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Class Actions under New Rule 23 and Federal Statutes of Limitation: A Study of Conflicting Rationale

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CLASS ACTIONS UNDER NEW RULE 23 AND FEDERAL STATUTES OF LIMITATION: A STUDY OF CONFLICTING RATIONALE

I. INTRODUCTION

A class action is a suit prosecuted or defended by one or more members of a group on behalf of all other members of the group, the purpose being to adjudicate, in a single action, disputes between the group and an adverse party or group where it is impracticable to join all the members of the group and bring them before the court.[1] Old Rule 23 of the Federal Rules of Civil Procedure,[2] predicating its categorization upon "the character of the right sought to be enforced,"[3] permitted three types of class actions: "true," "hybrid," and "spurious." Actions under Old Rule 23(a)(1) were "true" class actions "wherein, but for the class action device, the joinder of all interested persons would [have been] essential."[4] The class action was "hybrid," under Old Rule 23(a)(2), when "in addition to the question of fact common to all, there [was], in lieu of joint or common interests, the presence of property which [called] for distribution or management."[5] "Spurious" actions under Old Rule 23(a)(3) occurred when the character of the right was " 'several, and there [was] a common question of law or fact affecting the several rights and a common relief [was] sought.' "[6]

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1. *See* 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 561, at 254 (rev. ed. Wright 1961); FED. R. CIV. P. 23(c)(1).

2. FED. R. CIV. P. 23, before the recent 1966 amendment, provided in pertinent part:

> (a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
> (1) joint or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.
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> . . . .
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> (c) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

3. 3A J. MOORE, FEDERAL PRACTICE ¶ 23.02, at 3415 (2d ed. 1967) [hereinafter cited as MOORE].

4. MOORE, ¶ 23.08, at 3435. *See Developments in the Law — Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 930 (1958).

5. MOORE, ¶ 23.09, at 3439.

6. MOORE, ¶ 23.10, at 3442. For the potentiality of the use of the spurious class suit see Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 699-701 (1941).

These "right-oriented" categories, classified by Professor Moore and accepted by the courts, were intended to be functional as well as descriptive in that different effects were assigned to each type of class action.[7] While the holding in a true class action served to bind all members of the class,[8] and the judgment in a hybrid class action was binding on all members of the class as to their rights in the specific property involved in the action,[9] a decision in a spurious class action bound only those members of a class who were or who became actual parties to the action,[10] thus causing the spurious class action to be essentially "a permissive joinder device."[11] Under Old Rule 23, an absentee class member generally became an actual party to the action by intervening under Federal Rule 24.[12] However, this raised problems when an absentee class member wished to intervene at a time when the applicable statute of limitations would have barred an individual action by him. These problems were rooted in the different effects accorded judgments under the various types of class actions,[13] and the courts, in spurious actions, conflicted as to the circumstances under which intervention was to be permitted and as to the appropriate time for intervention.[14]

The sweeping revisions of New Rule 23, at first glance, would appear to put to rest the question of intervention in class suits.[15] The former categorization of class actions as "true," "hybrid," and "spurious" seems to have been eliminated, and the "right-oriented" approach has been replaced by a method which permits a class action only under circumstances

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7. MOORE, ¶ 23.11, at 3456.

8. MOORE, ¶ 23.11, at 3458. *See* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921).

9. MOORE, ¶ 23.11, at 3468–69. *See* Towle v. Donnell, 49 F.2d 49 (6th Cir. 1931).

10. MOORE, ¶ 23.11, at 3465.

11. MOORE, ¶ 23.10, at 3442. *See Developments in the Law — Multiparty Litigation in the Federal Courts,* 71 HARV. L. REV. 874, 930 (1958).

12. *See, e.g.,* Oppenheimer v. F.J. Young & Co., 3 F.R.D. 220 (S.D.N.Y. 1943).

13. *See* 14 SYRACUSE L. REV. 127, 128 & n.3 (1962).

14. There seems to have been agreement that commencement of the suit tolled the statute of limitations in both the "true" and "hybrid" class actions. 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 568, at 315 (rev. ed. Wright 1961). *See* Richmond v. Irons, 121 U.S. 27 (1887). The division of authority concerning tolling in the spurious situation will be examined in detail. *See* 76 HARV. L. REV. 1675, 1676 (1963).

15. Donelan, *The Advantages and Disadvantages of a Class Suit Under New Rule 23, as Seen by the Treble Damage Plaintiff,* 32 ABA ANTITRUST L.J. [formerly ABA ANTITRUST SECTION] 264, 265–66 (1966) (footnote omitted). The author states:

> Another obvious advantage which accrues to every member of the class at commencement, whether he knows he's a member of the class or not, is tolling the statute of limitations. If, in his discretion, a trial judge allows someone to join the class three to four years after commencement of the action, and thereby sneak in under the statute of limitations, the difference between substantive and procedural law will be in for some heavy scrutiny and I predict some very, very heated arguments. This advantage also works to the benefit of those who, ignorant of their rights, have failed to act sooner. Defense counsel will soon learn that this same aid extends to the jackals who hang back until the tiger has downed the stag ready for the kill. The miracle of an action under the new rule 23 is that it tolls the statute of limitations for the dull, the lazy, the timid, the sly, and digitalis there is only one, the unfortunate who has really been injured.

which are deemed to make such an action appropriate.[16] The change in the new rule that formally eliminates the category of "spurious" is the provision that the judgment in a class action based upon a common question of law or fact can operate conclusively on all members of the class.[17] But, notwithstanding the formal elimination of the spurious category, in a class action maintained under New Rule 23(b)(3), the nature of the class is the same as in the old spurious class action in that the rights of the members of the class are several, and there are predominate questions of law or fact which are common to the members of the class.[18]

Once the court determines that the action is maintainable as a class action under 23(b)(3), it is bound, under 23(c)(2), to give notice to all identifiable members of the class that unless they expressly request exclusion they will be included in the class, and, that if upon receiving notice no such request is made, they will be bound by the judgment.[19] Thus, under the new rule, the spurious class suit is no longer a device for permissive joinder,[20] and an absentee no longer need take affirmative action to intervene before he becomes an actual party to the action.[21] Once an absentee is identified as a member of the class and receives notice, he would appear to be given a right to become a party for all purposes.[22]

16. FED. R. CIV. P. 23(a) lists four prerequisites which must be met in addition to the conditions in 23(b):

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

17. FED. R. CIV. P. 23(c)(2) provides:

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

See Note, *Proposed Rule 23: Class Actions Reclassified,* 51 VA. L. REV. 629, 642 (1965).

18. FED. R. CIV. P. 23(b)(3) states:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> . . . .
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> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

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

19. FED. R. CIV. P. 23(c)(2), *supra* note 17.

20. *See* p. 371 *supra.*

21. *See* p. 371 *supra.*

22. *See* Cohn, *The New Federal Rules of Civil Procedure,* 54 GEO. L.J. 1204, 1223–24 (1966).

