely plaintiffs.[96] This comment examines the legal and policy ramifications of each of these approaches, determining how well each balances the conflicting policies underlying relation back.

II. The Three Approaches Taken by Courts

A. The Literal Approach Requiring Mistake of Identity

Some courts have adopted a "literal approach" that applies all the literal requirements of Rule 15(c) to plaintiffs.[97] Rule 15(c)(1) states:

> An amendment to a pleading relates back to the date of the original pleading when:
>
> A. the law that provides the applicable statute of limitations allows relation back;
>
> B. the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or
>
> C. the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> i. received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> ii. knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.[98]

Courts using this approach consider the threshold issue of whether the new claim arises out of the same conduct, transaction, or occurrence as the original claim.[99] Then, as the text of Rule 15(c) prohibits the addition of new parties unless there was a mistake concerning their identities,[100] the plaintiff must show that the defendants knew or should have known that

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96. *See* Plummer v. Farmers Grp., Inc., 388 F. Supp. 2d 1310, 1315-16 (E.D. Okla. 2005).

97. Olech v. Vill. of Willowbrook, 138 F. Supp. 2d 1036 , 1042 (N.D. Ill. 2000).

98. FED. R. CIV. P. 15(c)(1).

99. *See* Nelson v. Cnty. of Allegheny, 60 F.3d 1010, 1015 (3d Cir. 1995).

100. *See* FED. R. CIV. P. 15(c)(1)(C).

"but for a mistake, they would have been sued directly by these plaintiffs."[101] The mistake requirement makes this approach quite restrictive.

The Third Circuit articulated this approach in *Nelson v. County of Allegheny*.[102] In *Nelson*, a group of women had been arrested during a protest and subsequently filed a suit alleging civil rights violations.[103] More than two years after the statute of limitations had run, an amended complaint attempted to add two additional protestors as party plaintiffs.[104] The court stated that "for the [plaintiffs'] claims to relate back, all three conditions specified in Rule 15(c)(3) must be satisfied."[105] Because the new plaintiffs' allegations were transactionally related to the original pleading and the evidence overlapped, there was no prejudice to the defendant.[106] However, the court went on to hold that the amendment did not relate back because the plaintiffs did "not demonstrate[] 'a mistake concerning the identity of the proper party.'"[107] Rather, the plaintiffs "sat on their rights" and then "[sought] to take advantage of the rule to perform an end-run around the statute of limitations."[108] The court recognized that the mistake requirement places appropriate limits on relation back and screens out such late-coming plaintiffs by "requir[ing] plaintiffs to show that the already commenced action sufficiently embraces the amended claims so that defendants are not unfairly prejudiced by these late-coming plaintiffs and that plaintiffs have not slept on their rights."[109] Thus, the court determined that to respect the statute of limitations, it must apply the relation back rule as written.[110] Courts in the Third Circuit have embraced this approach,[111] while other courts have at least considered lack of mistake as a factor in declining to allow relation back.[112]

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101. *Nelson*, 60 F.3d at 1015.
102. *See id.* at 1011-15.
103. *Id.* at 1011.
104. *Id.*
105. *Id.* at 1014.
106. *Id.* at 1015.
107. *Id.* at 1014 (quoting FED. R. CIV. P. 15(c)(1)(C)).
108. *Id.* at 1015.
109. *Id.* at 1014.
110. *Id.*
111. *See, e.g.*, Brever v. Federated Equity Mgmt. Co., 233 F.R.D. 429, 435 (W.D. Pa. 2005).
112. *See, e.g.*, Asher v. Unarco Material Handling, Inc., 596 F.3d 313, 319 (6th Cir. 2010) (holding plaintiffs were not attempting to correct a misnomer or substitute the real party in interest, but instead were "attempt[ing] to circumvent the statute of limitations,

Requiring plaintiffs to demonstrate a "mistake of identity" limits the addition of new parties to those situations where there is a valid pleading error, ensuring that tardy plaintiffs are not able to use relation back rules to join a lawsuit when there is no legitimate pleading error to correct.[113] If an error has been made in the naming of one of the plaintiffs, the statute of limitations will not bar a plaintiff from correcting this error. However, one problem with applying the literal text to plaintiffs is that it is difficult to conceive of a situation in which the plaintiff was mistaken about its own identity. The most likely situation to arise is one in which the plaintiff was actually mistaken about his or her right to bring the suit. For example, one subsidiary corporation might bring a lawsuit when technically the right to bring the suit belonged to a parent corporation or a sister subsidiary.

In *Gardner v. State Farm Fire & Casualty Co.*, the Third Circuit held that such a case would be more appropriately dealt with under Rule 17, which allows for the joinder of the real party in interest.[114] Rule 17 states that "[a]n action must be prosecuted in the name of the real party in interest"[115] and allows the real party in interest an opportunity "to ratify, join or be substituted in the action."[116] Thus, when there was a mistake about who had the right to bring the lawsuit, Rule 17 allows plaintiffs to join a suit after the limitations period has passed.[117] Therefore, applying Rule 15(c) to amendments adding plaintiffs is redundant if showing a "mistake of identity" would only apply to situations where the real party in interest is being substituted in the case. Such cases would indeed be more appropriately dealt with under Rule 17.

However, Rule 17 may not be sufficiently broad to render Rule 15(c) useless as applied to all plaintiffs. For instance, if the original plaintiff in the suit is a real party in interest, Rule 17 will not allow for the addition of

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adding new parties and new claims"); Makro Capital of Am., Inc. v. UBS AG, 543 F.3d 1254, 1258 (11th Cir. 2008) (requiring mistake concerning identity of proper plaintiff).

113. *Nelson*, 60 F.3d at 1015; *see also* 1 GENSLER, *supra* note 92, at 315 ("Faithfully policing these requirements ensures that dilatory plaintiffs are not able to evade limitations periods by the expedient of joining with timely claimants and then seeking relation back.").

114. 544 F.3d 553, 562 (3d Cir. 2008). In *Gardner*, the Third Circuit refused to apply relation back to an amendment seeking to add a plaintiff, pointing out that the rule text applies to defendants, and that the rule "extend[ed] [only] by analogy to . . . plaintiffs." *Id.* at 561-62 (second alteration in original). Instead, the court declared that Rule 17 was "more applicable," and then refused to allow relation back under that theory. *Id.* at 562.

115. FED. R. CIV. P. 17(a)(1).

116. *Gardner*, 544 F.3d at 562.

117. FED. R. CIV. P. 17(a)(3) ("After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.").

other plaintiffs. The Advisory Committee Note discussing relation back of amendments adding plaintiffs mentions that Rule 17 is also relevant, but primarily directs courts toward Rule 15(c)(1)(C) for guidance.[118] Therefore, there may be other scenarios where justice would require an untimely plaintiff other than the real party in interest to be added as a plaintiff under Rule 15(c). If so, we must determine how to adapt the careful requirements of Rule 15(c) to plaintiffs to reach a functionally similar result.

B. The Liberal Notice-Based Approach

Recognizing that "mechanically applying the mistake requirement to the addition of a new plaintiff would make little sense," other courts have abandoned the literal text of the rule in favor of a notice-based approach.[119] Courts taking this approach reason that the policies behind statutes of limitations are upheld if the addition of the new plaintiff does not prejudice the defendant.[120] Therefore, when applying Rule 15(c) to plaintiffs, these courts allow relation back if the complaint provided the defendant with notice sufficient to avoid prejudice.[121] While some courts require a shared identity of interest between the old and new plaintiffs to establish sufficient notice, other courts consider the standard to be met any time the claims of the old and new plaintiffs arise out of the same conduct, transaction, or occurrence.