> For purposes of proving damages, an absentee class member who is a party to the action would not actually come before the court until after a favorable judgment

Rule 23 is devoid of jurisdictional requirements. Therefore, one would assume that notice will be given to an absent member of the class regardless of the fact that he would be barred by the applicable statute of limitations from bringing suit personally at the time he is presented with the opportunity to request exclusion.[23] Because an absentee member must take affirmative action only when he chooses to be excluded from the class, if he receves notice and takes no action, he is automatically included in the class and affected by the judgment. There is, however, one prerequisite for intervention in a class suit which was never a point of contention under Old Rule 23 and which seemingly will not prove troublesome under New Rule 23. That is, the applicable statute of limitations must not have been a bar to the absentee member's ability to bring an action at the time the class action in which he is seeking to intervene was instituted.[24] Thus, whenever this comment discusses intervention in class suits at a time when the applicable statute of limitations would bar an individual action by the absentee class member, a situation is referred to in which the original action in the class suit was instituted prior to the time that the absentee would have been barred by the statute from instituting his own action.

Another point worth noting is that New Rule 23 gives the trial judge added discretion in that an order concerning the propriety of designating the action a class action may be altered or amended until such time as there is a decision on the merits.[25] Conceivably, a trial judge could open a class action and allow additional plaintiffs to intervene years after the statute of limitations would have been a bar to their individual suits.

The ability to become a party to the action at a time subsequent to the individual's own statutory time limit would be of practical significance. For example, in the area of settlement negotiations, rule 23(e) requires court approval for such compromises and that notice of the proposed compromise be sent to all members of the class.[26] Thus, a defendant con-

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to the class were rendered. *See* Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673, 684 (N.D. Ind. 1966).

An absentee member may, if he does not request exclusion, enter an appearance through counsel. FED. R. CIV. P. 23(c)(2), *supra* note 17. Such an appearance would appear to be quite different from a personal appearance by the absentee for the purpose of pressing his individual claims. Entry of appearance through counsel would serve to bolster the original plaintiff's legal forces as well as decrease the latter's own trial expenses.

23. *See* 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 568, at 87 (rev. ed. Wright Supp. 1966); Advisory Committee's Note, 39 F.R.D. 69, 99 (1966).

24. *See, e.g.*, Slack v. Stiner, 358 F.2d 65, 70 (5th Cir. 1966); Escott v. Barchris Constr. Corp., 340 F.2d 731, 732–33 (2d Cir. 1965); Pennsylvania Co. for Ins. on Lives & Granting Annuities v. Deckert, 123 F.2d 979 (3d Cir. 1941).

25. FED. R. CIV. P. 23(c)(1) provides:

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

26. FED. R. CIV. P. 23(e).

> (e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed

templating settlement in a 23(b)(3) class action would be well advised to consider whether absent members who would be barred from bringing individual actions will be considered to be within the class and be notified of the proposed compromise.[27]

The purpose of this comment is to examine the desirability of allowing an absent member, who would be barred by the statute of limitations from bringing an individual action, to become a party to the class action, and an attempt will be made to determine whether such "intervention" is within the scope of the new rule. Particular emphasis will be accorded the anti-trust area where it is felt that New Rule 23 will have its most significant effect.[28]

II. CLASS ACTIONS: RATIONALE IN FAVOR OF TOLLING

A. Historical Development

The modern class action has its origins in the English common-law courts.[29] Even earlier, the chancery court had developed the bill of peace whereby, to avoid multiplicity of actions, repeated trials, delays, and injustice, an action could be maintained by, or brought against, some members of a group on behalf of the entire group when: the group was so large as to make joinder impossible, the group was adequately represented, and the group had a common interest in the question to be decided.[30] The judgment in such an action was binding on the entire group.[31]

In the United States, in 1842, Equity Rule 48[32] was promulgated and provided for a representative suit when the parties were so numerous as to make joinder inconvenient. The major distinction from its common law equity ancestor was in the provision that "the decree shall be without prejudice to the rights and claims of all the absent parties."[33] Eleven years later, Equity Rule 48's bar to a non-binding class action was controverted in *Smith v. Swormstedt*.[34] In *Smith*, which involved a class action to determine rights to a specific fund, the United States Supreme Court held that since the rights and liabilities of the fifteen hundred absent members of the class were adequately represented by the six

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dismissal or compromise shall be given to all members of the class in such manner as the court directs.

27. *See generally* 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 570, at 91 (rev. ed. Wright Supp. 1967).

28. *See* Donelan, *supra* note 15, at 264; Ford, *supra* note 18, at 254.

29. Z. CHAFEE, SOME PROBLEMS OF EQUITY 200–01 (1950).

30. *See Developments in the Law — Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 928 (1958).

31. Z. CHAFEE, *supra* note 29, at 202–03, 224–25.

32. J. HOPKINS, NEW FEDERAL EQUITY RULES ¶ 48, at 104–05 (8th ed. Babbitt 1933).

33. This principle stems from West v. Randall, 29 F. Cas. 718 (No. 17,424) (C.C.R.I. 1820) (dictum), in which Justice Story reasoned that in the United States, in addition to the English class action, another type of class action existed in which the judgment did not affect the rights of those not before the court.

34. 57 U.S. (16 How.) 288 (1853).

members who were before the court, the absent parties could be bound by the decree just as if they had been before the court.[35]

In 1912, Equity Rule 38,[36] which replaced Equity Rule 48, deleted the clause which limited the binding effect of the class action. The Supreme Court, in *Supreme Tribe of Ben-Hur v. Cauble*,[37] took the position that this omission eliminated the jurisdictional requirements of Equity Rule 48; thus, absentees could be bound by the judgment in a class action. Finally, *Hansberry v. Lee*[38] firmly impressed upon the class action the requirement of adequate representation. The Court found no constitutional objection to permitting a class suit judgment to be res judicata as to absent members; however, it was held that due process mandates the adoption of procedures which adequately protect the interests of absentees. Federal Rule of Civil Procedure 23 was enacted substantially as a restatement of Equity Rule 38,[39] and the avoidance of multiplicity of actions remained as the underlying purpose of the class action,[40] particularly for spurious class actions.[41] "Like many another practice, necessity was its mother. Its correct limitations must be ascertained by the experiences which brought it into existence."[42]

B. Case Law Prior to New Rule 23 in Favor of Tolling

Richmond v. Irons[43] is the case most frequently cited for the proposition that the commencement of a true or of a hybrid class action tolls the running of the statute of limitations as to all members of the class.[44] The case, the earliest one in the area and the single Supreme Court case on point, involved a creditor's bill in equity to discover the assets of a national bank that was in the process of liquidation. The Court held that the original action by a single creditor allowed any bona fide creditor to intervene at a later date, notwithstanding the running of the statute of limitations for an individual action by the intervenor.[45] The decision was grounded upon the strong equitable considerations inherent in the creditor's bill, the court pointing out that a decree for the payment of debts under a creditor's bill is "considered as a trust for the benefit of creditors. . . ."[46] Since "every creditor has to a certain extent an inchoate interest" in an action brought by another creditor, there is no need for

35. *Id.* at 302.
36. 226 U.S. 659 (1912).
37. 255 U.S. 356 (1921).
38. 311 U.S. 32 (1940).
39. MOORE, ¶ 23.02, at 3410.
40. Pentland v. Dravo Corp., 152 F.2d 851, 854n.6 (3d Cir. 1945); City of Chicago v. Allen Bradley Co., 32 F.R.D. 448, 452 (N.D. Ill. 1963).
41. Kainz v. Anheuser-Busch, Inc., 194 F.2d 737, 740 (7th Cir. 1952).
42. Weeks v. Bareco Oil Co., 125 F.2d 84, 90 (7th Cir. 1941).
43. 121 U.S. 27 (1887).
44. MOORE, ¶ 23.13, at 3476n.22; 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 568, at 315n.15.2 (rev. ed. Wright 1961).
45. 121 U.S. at 52.
46. *Id.* at 52-53.

each creditor to institute an individual action.[47] The prime import of the *Richmond* case, for present purposes, is that subsequent cases have, by analogy, applied the creditor's bill rationale to class actions generally.[48] The concept of *proceeds* being set aside in a separate and distinguishable fund for an identifiable group, namely, creditors, was not only the rationale for tolling the statute of limitations,[49] but was also the *sine qua non* of a true class bill.[50]

The creditor's bill rationale became firmly implanted in the class action in *Deckert v. Independence Shares Corp.*[51] After labeling as "hybrid" the Securities Act[52] class action under consideration, the court traced the history of the creditor's bill which was used, analogically, to support its finding that a hybrid class action tolled the statute of limitations.[53] The court further stated:

> To permit a "class" action to be brought, under Rule 23, and then to bar members of the class . . . from later joining in the action or from enjoying its benefits, is an inconceivable proposition. That would operate to the detriment of members of the class . . . who had been lulled into a sense of security in reliance upon Rule 23 which . . . permits the bringing of class actions without making any distinction between "true," "spurious" and "hybrid" bills.[54]

In addition to the creditor's bill rationale, the concept of *reliance* emerged as a significant factor from this case. Perhaps the strongest argument in favor of tolling the statute of limitations is the fact that all of the plaintiffs knew of the action, and, relying upon the representative nature of the suit to preserve their individual causes of action, did not bring their own suits.

In *Culver v. Bell & Loffland, Inc.*,[55] a case involving the Fair Labor Standards Act,[56] the court rejected defendant's argument that, because

47. *See id.* at 53–54.

48. 34 COLUM. L. REV. 118, 130 (1934).

49. *See* Standard Oil Co. v. Swinney, 201 F.2d 133 (5th Cir. 1953); Johnson v. United States, 102 F.2d 729 (10th Cir. 1939); Marsh v. United States, 97 F.2d 327 (4th Cir. 1938).

50. *See* Kimble v. Board of Comm'rs, 32 Ind. App. 377, 391, 66 N.E. 1023, 1028 (1903); *cf.* Southern Pac. Co. v. Bogert, 250 U.S. 483 (1919); Hallett v. Hallett, 2 Paige 19 (N.Y. 1829). *See* note 122 *infra* for the impropriety of the continued use of the creditor's bill rationale.

51. 39 F. Supp. 592 (E.D. Pa.), *remanded*, 123 F.2d 979 (3d Cir. 1941). The case illustrates the problems engendered by Old Rule 23's characterization of class actions as "true," "hybrid," or "spurious." The case was extremely complex in that there had been an appeal from the court's original decision on the validity and characterization of the class action. 39 F. Supp. at 594–95.

52. 15 U.S.C. § 77(*l*) (1964). On appeal, the third circuit labeled the action "spurious." Pennsylvania Co. for Ins. on Lives & Granting Annuities v. Deckert, 123 F.2d 979, 984 (3d Cir. 1941).

53. The court reasoned that even if the action were spurious, the statute would still be tolled because for this purpose rule 23 did not distinguish between types of class actions. 39 F. Supp. at 597.

54. *Id.*

55. 146 F.2d 29 (9th Cir. 1944).

56. 29 U.S.C. §§ 201–19 (1964).

the causes of action were dissimilar and therefore the pleadings did not relate back under rule 15,[57] the statute of limitations barred would-be intervenors. The decision to toll the statute in favor of the class action was based upon the "avoidance of multiplicity of suits" rationale, as well as on the fact that at all times the employer had the ability to identify with particularity each potential plaintiff, and, therefore, had no need for a specific complaint from each.[58] The court also noted that the provisions of the Fair Labor Standards Act encourage actions "by all employees similarly situated."[59] Moreover, in the Fair Labor Standards area, the success of the federal remedy may rest entirely upon the use of the class action; thus, the policy in such cases is particularly strong in favor of allowing the class action notwithstanding the running of the statute of limitations. This is exemplified by *Pentland v. Dravo Corp.*[60] where the court reasoned that classifying the proceeding as a "spurious" class suit furthered the congressional purpose underlying section 16 of the Fair Labor Standards Act: "[E]mployees, if they wish, can join in their litigation so that no one of them need stand alone in doing something likely to incur the displeasure of an employer. It brings something of the strength of collective bargaining to a collective lawsuit."[61] The equities in a case of this nature seem to militate in favor of tolling the statute.

Measured by the judicial recognition it has received,[62] the leading case for tolling would appear to be *York v. Guaranty Trust Co.*[63] A spurious class action was instituted by similarly situated note holders against the defendant-trustee for breach of fiduciary duty. The court, focusing on the reliance by potential plaintiffs on the representative nature of the class, stated in dictum:

> Rule [23] unequivocally tells all persons having claims of the type therein described that one or more of them may begin such a class action "on behalf of all" when the "class" is "so numerous as to make it impracticable to bring them all before the court." Any non-accepting noteholders, relying on that assurance, were justified in

57. FED. R. CIV. P. 15(c). In an individual action, after the statute of limitations has run, an amendment to a pleading will not be permitted which brings in a new party to the action. Wagner v. New York, O. & W. Ry., 146 F. Supp. 926 (M.D. Pa. 1956); Anderson v. Brody, 7 F.R.D. 84 (E.D. Ky. 1946).

58. 146 F.2d at 31.