1. Identity of Interest to Avoid Prejudice

In *Olech v. Village of Willowbrook*, the Northern District of Illinois rejected a literal application of Rule 15(c)(1)(C) to amendments adding plaintiffs.[122] The court reasoned that because the rule was intended to govern amendments adding defendants, its requirements must be adapted in order to meaningfully apply the rule to amendments adding plaintiffs.[123] To this end, the court examined the rule, noting that the mistake requirement "helps ensure that the newly added party—who was not originally a defendant in the case—in fact had timely notice that it was the real target of the allegations."[124] The court reasoned that when applying the rule to plaintiffs, the analogous concern was ensuring that the defendant was aware

118. FED. R. CIV. P. 15(c) advisory committee's note (1966).
119. *See* Olech v. Vill. of Willowbrook, 138 F. Supp. 2d 1036, 1043 (N.D. Ill. 2000).
120. *See, e.g.*, *id.* at 1041-44.
121. *See id.* at 1045.
122. *Id.* at 1043.
123. *Id.* at 1041-42.
124. *Id.* at 1043.

of "the possibility that other plaintiffs might assert claims arising from the . . . conduct" described in the original pleading.[125] Thus, the court focused on determining whether the defendant had fair "notice that it might have to defend a claim brought by the new plaintiff," and whether the defendant suffered any actual prejudice, such as the loss of evidence due to the passage of time.[126] In addition to requiring that the new "claim [arose] out of the same transaction, conduct or occurrence alleged in the original complaint," the court also considered whether an identity of interest existed between the two plaintiffs, "so close that a court can conclude that a defendant had notice of a new party's potential claims and thus would not suffer any prejudice by the party's addition."[127]

The Seventh Circuit used a similar analysis in *Staren v. American National Bank & Trust Co.*, allowing a corporation to be substituted as plaintiff, where the original plaintiffs were the individual owners of the corporation.[128] The court focused primarily on the fact that the claims asserted by the parties were transactionally related, stating that "[t]he emphasis is to be placed on the determination of whether the amended complaint arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading."[129] The court went on to observe that because the substituted and original plaintiffs had an identity of interest, the defendant had such notice that no prejudice would result.[130]

This approach is founded on the premise "that *notice* is the critical element involved in Rule 15(c) determinations."[131] However, courts taking this position fail to recognize that an absence of prejudice only partially satisfies the statute of limitations policies.[132] Even when a defendant is aware of the *potential* claims that other plaintiffs might assert, once the limitations period has passed without an actual lawsuit being asserted, the

125. *Id.* at 1043-44.
126. *Id.* at 1045.
127. *Id.*
128. 529 F.2d 1257, 1259, 1263 (7th Cir. 1976).
129. *Id.* at 1263.
130. *Id.*
131. *Id.*
132. *See* Powers v. Graff, 148 F.3d 1223, 1227 (11th Cir. 1998) ("'A potential defendant who has not been named in a lawsuit by the time the statute of limitations has run is entitled to repose . . . .'" (quoting Rendall-Speranza v. Nassim, 107 F.3d 913, 918 (D.C. Cir. 1997))); Wells v. HBO & Co., 813 F. Supp. 1561, 1567 (N.D. Ga. 1992) ("Rule 15(c) plainly provides that potential defendants are entitled to repose after a certain period unless they know they have escaped suit only by mistake.").

defendant is entitled to repose.[133] Thus, to ensure that the defendant is not being deprived of repose simply because a plaintiff has sat on his rights, relation back must be limited to exclude such late-coming plaintiffs.[134] When considering amendments that add new plaintiffs, courts cannot properly declare that notice is the only critical element to be considered.[135] Rather, a court should consider whether invoking the statute of limitations would unjustly prevent a party who had attempted to assert a claim from asserting it, or whether the statue is being properly used to prevent an untimely plaintiff from joining an action.[136] Other courts have flatly rejected the notion that transactional relatedness combined with notice is sufficient to satisfy the statute of limitations.[137]

In *Olech*, the court attempted to explain the rationale of the notice-based approach, first noting "that when the question is adding a party plaintiff rather than a party defendant, it is not the explicit requirements of Rule 15(c) that govern but rather the 'attitude' of Rule 15(c)."[138] The court, however, went on to proclaim that "the attitude that animates the rule is to liberally permit amendment of pleadings in order to facilitate decisions on the merits, so long as that can be done without sacrificing 'essential fairness' to defendants."[139] In so doing, the court wrongly identified the attitude of Rule 15(c)(1)(C). While the rules generally do liberally *permit*

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133. *Wells*, 813 F. Supp. at 1567.

134. *See* Williams v. United States, 405 F.2d 234, 238 (5th Cir. 1968) ("[W]hen it comes to a late effort to introduce a new party, something else is added. Not only must the adversary have had notice about the operational facts, but it must have had fair notice that a legal claim existed in and was in effect being asserted by, the party belatedly brought in.").

135. It has become axiomatic that notice is the primary consideration in Rule 15(c)(1)(B) determinations. *See supra* note 62 and accompanying text. Thus, some courts recite the principle in Rule 15(c)(1)(C) cases as well, failing to recognize the distinctions between the respective rules. *See, e.g.*, *Williams*, 405 F. 2d at 238 ("Clearly notice is the critical element involved in Rule 15(c) determinations.").

136. *See* Page v. Pension Benefit Guar. Corp., 130 F.R.D. 510, 511 (D.D.C. 1990) ("'In deciding whether an amendment relates back to the original claim, notice to the opposing party of the existence and involvement of the new plaintiff is the critical element.'" (quoting Avila v. INS, 731 F.2d 616, 620 (9th Cir. 1984))).

137. *See, e.g.*, Young v. Lepone, 305 F.3d 1, 15-16 (1st Cir. 2002); Pappion v. Dow Chem. Co., 627 F. Supp. 1576, 1581-82 (W.D. La. 1986) ("The policy for statutes of limitations would be circumvented if a plaintiff is allowed to amend his complaint and add a new plaintiff merely because the new plaintiff's claim arose from the same transaction or occurrence of the original claim and the defendant was aware that the new plaintiff existed.").

138. Olech v. Vill. of Willowbrook, 138 F. Supp. 2d 1036, 1043 (N.D. Ill. 2000).

139. *Id.*

amendments, the attitude taken toward relation back of amendments changing defendants is a restrained approach that respects statutes of limitations by limiting relation back to situations where it is necessary to correct a mistake by the plaintiff.[140] An application of the rule to plaintiffs requires similar restraint. Otherwise, late-coming plaintiffs are able to take advantage of relation back simply to circumvent the statute of limitations, and, as a result, defendants are denied both the use of the limitations defense and their interest in repose.[141]

2. The Transactional Test

Evolving Seventh Circuit jurisprudence has imposed few restrictions on relation back of amendments adding new plaintiffs. The Seventh Circuit allows claims by new plaintiffs to relate back as long as they are transactionally related to the claim set out in the pleading.[142] This broad and permissive approach could allow an individual claim to become a class action by amendment long after the statute of limitations has run.

In *Paskuly v. Marshall Field & Co.*, the Seventh Circuit affirmed a lower court ruling allowing an amendment adding class plaintiffs in a Title VII case to relate back to a filing by a similarly situated individual.[143] In determining the proper requirements for relation back of such amendments, the trial court addressed only the issue of prejudice, completely ignoring the other considerations involved in statutes of limitations.[144] While the trial court "note[d] that it is rare that an amendment will relate back which adds plaintiffs who are total strangers to the lawsuit," the court did not impose any standard to promote this principle, such as requiring some degree of privity between the original and additional plaintiffs.[145] The court only required the plaintiff to show that the defendant had not been prejudiced by lack of notice.[146] Because "Title VII is primarily designed to eradicate discrimination of a class-wide character," the trial court concluded that the filing of a Title VII complaint was sufficient to place the defendant on

140. Krupski v. Costa Crociere S.p.A., 130 S. Ct. 2485, 2494 (2010); *see also supra* Part I.D.

141. *See* Brever v. Federated Equity Mgmt. Co., 233 F.R.D. 429, 435 (W.D. Pa. 2005).

142. *See* Arreola v. Godinez, 546 F.3d 788, 796 (7th Cir. 2008).

143. 646 F.2d 1210, 1211 (7th Cir. 1981) (per curiam).

144. *See* Paskuly v. Marshall Field & Co., 494 F. Supp. 687, 689 (N.D. Ill. 1980) ("The primary purpose of statutes of limitation is to protect parties from the prejudice caused by the loss of evidence due to the passage of time."), *aff'd*, 646 F.2d 1210 (7th Cir. 1981) (per curiam).