59. Fair Labor Standards Act § 16, 29 U.S.C. § 216(b) (1964). The court in *Culver* stated: "The provisions of the Act permitting resort to representative suits should be liberally administered by the courts, since encouragement of the practice will redound to the advantage of employer and employee alike through avoidance of a multiplicity of suits." 146 F.2d at 31. *Accord,* Kum Koon Wan v. E.E. Black, Ltd., 75 F. Supp. 553 (D. Hawaii 1948); Wright v. United States Rubber Co., 69 F. Supp. 621 (S.D. Iowa 1946).

60. 152 F.2d 851, 853 (3d Cir. 1945).

61. *Id.* at 853.

62. *See, e.g.,* All American Airways, Inc. v. Elderd, 209 F.2d 247, 248n.1 (2d Cir. 1954); Newberg v. American Dryer Corp., 195 F. Supp. 345, 349 (E.D. Pa. 1961).

63. 143 F.2d 503 (2d Cir. 1944), *rev'd on other grounds,* 326 U.S. 90 (1945). The case ultimately became the outcome determinative rule of the *Erie v. Tompkins* area.

> believing that plaintiff's suit was begun on their behalf although they were not before the court. To hold that such noteholders cannot, as to lapse of time, have the benefit, by intervention, of the institution of the suit by plaintiff would be to convert the Rule into a trap.[64]

York, in addition to allowing intervention during a spurious class action by tolling the statute of limitations, suggested a procedure which would allow class members to intervene *after* a decision on the merits.[65] The rationale for this "one-way intervention" was based on the effect of a judgment in a spurious class action. Since the judgment was res judicata only to those members who had intervened, the court felt that to prohibit members from intervening after an adverse judgment to the defendant would be to convert the rule into a trap. Although sharply criticized by Professor Moore,[66] "one-way intervention" was approved in *Union Carbide & Carbon Corp. v. Nisley.*[67] Thus, an absentee member could await the outcome of a case, and, if a favorable decision were rendered, he would be permitted to benefit by the judgment without having been exposed to the risk of an adverse decision. Through "one-way intervention" the reliance concept was extended to intervention after judgment.

C. Case Law Prior to New Rule 23 Barring Intervention

One of the few cases to suggest that a spurious class action does not toll the statute of limitations is *P. W. Husserl, Inc. v. Newman,*[68] an antitrust case. The court, disregarding the contrary dicta in *York,* stated that because the absentees in a spurious class action are not bound by the judgment, "reliance upon the commencement of the action should not free the claims of the absentees from the statutory bar."[69] Thus, instead of focusing on the nature of the spurious class action as did the court in *Deckert,* the *Husserl* court emphasized its non-binding effect. It would be fair to assume that because of the binding effect of judgments under New Rule 23, the rationale of *Husserl* is no longer apposite; however, this does not compel the conclusion that the statute must be tolled under New Rule 23.[70]

The singular case which conclusively held that a spurious class action does not toll the statute of limitations focused on the nature of the action

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64. 143 F.2d at 529 (Frank, J.) (dictum). *Accord,* Mutation Mink Breeders Ass'n v. Lou Nierenberg Corp., 23 F.R.D. 155 (S.D.N.Y. 1959). *Contra,* 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 568, at 315 (rev. ed. Wright 1961).

65. 143 F.2d at 529.

66. MOORE, ¶ 23.12, at 3476; *accord,* Bascom Launder Corp. v. Telecoin Corp., 204 F.2d 331 (2d cir.), *cert. denied,* 345 U.S. 994 (1953).

67. 300 F.2d 561 (10th Cir. 1961), *cert. denied,* 371 U.S. 810 (1962), *noted in* 76 HARV. L. REV. 1675 (1963) *and* 14 SYRACUSE L. REV. 127 (1962).

68. 25 F.R.D. 264 (S.D.N.Y. 1960).

69. *Id.* at 267. The court indicated that in a true or hybrid class action all the members are deemed to be before the court upon timely institution of the action by a representative thereby preventing the statute from running. *Id.*

70. *See* p. 388 *infra.*

rather than on the effect of the judgment. In *Athas v. Day*,[71] a case involving a violation of the Securities Act,[72] the court stated:

> If this were a true or hybrid class action, the only question would be whether plaintiff adequately represented the class. If he did, the statute of limitations would not bar their recovery. The spurious class action, however, involves separate causes of action, and is a matter of efficiency to avoid multiplicity of actions. Consequently, each plaintiff must be able to avoid the bar of the statute of limitations without reference to the other causes of action.[73]

The *Athas* decision's reliance on the case of *Pennsylvania Co. for Ins. on Lives & Granting Annuities v. Deckert*,[74] however, appears to have been mistaken. In *Deckert*, a class action under the Securities Act was dismissed because of inadequate representation.[75] In dictum, the court after discussing intervention in the spurious and hybrid situations, concluded that intervention would not be permitted in a spurious class suit.[76] *Athas* read *Deckert* as saying that an intervenor in a class action must apply to intervene before the statute would preclude an independent action by him. However, one authority has taken the position that the *Deckert* case held that one is precluded from intervening only if the statute would have run against his claim prior to the commencement of the original class action.[77] While the language in *Deckert* could support either interpretation,[78] upon examining the *Deckert* court's reasoning, one is impressed with the difficulties of applying broad labels to determine when intervention is proper. The impression one receives is that of a court groping for a suitable rationale. In the district court, the action was termed "hybrid," and as noted,[79] the cases involving the creditor's bill rationale were analogized to the class action in order to allow intervention. In a spurious suit, however, where the rights are several, the court is not on the firm footing it is on in the hybrid situation where it can speak of the "inchoate interest"[80] of, and the "creation of a trust"[81] for, would-be intervenors. Thus, the *Deckert* case illustrates the immense difficulty of attempting to fit a square peg, the creditor's bill rationale, into a round hole, the spurious class action. *Deckert* also shows the necessity for a case by case analysis,

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71. 161 F. Supp. 916 (D. Colo. 1958).

72. 15 U.S.C. § 77e (1964).

73. 161 F. Supp. at 919.

74. 123 F.2d 979 (3d Cir. 1941). This is the decision of the appeal of the *Deckert* case which was discussed at p. 376 *supra*.

75. 123 F.2d at 983–84.

76. *Id.* at 985.

77. 3 L. Loss, SECURITIES REGULATIONS 33 (Supp. 1962). *See* p. 373 *supra*.

78. "[P]lanholder may not intervene as an additional party-plaintiff in the action at bar at this juncture if he purchased his securities more than three years prior to the commencement of the suit." 123 F.2d at 985. The failure to place an adjective before the word "suit" may well explain the conflicting views.

79. *See* p. 376 *supra*.

80. *See* the discussion of *Richmond v. Irons* at p. 375 *supra*.