145. *Id.*

146. *See id.*

notice of "class-based" claims.[147] Furthermore, because the claims involved the same evidence, the defendant was not prejudiced by loss of evidence.[148] Thus, the amendment was allowed to relate back.[149] In a per curiam opinion, the Seventh Circuit affirmed the trial court's decision, stating simply that relation back was proper because the class claims arose from the same practices as the plaintiff's original, individual claim.[150]

In *Arreola v. Godinez*, the Seventh Circuit went even further, explicitly holding that amendments adding new plaintiffs relate back as long as the claim arises out of the same transaction or occurrence set out in the original pleading.[151] Rule 15(c)(1)(B) provides that an amended pleading relates back when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading."[152] This rule is usually understood to allow amendments to add new claims or defenses that are transactionally related to that in the original pleading, or to assert new legal theories.[153] However, the Seventh Circuit held that because the amendment adding new plaintiffs *included* a claim that was transactionally related to the original pleading, Rule 15(c)(1)(B) would govern, and would allow relation back.[154] In a cursory analysis, the court noted that because the amendment did not seek to add a new defendant, "there [was] no problem under Rule 15(c)(1)(C)."[155]

Such a reading of Rule 15(c)(1)(B) would apparently allow for any changes to the pleading, so long as the amendment also asserts a claim transactionally related to the original pleading. However, this cannot be the intended reading of the rule. If it were, Rule 15(c)(1)(C) would be unnecessary, as the changes it authorizes would be allowed under Rule 15(c)(1)(B).[156] Furthermore, the Advisory Committee Notes to the 1966 amendment specify that "the attitude . . . toward change of defendants extends by analogy to amendments changing plaintiffs," clearly directing

147. *Id.*

148. *Id.*

149. *Id.* at 690.

150. Paskuly v. Marshall Field & Co., 646 F.2d 1210, 1211 (7th Cir. 1981) (per curiam).

151. 546 F.3d 788, 796 (7th Cir. 2008).

152. FED. R. CIV. P. 15(c)(1)(B).

153. *See, e.g.*, United States *ex rel.* Bledsoe v. Cmty. Health Sys., Inc., 501 F.3d 493, 516 (6th Cir. 2007).

154. *Arreola*, 546 F.3d at 796.

155. *Id.*

156. One of the requirements of Rule 15(c)(1)(C) is "if Rule 15(c)(1)(B) is satisfied." FED. R. CIV. P. 15(c)(1)(C).

courts toward Rule 15(c)(1)(C).[157] The Seventh Circuit application of Rule 15(c)(1)(B) to this issue leaves the door open for any number of plaintiffs who are strangers to a case to join pending actions long after the statute of limitations has passed. Other courts have "flatly reject[ed] the proposition that relation back is available merely because a new plaintiff's claims arise from the same transaction or occurrence as the original plaintiff's claims."[158] The First Circuit aptly points out that an action filed by one plaintiff does not give "a defendant notice of the impending joinder of any or all similarly situated plaintiffs."[159]

The Seventh Circuit's relation back doctrine is grounded on the faulty logic that because courts are encouraged to liberally allow parties to amend their pleadings, those amendments should also relate back liberally. The court does not consider that the expansive use of relation back rules for amendments adding time-barred plaintiffs is contrary to the underlying purpose of the rules—the adjudication of conflicts on their merits. Relation back generally promotes that goal, preventing the dismissal of meritorious claims on technicalities by allowing for the correction of inconsequential pleading errors.[160] However, by liberally construing relation back, the Seventh Circuit allows *un*meritorious (time-barred) claims to be added on a technicality. To best promote adjudication of conflicts on their merits, claims adding parties should relate back only under the narrow circumstances contemplated in Rule 15(c)(1)(C): when a party seeks to clarify a pleading by adding another person or entity who is clearly implicated in the lawsuit, but would otherwise be barred from making the correction by the statute of limitations.

C. The Involvement Approach

1. Application of the Involvement Standard

Recognizing both the importance of limiting potential plaintiffs and the problems with applying the mistake of identity requirement to plaintiffs, some courts have forged a third approach.[161] This approach rejects the notion that the mere absence of prejudice is sufficient to uphold the policies

157. *Id.* Rule 15(c) advisory committee's note (1966).

158. Young v. Lepone, 305 F.3d 1, 16 (1st Cir. 2002).

159. *Id.* at 15.

160. *See* Krupski v. Costa Crociere S.p.A., 130 S. Ct. 2485, 2494 (2010).

161. *See, e.g.*, Leachman v. Beech Aircraft Corp., 694 F.2d 1301, 1309 (D.C. Cir. 1982); Williams v. United States, 405 F.2d 234, 238 (5th Cir. 1968); *see also* Plummer v. Farmers Grp., Inc., 388 F. Supp. 2d 1310, 1315 (E.D. Okla. 2005) (discussing the literal and notice-based approaches and noting the limitations of each).

behind the statute of limitations.[162] Instead, it requires that defendants have notice not only of the existence of potential plaintiffs, but also of their involvement in the litigation.[163] Courts have generally recognized notice of the new plaintiff's involvement when an identity of interest exists between the original and the new plaintiffs, or when the defendant knew or should have known that other plaintiffs were attempting to assert claims.[164] If applied properly, this approach has the advantage of limiting relation back to those situations where the new plaintiff was asserting or attempting to assert the claims in the original complaint.

The Fifth Circuit formulated this approach in *Williams v. United States*, one of the first cases to test the application of the 1966 amendment to Rule 15(c) to plaintiffs.[165] In *Williams*, a mother had asserted a claim as next friend of her injured minor child.[166] After the statute of limitations had run, the mother sought to amend the complaint to add herself as a party plaintiff and recover for loss of services, as allowed by state law.[167] The court recognized that relation back of amendments adding parties demands special consideration of the purpose behind the statute of limitations, noting that the analysis must go beyond a mere question of notice.[168] Conceding that "notice is the critical element" in determining whether a *claim* should relate back, the court observed that when considering the relation back of amendments adding plaintiffs, "something else is added."[169] "Not only must the adversary have had notice about the operational facts, but it must have had fair notice that a legal claim existed in and was in effect being asserted by, the party belatedly brought in."[170] The court held that a liberal reading of the complaint "clearly revealed the existence of (a) a minor (b) the

162. *See, e.g.*, *Leachman*, 694 F.2d at 1309 ("Even if, as here, there were no showing of specific prejudice in the sense of lost or destroyed evidence, defendants would still be deprived of their interest in repose.").

163. *Id.*

164. *See infra* notes 165-88 and accompanying text.

165. 405 F.2d at 236-39.

166. *Id.* at 235. A "next friend" is "[a] person who appears in a lawsuit to act for the benefit of an incompetent or minor plaintiff, but who is not a party to the lawsuit and is not appointed as a guardian." BLACK'S LAW DICTIONARY 1142 (9th ed. 2009).

167. *Williams*, 405 F.2d at 235.

168. *Id.* at 237 ("[S]uch an addition amounts to the assertion of a 'new cause of action,' and if an amendment were allowed to relate back in that situation, the purpose of the statute of limitation would be defeated.").

169. *Id.* at 236, 238.

170. *Id.* at 238.

mother as parent and (c) the assertion by her of a claim."[171] The defendant knew of her involvement in the case as the child's next friend, and therefore an amendment allowing her to assert a claim in her own right was allowed to relate back.[172] The plaintiff's amendment in *Williams* has been characterized as "merely a change in capacity," where "the defendant must have known of the existence of the plaintiff's other capacity."[173] This approach to Rule 15(c) allows relation back for plaintiffs who were actually involved in the case, albeit informally, while prohibiting the addition of strangers who could have been involved but instead sat on their rights.

The D.C. Circuit applied this standard in *Leachman v. Beech Aircraft Corp.*, refusing to allow relation back for a corporation wholly owned by an existing plaintiff.[174] Considering how to adapt Rule 15(c)(1)(C)'s mistake of identity requirement to a situation involving additional plaintiffs, the court reasoned that "[t]he touchstone . . . is whether the defendant knew or should have known of the existence and involvement of the new plaintiff."[175] In adopting this standard, the court emphasized the need for limits to prevent "total strangers" from joining actions, "caus[ing] defendants' liability to increase geometrically and their defensive strategy to become far more complex long after the statute of limitations had run."[176] The court reasoned that even if the defendant had known of the plaintiff's ownership of the corporation, it would not have known of the corporation's potential *involvement* in the case.[177] Thus, the corporation's claim against the defendant "was simply a new cause of action" brought by an untimely claimant.[178] Therefore, although "there [was] no showing of specific prejudice in the sense of lost or destroyed evidence," the court refused to allow relation back.[179]

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171. *Id.* at 239 ("Since liability to the minor would give rise to a liability to the parent under local law, and since the circumstances of these individuals was such as would reasonably indicate a likelihood that the parent would incur losses of a recoverable kind, the Government was put on notice that the parent's claim was also involved." (footnote omitted)). The *Williams* court noted that the outcome "might have been different if the next friend . . . had been a nonrelated person, such as a corporate fiduciary." *Id.* at 239 n.13.

172. *Id.* at 239.

173. Leachman v. Beech Aircraft Corp., 694 F.2d 1301, 1309 (D.C. Cir. 1982) (discussing *Williams*, 405 F.2d 234).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 1310.

178. *Id.*

179. *Id.* at 1309-10.

This application of identity of interest permits relation back of new plaintiffs under a much narrower set of circumstances than the *Olech* standard.[180] Under *Leachman*, an amendment relates back when the "new" plaintiff had actually been involved in the suit "from an early stage."[181] However, under *Olech*, an amendment relates back when the defendant had notice even of the new party's *potential* claims.[182]

As an individual complaint probably does not place a potential defendant on notice of the actual assertion of class-wide claims or the actual involvement of members of a putative class, amendments adding class plaintiffs are not likely to relate back under the *Leachman* approach. The Western District of Michigan held that an individual complaint did not "place[] [the] defendant on notice that it could be called to answer for the extensive class allegations in the amended pleading."[183] Likewise, the Sixth Circuit, applying the Tennessee state law identity of interest standard, found no identity of interest when the original complaint and the amended class-wide allegations were identical.[184]

Identity of interest may not be the only way to establish notice of involvement. Some courts have also recognized such notice where "the original complaint on its face reveals the existence of additional claimants," which, "possibly in combination with some conduct by plaintiffs or the defendant, justifies an inference that the new claimants were in fact 'involved' in the action."[185] For example, in *Sokolski v. Trans Union Corp.*, the original complaint made clear that the plaintiff intended "to name and certify a class action within 60 days before trial."[186] The court allowed relation back on the theory that the timely-filed "complaint provided the defendants with adequate notice that a class action was contemplated and

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180. *Compare id.*, *with* Olech v. Vill. of Willowbrook, 138 F. Supp. 2d 1036, 1045 (N.D. Ill. 2000).

181. *Leachman*, 694 F.2d at 1309 (quoting 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 15.15 (1982)) (internal quotation marks omitted).

182. *Olech*, 138 F. Supp. 2d. at 1045.

183. Peralta v. Accept Acceptance, LLC, No. 1:07-cv-1270, 2009 WL 723910, at *4 (W.D. Mich. Mar. 10, 2009).

184. Smith v. Nationwide Prop. & Cas. Ins. Co., 505 F.3d 401, 405-06 (6th Cir. 2007).

185. Page v. Pension Benefit Guar. Corp., 130 F.R.D. 510, 512 (D.D.C. 1990) (citing Andujar v. Rogowski, 113 F.R.D. 151, 159 (S.D.N.Y. 1986)); *see also* Sokolski v. Trans Union Corp., 178 F.R.D. 393, 398-99 (E.D.N.Y. 1998) (allowing relation back of amendment adding class plaintiffs where original complaint requested that plaintiff be granted leave to amend and certify a class action, and alleged that the defendant intended "to deceive plaintiff and 'others'").

186. 178 F.R.D. at 398.

would be sought."[187] Likewise, in *Soler v. G & U, Inc.*, the Southern District of New York found that notice of involvement was satisfied when language in the complaint explicitly referred to new plaintiffs, combined with the fact that the prospective plaintiffs had filed consent to sue forms.[188]

2. Potential Misapplication of the Notice of Involvement Standard

To uphold the statute of limitations policies, the notice of involvement standard must be applied properly. However, three particular areas pose a risk for misapplication of the standard. One danger is that courts will consider references to the *existence* of the potential plaintiffs in the complaint sufficient to satisfy the requirements of dual notice, when such references clearly do not accomplish this goal.[189] *Page v. Pension Benefit Guaranty Corp.* illustrates the care courts must take in separating the actual involvement of potential plaintiffs from obvious references to their existence in the complaint.[190] In *Page*, an individual plaintiff alleged that the defendant "fail[ed] to guarantee and pay benefits to her and other members of her pension plan."[191] The complaint made references to "'plaintiff and other members of the class'" and "'other individuals similarly situated.'"[192] The plaintiff later sought to add as plaintiffs "a proposed nationwide class of indeterminate size," arguing that the complaint was, on its face, "an obvious omnibus challenge on behalf of every allegedly wronged pensioner."[193] The court rejected this argument, holding that even these explicit references to the potential class were not sufficient to provide notice of the class members' involvement in the case.[194] The court emphasized that to allow such statements to satisfy the requirement would effectively reduce the standard to a transactional test.[195]

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187. *Id.* at 398-99.

188. 103 F.R.D. 69, 74-75 (S.D.N.Y. 1984).

189. *See Page*, 130 F.R.D. at 511-12 (holding that references in the complaint to "'other individuals similarly situated'" did not provide notice of those individuals' involvement).

190. *See id.* at 512-13.

191. *Id.* at 511.

192. *Id.* at 511-12.

193. *Id.* at 511, 513.

194. *Id.* at 513 ("The Court rejects the idea, advanced by plaintiff, that a declaratory judgment action by a limited group necessarily puts a defendant on notice that it may be engaged in litigation with nationwide implications.").

195. *Id.* (characterizing plaintiff's argument as "another way of saying that where a new plaintiff's claims arise from the same transaction or occurrence, and nothing more, relation back should obtain"). The *Page* court went on to allow a limited class of plaintiffs to relate back on other grounds. *Id.*

Thus, a reference in the complaint to other parties who may have potential claims is insufficient to establish their involvement in the case.[196] One possible exception may be when the original plaintiff has the capacity to sue on behalf of the new plaintiff. For example, as determined in *Williams v. United States*, when claims are asserted by a parent or guardian on behalf of a minor child, the defendant would be aware of the individual claims of the parent or guardian arising from the same transaction.[197]

To understand how "capacity to sue" can play a critical role, contrast *Williams* with *LeMasters v. K-Mart, Inc.*, a case which appears to contain similar facts but where the plaintiff lacked capacity to sue on behalf of the new plaintiff.[198] In *LeMasters*, the plaintiff's wife had witnessed the accident that gave rise to the plaintiff's injury claim.[199] The defendant had notice of these facts "minutes after the accident," as evidenced by the accident report.[200] Seeking to amend the complaint to add the wife as a plaintiff claiming loss of consortium, the plaintiff argued that, under *Williams*, the amendment should relate back because it was clear that the plaintiff had a wife, and that the defendant was on notice that she had a potential claim for loss of consortium.[201] However, the court refused to allow relation back, reasoning that the fact that the plaintiff had a wife did not imply that she had a claim for loss of consortium.[202]

In *Williams*, the mother was in a unique situation because she had the capacity to assert claims both in her own right and as her child's next friend.[203] Although she first brought the lawsuit on behalf of the child, the defendant was aware of her "involvement" in the case, as well as her existence.[204] In *LeMasters*, on the other hand, the plaintiff had no capacity to assert a claim on behalf of his wife.[205] Absent some affirmative action by the wife to show her involvement in the case, the defendant had no reason to suspect that she was or would be asserting claims.[206]

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196. *See id.* at 511-12.
197. *See* Williams v. United States, 405 F.2d 234, 239 (5th Cir. 1968).
198. *Compare id.*, *with* LeMasters v. K-Mart, Inc., 712 F. Supp. 518, 520-21 (E.D. La. 1989).
199. *LeMasters*, 712 F. Supp. at 520.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Williams*, 405 F.2d at 235.
204. *Id.* at 239.
205. *LeMasters*, 712 F. Supp. at 520.
206. *Id.*

A second danger of misapplication is in the way courts interpret the new plaintiff's involvement. For example, in *Andujar v. Rogowski*, four individuals initiated a lawsuit, filing a complaint that described an incident involving "'plaintiffs, along with other workers.'"[207] An amendment adding three additional individuals was allowed to relate back based primarily on the fact that one of the defendants had "participated in settlement negotiations that involved demands made on behalf of [the new plaintiffs]."[208] The court reasoned that those demands, combined with the statements in the complaint, placed the defendants on actual notice "of the existence of other potential claims outstanding."[209]

The danger here lies in the fact that settlement negotiations with a potential plaintiff place a defendant only on notice that a claim exists, not that such a claim will necessarily be asserted. Under ordinary circumstances, a plaintiff must file a lawsuit within the limitations period. The fact that the parties engaged in settlement negotiations prior to the running of the limitations period does not allow a tardy would-be plaintiff to escape the limitations bar.[210] As the Sixth Circuit has observed, "a defendant does not waive a statute of limitations defense merely by engaging in settlement negotiations with a plaintiff."[211] Likewise, when one plaintiff has filed a suit, the fact that a defendant engages in settlement negotiations with a second potential plaintiff should not waive the defendant's limitations defense as to the second plaintiff. Absent an express reference to the imminent addition of new plaintiffs in the complaint, settlement negotiations give no indication that a party to the negotiations was attempting to assert a legal claim in a pending lawsuit.[212]

Again, a possible exception could be when the original plaintiff has the capacity to assert claims on behalf of the new plaintiff. For example, if a trustee asserts a claim arising out of a conduct, transaction, or occurrence that would also give rise to a claim by the trustee's beneficiary, and in settlement negotiations the trustee makes demands on behalf of the

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207. 113 F.R.D. 151, 159 (S.D.N.Y. 1986).