81. *Id.*

or, rather, a statute by statute analysis, to determine whether to toll a particular statute.[82]

D. Escott: A Possible Solution

Due to the absence of discussion of the policies inherent in statutes of limitation, the prior case law lacks satisfactory analysis regarding the conflicting rationale between such statutes and class actions. On the eve of the promulgation of New Rule 23, such an analysis was presented by the Second Circuit Court of Appeals in *Escott v. Barchris Constr. Corp.*[83] The court, directly confronted with the question of whether or not plaintiff-shareholders could intervene in a registration statement misrepresentation action under the Securities Act,[84] held that the spurious class action tolled the statute of limitations.[85] The rationale for this holding was grounded in the weightier policy arguments favoring the class action compared to those for the statute of limitations.[86] The court stated that since the class action was, for the purpose of aiding judicial administration, designed to more efficiently handle large cases involving numerous plaintiffs, rule 23 should be favored and its use encouraged.[87] Furthermore, it was reasoned that rule 23 must be liberally construed because it is a "device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group."[88]

That in the securities regulation area the importance of protecting the small investor may be the strongest policy argument for tolling the statute is further evidenced by *Harris v. Palm Spring Alpine Estates, Inc.*: "Indeed, it has been suggested that 'the ultimate effectiveness of the federal remedies' in this area 'may depend in large measure on the applicability of the class action device,' and particularly of the 'spurious' class action provided by Rule 23(a)(3)."[89] The rationale for tolling in this situation is closely analogous to that for employee actions under the Fair Labor Standards Act,[90] and, in both types of actions, a court seemingly will be sympathetic to the plaintiff's position and reluctant to allow the defendant to assert a statute of limitations defense.

In arriving at its decision the *Escott* court also considered the rationale underlying the statute of limitations, namely: (1) to prevent surprise, (2) to prevent the loss of evidence, (3) to avoid memory failure of witnesses

82. See Slack v. Stiner, 358 F.2d 65 (5th Cir. 1966), where the conflicting policies of *Athas* and *York* are presented.

83. 340 F.2d 731 (2d Cir. 1965), *cert. denied sub. nom.*, Drexel & Co. v. Hall, 382 U.S. 816 (1966).

84. 15 U.S.C. § 77k (1964).

85. 15 U.S.C. § 77m (1964) provides for a bar if the action is not instituted within one year after discovery of the misrepresentation nor within three years after the sale.

86. 340 F.2d at 733.

87. *Id.*

88. *Id.*

89. 329 F.2d 909, 913 (9th Cir. 1964), quoting 3 L. LOSS, SECURITIES REGULATIONS 1819–20 (2d ed. 1961).

90. See [illegible]

and the disappearance of witnesses, and, (4) to free defendants from stale claims.[91] These rationale, however, were found to be inapposite:

> In the present case the claims were not allowed to grow stale. Before the period of limitations had expired an action was instituted. The defendants were thus made aware of the nature of the evidence that would be needed at the trial. Since the action was brought on behalf of all others similarly situated, the defendants were put on notice of the possibility of claims aggregating the full sales price of all the debentures. There can have been no occasion for surprise when these additional plaintiffs sought to intervene.[92]

Judge Friendly, in a convincing concurring opinion, attacked the propriety of always subordinating the policies of the statute of limitations to those of class actions, and he would limit the holding to the statute of limitations in the Securities Act.[93] Judge Friendly points out that, ironically, the most efficient approach to the multiplicity of actions problem would be to allow the statute to run, thus barring any future actions.[94] He urges that the vindication of small claims rationale for tolling the statute is anamolous in that it allows a particular plaintiff to sit on the sidelines while another plaintiff carries the complete burden of prosecuting the action. However, if the statute would run, all plaintiffs would be encouraged to intervene, thereby giving the original plaintiff assurance of financial support.[95] The majority's finding that the original action provides the defendant with adequate notice of the possibility of other plaintiffs intervening is not entirely persuasive. Given the nature of the spurious class suit — the enforcement of several rights having no unifying element except common questions of law or fact[96] — as compared to the nature of the true or hybrid class suit — the enforcement of a primary right common to all or a single fund for administration[97] — Judge Friendly notes three specific difficulties which the majority opinion fails to resolve: (1) the issue of concealment[98] can vary among individual plaintiffs, and the institution of a class action by one plaintiff does not necessarily give the defendant notice of what he must prepare on the issue of concealment as to other potential plaintiffs; (2) each plaintiff alleges specific damages which must be refuted by individualized evidence, and there is no notice given to the defendant as to the damages claimed by any potential plaintiff; (3) a defendant may have defenses peculiar to a particular plaintiff

91. 340 F.2d at 734. *See* Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 712n.88 (1941).
92. 340 F.2d at 734.
93. 340 F.2d at 736 (concurring opinion).
94. *Id.* at 735.
95. *Id.*
96. MOORE, ¶ 23.10, at 3442–55.
97. MOORE, ¶ 23.08–09, at 3434–41.
98. 15 U.S.C. § 77m states in pertinent part:
No action shall be maintained to enforce any liability created under section 77k . . . of this title unless brought within one year after the discovery of the untrue statement or the omission or after such discovery should have been made by the exercise of reasonable diligence. . . .

or potential plaintiff, and the original notice does not apprise him of all defenses he may have to raise.[99] In these three situations memories may have faded and witnesses may have disappeared, factors that comprise the stale claims that statutes of limitation guard against.[100] Finally, Judge Friendly points out that if it is assumed that one plaintiff, relying on the class action, did not bring an action individually, it still remains that many plaintiffs whom the statute is designed to bar will benefit by an encompassing holding that the statute is tolled as to all persons.[101] In other words, those plaintiffs who have not relied upon the class action in allowing their claims to grow stale, as well as those who have so relied, will be allowed to intervene.

The *Escott* decision would indicate that the best solution to the problem of reconciling the class action and the statute of limitations is for a court to take an interest-balancing approach. This analysis will be considered later in the context of antitrust litigation.