208. *Id.*

209. *Id.*

210. Michals v. Baxter Healthcare Corp., 289 F.3d 402, 409 (6th Cir. 2002); *see also* Simpson v. Jack Baker, Inc., 620 A.2d 254, 255 (D.C. 1993) (per curiam) (declining to toll the statute of limitations where plaintiff, "in hopes of settlement, . . . failed to file suit prior to the expiration of the statute of limitations").

211. *Michals*, 289 F.3d at 409.

212. *See* Raziano v. United States, 999 F.2d 1539, 1541 (11th Cir. 1993) (declining to toll the statute of limitations where settlement negotiations placed the defendant on notice that the claim *might* be pursued in court).

beneficiary, it is possible that the defendant is on notice that the trustee is attempting to assert a claim on behalf of the beneficiary. Under this analysis, settlement negotiations undertaken on behalf of a class would constitute "involvement" of the class only when the class had been certified, giving the negotiator capacity to assert claims on behalf of the new class plaintiffs.[213]

A third potential for misapplication arises from confusion created by courts purporting to apply an "identity of interest" test. While some courts following the *Leachman* and *Williams* approach apply an "identity of interest" test as a standard for determining when a defendant should have had notice of a potential plaintiff's involvement,[214] the term is problematic because of its widespread use in other contexts. To satisfy the "existence and involvement" requirement articulated in *Williams*, courts usually require a "legal or familial relationship" to establish identity of interest.[215] However, courts applying a liberal approach focused on notice use an "identity of interest" test to determine whether the defendant had notice sufficient to avoid prejudice.[216] Under this much broader standard, even a putative class may have a sufficient "identity of interest" with a similarly situated individual to allow for relation back.[217]

Rather than examine identities of interest, a more precise inquiry for determining involvement may be whether the original plaintiff had the capacity to assert representative claims on behalf of the new plaintiff.[218]

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213. *But see* Page v. Pension Benefit Guar. Corp., 130 F.R.D. 510, 511 (D.D.C. 1990). After holding that references to the existence of additional potential plaintiffs in the complaint were not enough to permit relation back, the *Page* court allowed a limited class of plaintiffs to relate back. *Id.* at 512-13. Because the defendant had engaged in "settlement negotiations on a nationwide class basis," the court determined the defendant had recognized that the class plaintiffs were involved in the litigation. *Id.* at 513. Thus, the court granted relation back to those members of the class for whom the statute of limitations had not yet expired at the time of the settlement negotiations. *Id.* at 514. The plaintiff did not have the capacity to assert claims on behalf of the class members at the time of the negotiations, as the class had not yet been certified. *See id.* at 512-14. However, the court appears to have reasoned that because the plaintiff could have gained that capacity through certification, notice could be imputed to the defendant. *See id.* at 514.

214. *See, e.g.*, Young v. Lepone, 305 F.3d 1, 14-16 (1st Cir. 2002); Pappion v. Dow Chem. Co., 627 F. Supp. 1576, 1581 (W.D. La. 1986).

215. *See In re* Glacier Bay, 746 F. Supp. 1379, 1391 (D. Alaska 1990) (noting that although not required by the language of Rule 15(c), "a large number of the cases allowing relation back under Rule 15(c) do involve legal or familial relationships").

216. Olech v. Vill. of Willowbrook, 138 F. Supp. 2d 1036, 1045 (N.D. Ill. 2000).

217. *See* Arreola v. Godinez, 546 F.3d 788, 796 (7th Cir. 2008).

218. *See supra* notes 198-213 and accompanying text.

Indeed, when the *Williams* court introduced the use of the "identity of interest" test to determine whether notice of a plaintiff's involvement was met, the mother had the capacity to assert claims on her child's behalf as well as her own.[219] Under this standard, relation back would also be allowed when "the same natural person serves two fiduciary roles," for example, as both personal representative of a decedent's estate and as guardian ad litem of the surviving children.[220] When the defendant has notice that the original plaintiff had the capacity to sue on behalf of the plaintiff to be brought in, and the claims of the new plaintiff are transactionally related to the claims in the original complaint, the defendant can be said to have notice not only of the existence of the new plaintiff's claims, but also of the actual involvement of the new plaintiff in the suit.

Involvement requires that the defendant had "adequate notice of the new plaintiffs, and that the original suit in effect asserted their claims as well."[221] When applied in this way, the involvement requirement functions as an effective replacement for the "mistake of identity" requirement, limiting relation back to those cases where the plaintiffs did not sit on their rights, but had reason to believe those rights were being actively asserted, either by themselves or by someone with the capacity to do so.

III. Tenth Circuit Jurisprudence

A. The Tenth Circuit Court of Appeals

The standard for relation back of amendments adding plaintiffs is not settled in the Tenth Circuit. In a recent case, *McClelland v. Deluxe Financial Services, Inc.*, the Tenth Circuit considered the question of whether an amendment adding class allegations of discrimination would relate back to an individual claim based on similar allegations.[222] The court refused to allow the claim to relate back, based on a determination not only that the amendment sought to add new plaintiffs, but also that it included "new and separate allegations implicating a wider set of facts, witnesses, and proofs."[223] The court applied Rule 15(c)(1)(B) and concluded that the "complaint [did] not arise out of the same 'conduct, transaction, or

219. Williams v. United States, 405 F.2d 234, 239 (5th Cir. 1968).
220. Beal v. City of Seattle, 954 P.2d 237, 242 (Wash. 1998) (en banc).
221. Page v. Pension Benefit Guar. Corp., 130 F.R.D. 510, 511 (D.D.C. 1990).
222. 431 F. App'x 718, 729-30 (10th Cir. 2011).
223. *Id.* at 730.

occurrence set out . . . in the initial pleading,'" and therefore did not relate back.[224]

Because the plaintiff did not meet the threshold requirement of transactional relatedness,[225] it is unclear whether the court would have applied some form of other requirements under Rule 15(c)(1)(C), or if the court would have found transactional relatedness sufficient to allow relation back, as the Seventh Circuit has done.

The court did briefly address the issue of repose, noting that while "a potential defendant has a 'strong interest in repose,' repose should not be a 'windfall' for a defendant who possesses sufficient notice of impending claims."[226] The court went on to focus on whether "sufficient notice" was given.[227] Thus, for amendments adding plaintiffs to relate back, the Tenth Circuit appears to require (1) transactional relatedness, and (2) "sufficient notice of impending claims."[228] Although *McClelland* provides some guidance, it remains unclear in the Tenth Circuit what constitutes "sufficient notice." The court expressly rejected the Seventh Circuit's *Paskuly* position that an individual allegation of discrimination was "sufficient *in and of itself* to provide notice" of class-wide discrimination claims.[229] However, it is unclear whether "sufficient notice" to protect a defendant's interests in repose requires mere notice that related claims by additional plaintiffs were *possible*, as the Seventh Circuit requires, or notice both of the existence and *involvement* of the new plaintiff, as *Leachman* demands.

Because the court was not faced with determining the precise requirements for relation back of amendments adding plaintiffs, the court did not address whether any kind of limiting requirement, such as "identity of interest," should be imposed. However, because the court was silent on the issue, requiring identity of interest would not be inconsistent with *McClelland*. An identity of interest standard would promote the threshold requirements of transactional relatedness and notice, while also addressing the next step of the analysis.

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224. *Id.* at 719 (second alteration in original) (quoting FED. R. CIV. P. 15(c)(1)(B)).
225. *See id.* at 730.
226. *Id.* at 723 (quoting Krupski v. Costa Crociere S.p.A., 130 S. Ct. 2485, 2494 (2010)).
227. *Id.* at 731-32.
228. *See id.* at 719, 723.
229. *Id.* at 732.