III. NEW RULE 23 AND THE STATUTE OF LIMITATIONS

A. General Considerations

Initially, there are a number of situations under New Rule 23(b)(3) which must be noted where absentee members of a class may be able to "intervene"; that is, situations in which they will be notified of the action and will be effected by the judgment.[102] The first opportunity to intervene would present itself after the court determined that a class action is maintainable under 23(b)(3), the section in which the nature of the class is the same as in the spurious class action under Old Rule 23.[103] Under 23(c)(2), the court, notwithstanding the running of the statute of limitations, would give notice to all *identifiable* members of the class, thereby enabling them to be affected by the judgment.[104] Secondly, since rule 23(c)(2) provides for notice to *identifiable* members, if an absentee member is overlooked in the notice procedure, but is subsequently found to be a member of the class, he would upon the discovery of his membership, be notified and permitted to be affected by the judgment. It might be expected that such oversights will be quite common in nationwide antitrust suits involving hundreds of small companies. Finally, since an order "may be conditional, and may be altered or amended before the decision on the merits,"[105] although a court may determine initially that the action cannot be maintained as a class action, the action may subsequently be opened as a class action, thus allowing members of the class to become parties notwithstanding the running of the statute of limita-

99. *But see* FED. R. CIV. P. 23(a)(3), *supra* note 16.
100. 340 F.2d at 735 (concurring opinion).
101. *Id.*
102. *See* p. 372 *supra.*
103. *See* FED. R. CIV. P 23(b)(3). *See* p. 372 & note 18 *supra.*
104. *See* p. 372 & note 17 *supra.*
105. FED. R. CIV. P. 23(c)(3). *See* p. 373 & note 25 *supra.*

tions. As to the point of time at which notice is received, the federal rules provide that it should be determined "[a]s soon as practicable"[106] whether or not a class action is maintainable. However, one commentator has stated: "In the normal antitrust action, this will not be very soon. In [*Union Carbide & Carbon Corp. v.*] *Nisley,*[107] it was not [determined] until after trial. In short, it is going to be very hard to find an appropriate class until you know a great deal about the law suit."[108] Therefore, an absentee member may not be aware of the action or may not act to obtain his exclusion until the statute of limitations has long run as respects his personal ability to initiate suit, yet he would still be a party to the action and therefore affected by the judgment.[109]

A situation which hopefully will be avoided under New Rule 23[110] is "one-way intervention," previously discussed in conjunction with the *York* and *Union Carbide* cases.[111]. The Advisory Committee's Note to New Rule 23(c)(3) expressly excludes one-way intervention.[112] Hopefully, the class will be defined at an early stage of the proceedings, and the judgment will be binding only on those determined to be in the class. Intervention will not be permitted after judgment. The problem of whether to toll the statute of limitations is still present; however, it seems that potential plaintiffs will not be able to sit on the sidelines until a winner is declared before joining the battle.

The question then is whether under New Rule 23 a tenable argument can be advanced against tolling. More specifically, the issue is whether the interest-balancing approach emanating from the *Escott* decision should be utilized under New Rule 23. It would seem that the general purposes of statutes of limitation mandate this approach. In *Order of R.R. Telegraphers v. Railway Express Agency,* the United States Supreme Court stated:

> Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing

106. *Id. See* Lipsett v. United States, 359 F.2d 956, 958n.1 (2d Cir. 1966).

107. 300 F.2d 561 (10th Cir. 1961), *cert. denied sub. nom.,* Wade v. Union Carbide & Carbon Corp., 371 U.S. 810 (1962) (footnote added).

108. Fales, *Significance of Amended Rule 23 to the Antitrust Bar,* 32 ABA ANTITRUST L.J. 282, 288 (1966). *See* Advisory Committee's Note, 39 F.R.D. 69, 106-07 (1966).

109. It should be noted that where a member voluntarily excludes himself from the class, there would appear to be no reason for tolling the statute as to him, although no such distinction seems to have been drawn in the prior case law. *See* Ford, *The History and Development of Old Rule 23 and the Development of Amended Rule 23,* 32 ABA ANTITRUST L.J. 254, 263n.49 (1966).

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

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

111. *See* pp. 377-78 *supra.*

112. Advisory Committee's Note, 39 F.R.D. 69, 105-06 (1966).

> surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses, have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.[113]

The only real notice given to a defendant at the beginning of a class action is that at some time in the future additional plaintiffs *may* or *may not* decide to become parties to the action. "Notice" of such a limited nature appears to controvert the policy enunciated in *Railway Express,* and the issue to be considered is whether New Rule 23 can be interpreted as requiring that notice be sent only to those members who would not be barred by the applicable statute of limitations from instituting an individual suit. A decision within a given statutory context should depend upon the balancing of policy interests of class actions and statutes of limitation.[114]

B. Interest Balancing and Antitrust Litigation

New Rule 23 has been cynically described as a provision which will stimulate the use of the private action in the antitrust area:

> The golden era of antitrust which was the delight of the antitrust bar and the despair of the electrical equipment industry some years ago, has waned. In the opinion of many, the tempo of antitrust activity has slowed in recent years. If the inherent advantages of the New Rule 23 are realized to their full potential by treble damage class plaintiffs, let me be the first to welcome you back to the affluent world of endless depositions, national discovery programs and large retainers. The best is yet to come.[115]

The above commentator envisions the tolling of the statute of limitations as one of the obvious advantages to private class plaintiffs.[116] The utilization of an interest-balancing approach in the antitrust area, however, may serve to dampen the spirits of treble-damage plaintiffs, as the following analysis should demonstrate.[117]

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113. 321 U.S. 342, 348–49 (1944). *Accord,* Isthmian Lines, Inc. v. Rosling, 360 F.2d 926 (2d Cir. 1966). *See Developments in the Law — Statutes of Limitations,* 63 HARV. L. REV. 1177, 1185 (1950). For an historical development see 1 H. WOOD, LIMITATIONS, §§ 2, 4–5, at 4–12 (rev. ed. Moore 1916). *See also* p. 381–82 *supra.*

114. Needless to say, the argument in favor of such an approach would be stronger when intervention is sought through the judge's discretion in opening a class action rather than through the initial notice requirements under FED. R. CIV. P. 23(c)(2).

For a discussion of the due process requirements concerning notice, see Advisory Committee's Note, 39 F.R.D. 69, 106–07 (1966); Note, 51 VA. L. REV. 629, 636 (1965).

115. Donelan, *The Advantages and Disadvantages of a Class Suit Under New Rule 23, as Seen by the Treble Damage Plaintiff,* 32 ABA ANTITRUST L.J. 264 (1966).

116. *Id.* at 265–66.

117. For a survey of other federal limitation statutes where the interest-balancing approach may be utilized see Blume & George, *Limitations and the Federal Courts,* 49 MICH. L. REV. 937, 983–88 (1951).

In *Escott,* the economic justification for balancing in favor of the class action was the vindication of small claims,[118] a justification which would seldom be warranted in an antitrust action. While in the Fair Labor Standards area,[119] and in the Securities area,[120] the individual plaintiff with a small amount at stake is usual, in antitrust cases such a plaintiff is the exception rather than the rule.[121] Furthermore, the Clayton Act provides for the vindication of claims of private plaintiffs by allowing a treble-damage recovery plus "the cost of suit, including a reasonable attorney's fee."[122]

In balancing the policies of class actions and statutes of limitation one must consider that in addition to a four year statute of limitations for antitrust actions,[123] the Clayton Act provides that whenever a civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations "in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter."[124] This section also provides that a holding adverse to the defendant in a government action operates as prima facie evidence of an antitrust violation in a private action against the same defendant,[125] thus minimizing the private plaintiff's expense of amassing evidence and eliminating his burden of proving violative conduct. "The sole reason for [these provisions] of the Clayton Act was to stimulate private antitrust suits and aid such private suitors."[126] Any type of interest-balancing in the antitrust area must take into consideration these policies inherent in the antitrust legislation. In fact, several commentators believe that the private action is the best means of effecting a forceful antitrust policy.[127] In light of these policies, it is arguable that the need for effective antitrust enforcement outweighs the potential inequities inherent in tolling the statute of limitations for absentee members. Such

118. Escott v. Barchris Constr. Corp., 340 F.2d 731, 733 (2d Cir. 1965), *cert. denied sub. nom.,* Drexel & Co. v. Hall, 382 U.S. 816 (1966). *See* p. 380 *supra.*

119. *See* p. 377 *supra.*

120. *See* p. 380 *supra.*

121. Fales, *Significance to the Antitrust Bar of Amended Rule 23,* 32 ABA ANTITRUST L.J. 282, 284 (1966).

122. 15 U.S.C. § 15 (1964). The common interest of a class suit now being centered in common questions of law or fact, 34 COLUM. L. REV. 118, 120n.7 (1934), the creditor's bill rationale of the early cases is equally unsuitable for antitrust actions. *See* pp. 375-76 *supra.*

123. 15 U.S.C. § 15(b) (1964).

124. 15 U.S.C. § 16(b) (1964). *See* Comment, 23 WASH. & LEE L. REV. 353 (1966); Comment, 14 J. PUB. L. 232 (1965).

125. 15 U.S.C. § 16(d) (1964).

126. New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., 332 F.2d 346, 354 (3d Cir. 1964), *aff'd,* 381 U.S. 311 (1965). Section 5(b) of the Clayton Act, 15 U.S.C. § 16(b) (1964), has been extended so as to toll the statute against parties not named as defendants in the prior government action. Michigan v. Morton Salt Co., 259 F. Supp. 35 (D. Minn. 1966), *noted in* 55 GEO. L.J. 930 (1967).

127. *E.g.,* Bicks, *The Department of Justice and Private Treble Damage Actions,* 4 ANTITRUST BULL. 5 (1959); Loevinger, *Private Action — The Strongest Pillar of Antitrust,* 3 ANTITRUST BULL. 167 (1958). *See also* Note, 55 GEO. L.J. 930, 935 n.44 (1967).

tolling may then be viewed as just another way of realizing the congressional conviction that "private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws."[128]

Another factor for consideration in an interest-balancing approach is the doctrine of fraudulent concealment. Although the Supreme Court has yet to rule on the point, the lower federal courts which have been presented with the issue have agreed that, even absent an express qualification in the statute, fraudulent concealment tolls the running of the four year statute of limitations for private damage actions[129] as a result of a federal equitable doctrine to be read into every federal statute of limitations.[130]

Given the fact that the four year statute of limitations in an antitrust case is tolled initially by one of the above methods, a potential antitrust plaintiff would be hard pressed to place himself in an equitable position where he could successfully argue that he should be granted the added advantage of having the statute of limitations tolled as to him by a class action instituted by some other plaintiff. The initial tolling appears to fulfill the strong public policy considerations favoring private antitrust actions, and the request for an additional period in which to bring suit may not be viewed as simply another device to further the legislative intent to foster successful antitrust enforcement. Support for the proposition that an extension of time, in addition to that already provided for by the act, is not in conjunction with public policy is evidenced by the legislative history of the pertinent sections of the Clayton Act:

> While the [Advisory C]ommittee considers it highly desirable to toll the statute of limitations during a Government antitrust action and to grant plaintiffs a reasonable time thereafter in which to bring suit, it does not believe that the undue prolongation of proceedings of this type is conducive to effective and efficient enforcements of the antitrust laws.[131]

Also worthy of note is the Advisory Committee's caveat that notice to members of the class under the new rule "is available fundamentally 'for the protection of the members of the class or otherwise for the fair conduct of the action' and should not be used merely as a device for the undesirable solicitation of claims."[132] In the antitrust context, the

128. Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965).

129. General Elec. Co. v. City of San Antonio, 334 F.2d 480 (5th Cir. 1964); Rinzler v. Westinghouse Elec. Corp., 333 F.2d 719 (5th Cir. 1964); Public Serv. Co. v. General Elec. Co., 315 F.2d 306 (10th Cir.), *cert. denied*, 374 U.S. 809 (1963); Atlantic City Elec. Co. v. General Elec. Co., 312 F.2d 236 (2d Cir. 1962), *cert. denied*, 373 U.S. 909 (1963). For the purposes of this discussion, the doctrine of fraudulent concealment suspends the running of the statute until the discovery of the fraud. *See generally* McSweeney, *infra* note 130; Note, 111 U. PA. L. REV. 1214 (1963).

130. *See* McSweeney, *The Statute of Limitations in Treble Damage Actions Under the Federal Antitrust Laws — When the Period Begins and Tolling by Government Actions and Fraudulent Concealment*, 11 ANTITRUST BULL. 717, 728 (1966).

131. H.R. REP. No. 422, 84th Cong., 1st Sess. 6 (1955).

132. Advisory Committee's Note, 39 F.R.D. 69, 107 (1966).

effect of notice, rather than to enable a group to bring an action, may merely serve to provide leverage in settlement negotiations and to allow counsel to take advantage of the "legitimized solicitation of claims."[133]

Another argument that would-be intervenors might raise to enhance the contention that the interests balance in their favor in antitrust actions would be that of reliance; that is, the class action would be converted into a trap if in reliance upon the institution of the original action absentee members refrained from bringing individual actions before the statute ran, thereby prohibiting them from becoming parties at a later date and preventing them from bolstering the original action by supplying additional counsel and contributing additional counsel fees. This particular argument necessitates construing New Rule 23 to mean that reliance is a prerequisite to an otherwise barred absentee member's right to receive notice. However, the question of reliance, even if raised, seems to be properly subordinated to the policies underlying statutes of limitation. Using Judge Friendly's concurring opinion in *Escott*[134] as a point of reference, the determinative question would be whether the commencement of the original action adequately apprises the defendant of the absentees' claims.[135] The nature of the antitrust action has certain inherent characteristics which make particularly pertinent the rationale underlying statutes of limitation; that is, surprise, loss of evidence, memory failure of and disappearance of witnesses, and stale claims.[136] First, the parties are usually corporations with extremely complex organizational schemes; executive turn-over, death, and retirement can make it difficult, if not impossible, to structure litigation which is dependent upon evidence that must be gleaned from such sources. Secondly, the issue of damages is of prime concern. With the possibility of a great many plaintiffs being involved, the task of securing evidence to rebut every potential claim is extremely difficult, and the institution of the original action cannot be said to apprise the defendant of which plaintiffs will assert claims after the statute has run. Furthermore, the fact that antitrust litigation is so protracted[137] intensifies each of the objections to tolling based on the statute of limitations rationale.