B. District Court Opinions

The district courts within the Tenth Circuit have taken a variety of approaches to allowing relation back for new plaintiffs. In *American Banker's Insurance Co. v. Colorado Flying Academy, Inc.*, the District of Colorado took an approach similar to that of the Seventh Circuit.[230] First, the court quoted Rule 15(c), including the mistake of identity requirement.[231] The court next quoted the 1966 Advisory Committee Note providing that the attitude of the rule "extends by analogy to amendments changing plaintiffs."[232] Then, the court simply stated that because the allegations were "almost identical," and because there was no apparent prejudice to the defendant, the amendment related back.[233] The court did not undertake any analysis of the requirements listed in Rule 15(c); nor did it give any justification for completely eliminating any form of the mistake requirement. In so doing, the court reduced the nuanced requirements of Rule 15(c) to a simple transactional test. Relying partially on *American Banker's*, the District of Kansas has also allowed relation back when claims were transactionally related and no prejudice was found.[234]

The Northern District of Oklahoma used a similar test in *United States ex rel. Koch v. Koch Industries, Inc.*[235] In *Koch*, however, the court relied on a Tenth Circuit case from 1951, *American Fidelity & Casualty Co. v. All American Bus Lines, Inc.*,[236] to conclude that transactional relatedness should be the only requirement.[237] The court failed to note that at the time *American Fidelity* was decided, the rules did not specifically provide for changing parties at all, as the provision now known as Rule 15(c)(1)(C) was not added until 1966.[238] In *American Fidelity*, the court was tasked with determining whether the real party in interest could be added to the action once the statute of limitations had passed.[239] Today, it is generally accepted that an amendment adding the real party in interest automatically relates

230. *See* 93 F.R.D. 135, 136-37 (D. Colo. 1982).

231. *See id.* at 136.

232. *Id.* (quoting Fed. R. Civ. P. 15(c) advisory committee's note (1966)) (internal quotation marks omitted).

233. *Id.* at 136-37.

234. Ottawa Cnty. Lumber & Supply, Inc. v. Sharp Elecs. Corp., No. 03-4187-RDR, 2004 WL 813768, at *2 (D. Kan. Feb. 17, 2004).

235. *See* No. 91-CV-763-B, 1995 WL 812134, at *8 (N.D. Okla. 1995).

236. 190 F.2d 234 (10th Cir. 1951).

237. *Koch*, 1995 WL 812134, at *8.

238. *See* FED. R. CIV. P. 15(c) (1938) (amended 1966).

239. *Am. Fidelity & Cas. Co.*, 190 F.2d at 237.

back under Rule 17.[240] Therefore, although the analysis in *American Fidelity* was correct, it is not analogous to the situation in *Koch*. Furthermore, because Rule 15(c) did not expressly address adding or changing parties in 1951, there was no "mistake of identity" requirement in the rule at that time.[241] However, the requirement was present in the rule at the time *Koch* was decided,[242] and the court should have addressed why it chose to ignore that requirement.

In 1994, the District of Colorado again addressed relation back of plaintiffs in *Ambraziunas v. Bank of Boulder*.[243] In *Ambraziunas*, however, the court applied the literal approach and refused to allow relation back because, although the plaintiffs shared "commonality between their claims," they did not establish "any mistake in the original complaint to merit the relation back of the claims."[244] Although the court's approach in this case was contrary to its earlier decision in *American Banker's*, the court did not refer to *American Banker's* or any other Tenth Circuit court's decision.[245]

The Eastern District of Oklahoma, in *Plummer v. Farmers Group, Inc.*, followed *Olech* in applying a prejudice-focused identity of interest test.[246] In what appears to be the most extensive analysis of relation back taken by any court in the Tenth Circuit, the *Plummer* court announced a four-factor test including an identity of interest requirement, stating that the purpose of the test is "to determine whether the Rule 15(c) requirements of fair notice and lack of prejudice have been met."[247]

Although the court used the term "identity of interest," it placed emphasis on notice, rather than actual involvement of the plaintiff, resulting in an approach that more closely resembles the Seventh Circuit than

240. *See, e.g.*, Scheufler v. Gen. Host Corp., 126 F.3d 1261, 1270-71 (10th Cir. 1997); Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11, 20-21 (2d Cir. 1997).

241. *See* FED. R. CIV. P. 15(c) (1938) (amended 1966).

242. *See* FED. R. CIV. P. 15(c) (1966) (amended 1991, 1993).

243. *See* 846 F. Supp. 1459 (D. Colo. 1994).

244. *Id.* at 1467.

245. The court cited only two sources: *In re* Integrated Res. Real Estate Ltd. P'ships Sec. Litig., 815 F. Supp. 620, 642 (S.D.N.Y. 1993), and 6A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1501, at 154 (1990). *See Ambraziunas*, 846 F. Supp. at 1467.

246. *See* 388 F. Supp. 2d 1310, 1315-16 (E.D. Okla. 2005). In *Plummer*, the court addressed this issue not in the statute of limitations context, but to decide if an amendment "related back" to before the Class Action Fairness Act went into effect. To decide this, the court went through the Rule 15(c)(1)(C) analysis as if it applied. *Id.*

247. *Id.*

Williams or other courts using an "existence and involvement" standard.[248] While the court did use notice to limit the class of potential plaintiffs, stating that "notice from the initial [individual] complaint . . . cannot serve as 'adequate' notice of all claims on behalf of all plaintiffs who might someday fall with in [sic] the class definition,"[249] this approach still appears to be much more liberal than the restrictive identity of interest test articulated in *Williams*. Although the court refused to allow relation back for plaintiffs who were all victims of the defendant's alleged actions, it was because the claimants had "separate contracts, for separate property, with differing monetary value."[250] It is unclear to what extent the court would allow untimely amendments for class action plaintiffs with identical claims.

Thus, it appears that the trend among the district courts in the Tenth Circuit is an approach similar to that of the Seventh Circuit. Generally, the courts require only transactional relatedness and a lack of prejudice. However, with the exception of the *Plummer* court, none of these courts appear to have closely examined the issue.

IV. The Effect of State Relation Back Law in Federal Court

In an interesting twist on this issue, federal courts may find themselves applying state relation back law in the area where relation back is most likely to cause extreme results: the class action context. Assume an individual, not having federal jurisdiction for his claim, files a case in state court. When the amendment is made to add class plaintiffs, the defendant will likely immediately remove to federal court under the Class Action Fairness Act.[251] If the statute of limitations ran before the amendment was filed, the federal court will apply state civil procedure statutes to determine if the amendment (which was made in state court) will relate back.[252]

Many state rules of civil procedure mirror the federal rules, and therefore states often look to the federal courts for guidance on how to apply these rules.[253] Thus, much of the relevant state law has been influenced by the

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248. *See id.*

249. *Id.* at 1316 (alterations in original) (quoting Heaphy v. State Farm Mut. Auto. Ins. Co., No. C05 5404RBL, 2005 WL 1950244, at *4 (W.D. Wash. Aug. 15, 2005)) (internal quotation marks omitted).

250. *Id.*

251. 28 U.S.C. § 1453 (2012).

252. *See, e.g.*, Pac. Emp'rs Ins. Co. v. Sav-a-Lot of Winchester, 291 F.3d 392, 395 (6th Cir. 2002).

253. *See Ex parte* Novus Utils., Inc., 85 So. 3d 988, 996 (Ala. 2011) ("We note that federal decisions construing the Federal Rules of Civil Procedure are persuasive authority in

approaches taken among federal courts.[254] A state court, however, is not bound by the federal courts in a particular circuit.[255] Furthermore, some state civil procedure statutes differ significantly from the Federal Rules of Civil Procedure.[256] In Florida, for example, the state civil procedure statute does not specifically allow for relation back when adding new parties.[257] Therefore, the general rule in Florida state court is that relation back is not allowed when adding new parties.[258] However, the Florida courts have constructively allowed such amendments to relate back when sufficient "identity of interest" is shown.[259] As a result, it is possible that a federal court in the Eleventh Circuit—which normally applies a literal, mistake of identity approach—might find itself bound to apply an "identity of interest" approach when applying Florida state relation back law. Likewise, some courts in the Eleventh Circuit might be bound by Alabama law, which deals with relation back of plaintiffs exclusively under the state's version of Rule 17, which is treated as a "companion rule" to Rule 15[260] and thus requires

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construing the Alabama Rules of Civil Procedure because the Alabama Rules were patterned after the Federal Rules."); Luckett v. Bodner, 2009 WI 68, ¶ 29, 318 Wis. 2d 423, 769 N.W.2d 504 ("When 'a state rule mirrors the federal rule, we consider federal cases interpreting the rule to be persuasive authority.'" (quoting Wisconsin v. Evans, 2000 WI App 178, ¶ 8 n.2, 238 Wis. 2d 411, 617 N.W.2d 220)).

254. *See, e.g.*, R.A. Jones & Sons, Inc. v. Holdman, 470 So. 2d 60, 67 (Fla. Dist. Ct. App. 1985) (citing Williams v. United States, 405 F.2d 234, 237 (5th Cir. 1968), when applying the state relation back rule); Kest v. Hanna Ranch, Inc., 785 P.2d 1325, 1329 (Haw. Ct. App. 1990) ("[W]e will consider pertinent federal decisions interpreting FRCP Rule 15(c), since they are deemed 'to be highly persuasive' in the construction of our Rule 15(c)." (quoting Ellis v. Crockett, 451 P.2d 814, 824 (Haw. 1969))); Perrin v. Stensland, 240 P.3d 1189, 1193 (Wash. Ct. App. 2010) (applying the United States Supreme Court's construction of FED. R. CIV. P. 15(c) to the state's corresponding relation back rule).

255. Beal *ex rel.* Martinez v. City of Seattle, 954 P.2d 237, 240-41 (Wash. 1998).

256. *See* FLA. R. CIV. P. 1.190(c).

257. *See id.*

258. Schwartz *ex rel.* Schwartz v. Wilt Chamberlain's of Boca Raton, Ltd., 725 So. 2d 451, 453 (Fla. Dist. Ct. App. 1999).

259. *See, e.g.,* Ron's Quality Towing, Inc. v. Se. Bank of Fla., 765 So. 2d 134, 136 (Fla. Dist. Ct. App. 2000) (per curiam); *R.A. Jones & Sons, Inc.*, 470 So.2d at 68; Schachner v. Sandler, 616 So. 2d 166, 167 (Fla. Dist. Ct. App. 1993).

260. The Advisory Committee Notes to Alabama Rule of Civil Procedure 17(a) state:

> This subdivision specifically provides that substitution of plaintiffs in order to bring the real party in interest before the court shall have the same effect had the action been commenced in the name of the real party in interest. This, in effect, makes the doctrine in relation back of amendments changing parties applicable to plaintiffs and is the companion to similar treatment for defendants found in Rule 15.

that the defendant "knew or should have known that, but for a mistake concerning the identity of the proper party, *the substituted or joined party would have brought the action against him*."[261] Regardless of how liberally or narrowly a particular federal jurisdiction allows relation back under Rule 15(c), the prevailing interpretation of the state law must control in these cases.[262]

V. Implications in the Class Action Context

Relation back of plaintiffs can have particularly significant implications in the class action context. For example, in *Page*, the plaintiff originally filed an individual action.[263] The "nationwide class of indeterminate size" she sought to add after the limitations period expired would have included "all persons whose benefits had not vested under the terms of a retirement plan in violation of ERISA's strict vesting requirements, and for whom [the defendant] nevertheless [had] refused to guarantee benefit payments."[264] Although increased liability alone is not considered sufficient prejudice to deny relation back,[265] such a massive change in the scope of the litigation also "make[s] a mockery of . . . repose."[266] Thus, to respect the statute of limitations, it appears that allowing relation back of class actions should only be allowed in exceptional cases.

An additional consideration is a principle the Supreme Court put forth in *American Pipe & Construction Co. v. Utah*.[267] In that case, the Court noted that for tolling purposes, policies underlying the statute of limitations are satisfied when the initiation of a class action "notifies . . . defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate

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ALA. R. CIV. P. 17 advisory committee's note (1973); *see also* Blue Star Ready Mix v. Cleveland *ex rel.* Cleveland, 473 So. 2d 497, 499 (Ala. 1985).

261. *Blue Star Ready Mix*, 473 So. 2d at 499 (emphasis added).

262. *See* Pac. Emp'rs Ins. Co. v. Sav-a-Lot of Winchester, 291 F.3d 392, 395 (6th Cir. 2002) (holding that where the amendments are filed prior to removal to federal court, state civil procedure rules, rather than the federal rules, apply); *see also* FED. R. CIV. P. 81(c) ("These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure *after removal*." (emphasis added)).

263. Page v. Pension Benefit Guar. Corp., 130 F.R.D. 510, 511 (D.D.C. 1990).

264. *Id.*

265. *In re* Glacier Bay, 746 F. Supp. 1379, 1391 (D. Alaska 1990).

266. Young v. Lepone, 305 F.3d 1, 15-16 (1st Cir. 2002); *see also Page*, 130 F.R.D. at 513 ("Such a principle would effectively nullify the statute of limitations and its assurance of some repose to a defendant.").

267. 414 U.S. 538, 554-55 (1974).

in the judgment."[268] Later, in *Perry v. Beneficial Finance Co. of N.Y.*, the Western District of New York relied on this rationale to limit a proposed class to those members for whom the statute of limitations had not yet expired.[269] The court reasoned that because the original single-plaintiff action did not apprise the defendant of the size and generic identities of the proposed class members, any claims barred by the statute of limitations would not relate back.[270]

Thus, under *Perry*, no amendments adding class plaintiffs would likely ever be allowed to relate back to a lawsuit filed as a single-plaintiff action. Conversely, under the Seventh Circuit's transactional approach, virtually any individual action could be amended to include class claims after the limitations period has expired. Finally, courts applying the *Williams* standard requiring notice of the existence *and involvement* of the new plaintiff may or may not find that such an amendment should relate back. The majority of courts applying the *Williams* standard are in agreement that an individual complaint does not ordinarily provide adequate notice of the claims of potential class members.[271] Class claims, if permitted to relate back at all, are restricted to those cases where, as in *Sokolski*, the original complaint makes specific references to "new plaintiffs,"[272] or where, as in *Page*, a plaintiff in an individual action purported to assert claims on behalf of a proposed class in settlement negotiations.[273] However, even where a plaintiff asserts class-wide demands in settlement negotiations, if the class has not yet been certified, the plaintiff does not have the legal capacity to assert claims on behalf of the other class members; and absent that authority, a defendant might not have reason to believe that the new plaintiffs' claims were actually being asserted in the original complaint.

VI. Courts Should Apply a Narrow Involvement Approach

Courts should allow relation back of amendments adding plaintiffs only when defendants had notice of the existence and involvement of the new plaintiffs, as articulated in *Williams*. This approach allows relation back when the new claim is transactionally related to the original claim and the defendant had notice of both the existence *and involvement* of the new

268. *Id.* at 555.

269. 81 F.R.D. 490, 495 (W.D.N.Y. 1979).

270. *Id.*; *see also* Clif J. Shapiro, Note, *Amendments That Add Plaintiffs Under Federal Rule of Civil Procedure 15(c)*, 50 GEO. WASH. L. REV. 671, 685 (1982).

271. *See supra* notes 183-84 and accompanying text.

272. Sokolski v. Trans Union Corp., 178 F.R.D. 393, 398 (E.D.N.Y. 1998).

273. Page v. Pension Benefit Guar. Corp., 130 F.R.D. 510, 513 (D.D.C. 1990).

plaintiff within the notice period set out in Rule 15(c)(1)(C). The involvement approach furthers the policy of adjudicating claims on the merits while upholding the policies behind statutes of limitations.[274] This approach is more practical than applying "mistake of identity" to plaintiffs, but serves the same limiting function. A more liberal approach, allowing relation back of all amendments adding new parties as long as they assert transactionally-related claims, would enlarge substantive rights and possibly render Rule 15(c) invalid under the Rules Enabling Act.[275] Furthermore, such an approach "would undermine applicable statutes of limitations and make a mockery of the promise of repose."[276]

A. The Standard for Finding Involvement

To effectively uphold the policies behind the statute of limitations, the standard for finding involvement must be restrictively applied. As a threshold requirement, plaintiffs must demonstrate that the amendment asserts a claim arising out of the conduct, transaction, or occurrence set out, or attempted to be set out, in the original complaint. Then, the court must consider whether the defendant had notice that the plaintiff to be brought in by amendment asserted or attempted to assert a claim in court during the limitations period.

First, the original plaintiff must have had the capacity to assert claims on behalf of the new plaintiff.[277] Second, circumstances must also indicate that the plaintiff was asserting those representative claims. Thus, demands made on behalf of the new party in settlement negotiations would provide notice sufficient to allow relation back, but only if an existing plaintiff had a right to assert those demands on the new plaintiff's behalf.[278] Likewise, explicit references to "new plaintiffs" in the original complaint could indicate to the defendant that another party was involved, but only if the existing plaintiff had the right to assert those claims on behalf of those plaintiffs. Settlement negotiations by an individual on behalf of a proposed class do not provide

274. Dismissal of an untimely claim is considered a decision on the merits, not a mere technicality. United States v. Or. Lumber Co., 260 U.S. 290, 299-300 (1922) (stating that a limitations defense is "substantial and meritorious" and noting that "[s]tatutes of limitation are vital to the welfare of society and are favored in the law").

275. *See infra* Part IV.D.

276. Young v. Lepone, 305 F.3d 1, 15-16 (1st Cir. 2002).

277. *See supra* notes 198-206 and accompanying text.

278. *See supra* text accompanying notes 203-13, 273 (discussing whether assertion of class-wide demands in settlement negotiations indicates "involvement" of the putative class).

sufficient notice to allow relation back if the individual has not yet been certified to represent the class members.

B. The Involvement Approach Addresses the Policies Underlying Statutes of Limitations

As the Advisory Committee Note makes clear, the primary policy concern when dealing with relation back is the statute of limitations.[279] The involvement approach has the advantage of imposing requirements that speak to the policies behind statutes of limitations. This approach implicitly addresses the statute of limitations by requiring that "the defendant must have had, within the applicable limitations period, adequate notice of the new plaintiffs, and that the original suit in effect asserted their claims as well."[280] First, this approach protects the defendant's interest in repose by limiting the number of potential new plaintiffs to those who were essentially embraced by the original claim. Thus, the involvement requirement serves as an effective substitute for the mistake provision in Rule 15(c). Both requirements uphold the statute of limitations policies by limiting relation back to those cases where the plaintiff has attempted to assert a claim during the statutory period, while screening out cases where the plaintiff simply seeks to take advantage of relation back to circumvent the statute of limitations. Without this limiting safeguard, potentially unlimited numbers of additional plaintiffs "could cause defendants' liability to increase geometrically and their defensive strategy to become far more complex long after the statute of limitations had run."[281] As the *Leachman* court aptly pointed out: "At some point, defendants should have notice of who their adversaries are."[282] This is particularly obvious in the class action context, when a small individual action could become a nationwide class action suit long after the statute of limitations has expired. Furthermore, by imposing a notice requirement, this approach prevents prejudice to the defendant by ensuring that the defendant was *aware* of the plaintiff's involvement before the limitations period had passed.

C. The Absence of Prejudice Alone is Not an Effective Test

Courts espousing a liberal standard for relation back of amendments adding plaintiffs argue that claims arising from the same transaction or occurrence should relate back simply because they provide notice, and that

279. FED. R. CIV. P. 15(c) advisory committee's note (1966).
280. Page v. Pension Benefit Guar. Corp., 130 F.R.D. 510, 511 (D.D.C. 1990).
281. Leachman v. Beech Aircraft Corp., 694 F.2d 1301, 1309 (D.C. Cir. 1982).
282. *Id.*

this notice ensures the defendant will not be prejudiced.[283] However, this argument fails because while an initial suit might place the defendant on notice of the existence of other potential plaintiffs, it does not give notice that these other potential plaintiffs are involved in the case or that they plan to become involved.[284] As the First Circuit pointed out in *Young v. Lepone*, "[S]uch minimal notice hardly suffices to avert undue prejudice" to the defendant.[285] Even where the claims are identical, the addition of new plaintiffs may "entail new legal theories and tactics against which [the defendant] must defend."[286]

Furthermore, notice merely for the sake of preventing prejudice does not go far enough in addressing the underlying policies behind the statute of limitations. First, even if no specific prejudice is shown, an untimely claim violates the defendant's interest in repose.[287] Moreover, as the *Williams* court pointed out, when belatedly introducing a new party, "something else is added" to the usual notice requirement.[288] That "something else" is encompassed in the "mistake of identity" requirement of Rule 15(c)(1)(C) by limiting amendments adding defendants to those defendants the plaintiff tried to bring in during the limitations period, but was not able to because of a mistake. To satisfy the policies behind the statute of limitations, it is necessary to limit new plaintiffs by excluding those whose untimeliness is due to inexcusable negligence, and to include only those who were in fact involved in the litigation from the beginning. Requiring only a showing of notice allows plaintiffs to contravene the statute of limitations by taking advantage of the diligence of others.

D. Rules Enabling Act and Erie Doctrine Considerations

Recognizing the substantive policy behind statutes of limitations, some courts have been wary of expanding a plaintiff's right to bring a lawsuit.[289] Because substantive rights may not be enlarged or modified by procedural

283. *See* Arreola v. Godinez, 546 F.3d 788, 796 (7th Cir. 2008). *See generally* Shapiro, *supra* note 270.

284. Young v. Lepone, 305 F.3d 1, 16-17 (1st Cir. 2002).

285. *Id.* at 17.

286. *Id.*

287. *Leachman*, 694 F.2d at 1309.

288. Williams v. United States, 405 F.2d 234, 238 (5th Cir. 1968).

289. *See, e.g.*, Brever v. Federated Equity Mgmt. Co., 233 F.R.D. 429, 435 (W.D. Pa. 2005).

rule,[290] interpreting the rule in a way that does so would "run afoul of the Rules Enabling Act."[291]

Likewise, a restrictive approach may be necessary under the theory that relation back of plaintiffs is not covered by the Federal Rules of Civil Procedure at all. The Advisory Committee's Notes only suggest that "the attitude taken . . . extends by analogy to amendments changing plaintiffs" as well.[292] Thus, it is possible that the committee merely invites courts to deal with this issue themselves. If so, an expansive judicially-created relation back doctrine in conflict with substantive state limitations statutes could violate the *Erie* Doctrine, as it would result in "an 'inequitable administration' of the law."[293] Some courts have recognized this as a constraint on their ability to allow relation back liberally.[294] It is for this reason that some literal-interpretation courts adhere to the text of Rule 15(c).[295] The Sixth Circuit acknowledged the limitation in *Asher v. Unarco Material Handling, Inc.*, observing that "[i]f the drafters of Rule 15(c) had intended to permit relation back on these facts, the rule would have so stated. Similarly, had the [state] legislature wanted the claims of untimely plaintiffs to escape the time bar . . . it would have spoken."[296]

Conclusion

In keeping with the purpose of the Federal Rules of Civil Procedure, courts are instructed to allow amendments liberally in order to promote the adjudication of conflicts on the merits. It does not follow, however, that this policy should also require amendments to *relate back* liberally. Dismissal because a claim is time-barred under the relevant statute of limitations is a

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290. *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 556 n.26 (1974) ("The Enabling Act empowering the Supreme Court to promulgate rules of procedure commands that '[s]uch rules shall not abridge, enlarge or modify any substantive right . . . .'" (alterations in original) (quoting 28 U.S.C. § 2072)).

291. *Brever*, 233 F.R.D. at 435; *see also* 28 U.S.C. § 2072 (2012); Yorden v. Flaste, 374 F. Supp. 516, 520 n.17 (D. Del. 1974) ("The potential conflict between this Federal Rule and the state statute of limitations may raise an *Erie* problem.").

292. FED. R. CIV. P. 15(C) advisory committee's note (1966).

293. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 753 (1980) (quoting Hanna v. Plumer, 380 U.S. 460, 468 (1965)); *see also id.* at 747 ("[T]he 'outcome-determination' test of *Erie* and *York* [must] be read with reference to the 'twin aims' of *Erie*: 'discouragement of forum-shopping and avoidance of inequitable administration of the laws.'" (quoting *Hanna*, 380 U.S. at 468)).

294. *See* Asher v. Unarco Material Handling, Inc., 596 F.3d 313, 320 (6th Cir. 2010).

295. *See id.*

296. *Id.*

substantive and meritorious defense, and defendants should be deprived of the protections of the statute of limitations only when the underlying policies behind the statute have been upheld. A relation back rule requiring that defendants have notice that the new plaintiff attempted to assert a claim in court during the limitations period will enable plaintiffs to bring meritorious claims while ensuring "essential fairness" to the defendant by upholding the policies underlying the statute of limitations.

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