The factors heretofore discussed as pertinent to an interest-balancing approach for antitrust litigation — the inherent characteristics of antitrust suits, the fact that individual defenses might be applicable to different potential plaintiffs,[138] the lack of an economic justification favoring class actions as exists in the Securities and Fair Labor area, the treble-damage

133. *See* W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 562, at 72 (rev. ed. Wright Supp. 1966).

134. *See* p. 381 *supra.*

135. *See Developments in the Law — Multiparty Litigation in the Federal Courts,* 71 HARV. L. REV. 874, 942–43 (1958).

136. *See* p. 380–81 *supra.*

137. *See* P. AREEDA, ANTITRUST ANALYSIS ¶ 165, at 45–46 (1967).

138. It should be noted that if the individual defenses are atypical a class action would not be maintainable. *See* FED. R. CIV. P. 23(a)(3), *supra* note 16. *But cf.* p. 381–82 *supra.*

provision, the use of the government decision as prima facie evidence of an antitrust violation, the four year statute of limitations, and the use of the fraudulent concealment doctrine — seem to lead to the conclusion that in antitrust actions the policies underlying the statute of limitations outweigh those underlying the favoring of class actions.

In addition to the considerations regarding class actions for antitrust suits and the rationale underlying statutes of limitation generally, an interest-balancing approach necessitates an examination of the policies underlying New Rule 23 itself. The purpose of New Rule 23, as was the purpose of Old Rule 23[139] and of class actions generally,[140] is to avoid multiplicity of actions. The changes effected by New Rule 23 would appear to be designed to further this purpose. By providing that all members of the class who receive notice and who do not take affirmative action to exclude themselves from the class are bound by the judgment, a maximum number of the class members are concluded by the class action without ever appearing before a court. However, the utilization of the interest-balancing approach is not inconsistent with the avoidance of multiplicity of actions rationale of New Rule 23. If the interest has been resolved in favor of non-tolling, the multiplicity of actions problem is resolved because the running of the statute bars any future action.[141] Furthermore, any question as to whether the statute has in fact run for a particular class member, in order to determine whether he should be sent notice, can be answered by a brief appearance before the court for this limited purpose only.

The necessity for applying an interest-balancing approach to antitrust actions, and for taking a long, hard look at statutes of limitation policies, can also be inferred from the legislative history of the tolling provisions for antitrust actions: "[I]n many instances the long duration of [antitrust] proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and over-burden the calendars of the court."[142]

IV. SUBSTANCE v. PROCEDURE

An important remaining point for consideration is whether tolling the statute of limitations by the initiation of a class action is validly within the scope of New Rule 23.[143] The Supreme Court's rule-making power is limited by the enabling statute which provides that "[s]uch rules shall not abridge, enlarge or modify any substantive rights. . . ."[144] It must be noted initially that even if an applicable statute of limitations were considered to be substantive, since New Rule 23, on its face, does not purport

139. *See* pp. 375–77 & note 59 *supra.*
140. *See* pp. 374–75 *supra.*
141. *See* p. 381 *supra.*
142. H.R. REP. No. 422, 84th Cong., 1st Sess. 6 (1955).
143. *See* note 15 *supra.*
144. 28 U.S.C. § 2072 (1964).

to deal with the question of tolling, the rule itself does not affect substantive rights, and, therefore, is not within the proscription of the Enabling Act.[145] However, if the rule is interpreted as requiring notice to be sent to absentee members who would be barred from bringing individual actions, an argument could be advanced that New Rule 23 is invalid because, in its application, it abridges substantive rights. The issue would then become whether the applicable statute of limitations confers a substantive right, and this issue revolves around the distinction between "right" and "remedy."[146] Ordinarily, statutes of limitation bar the remedy and not the right and, consequently, are viewed as procedural. Therefore, the tolling of the statute by a class action under rule 23 would not "abridge, enlarge or modify any substantive rights." However, if the statute of limitations is part of a statute which creates a liability for which there was no common law remedy, the limitations provision is said to go to the right as well as the remedy and, therefore, is substantive in nature.[147] Thus, in the federal statutory remedies heretofore discussed, the applicable statutes of limitation would be considered substantive.[148]

In *Hanna v. Plummer*[149] the question arose as to the relationship the Federal Rules of Civil Procedure have to the substantive-procedural clash of the *Erie* doctrine.[150] The Supreme Court indicated that the federal rules must prevail over a conflicting state law, and that the substantive-procedural boundaries delineated for purposes of the *Erie* doctrine are not conclusive of those prevailing under the Enabling Act.[151] Although *Hanna* established the supremacy of the federal rules over state procedure, it is submitted that the conflict between the federal rules and federal statutory rights with their own statutes of limitation is not within the scope of *Hanna,* but will be considered in light of the traditional substantive-procedural dichotomy.[152] The effect of *Hanna,* however, is to create a strong presumption in favor of the validity of the federal rules. As the Court stated:

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided

145. *See* Hanna v. Plummer, 380 U.S. 460, 469–70 (1965).

146. *See Developments in the Law — Statutes of Limitations,* 63 HARV. L. REV. 1177, 1186 (1950); 7 WASH. & LEE L. REV. 237, 238 (1950).

147. Osbourne v. United States, 164 F.2d 767, 768 (2d Cir. 1947); Pennsylvania Co. for Ins. on Lives & Granting Annuities v. Deckert, 123 F.2d 979, 985 (3d Cir. 1941); Page v. Cameron Iron Works, 155 F. Supp. 283, 286–87 (S.D. Tex. 1957); Cauley v. Massengill Co., 35 F. Supp. 371, 372 (D. Tenn. 1940).

148. The effect of New Rule 23 on applicable state statutes of limitation is beyond the scope of this comment.

149. 380 U.S. 460 (1965), *noted in* 54 CALIF. L. REV. 1382 (1966).

150. Federal courts shall apply federal procedure and the substantive law of the state in which they are sitting. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

151. 380 U.S. at 469–72.

152. The Court in *Hanna* reiterated the substance-procedure test promulgated in *Sibbach v. Wilson & Co.*: "[P]rocedure . . . [is] the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." Hanna v. Plummer, 380 U.S. 460, 464 (1964), quoting Sibbach v. Wilson, 312 U.S. 1, 14 (1941). This test would be the touchstone for an analysis under the Enabling Act.

> Erie choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.[153]

In the wake of *Hanna's* fortification of the federal rules, the Third Circuit Court of Appeals, in *Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co.*,[154] declared that the indispensable party doctrine, as enunciated in *Shields v. Barrow*,[155] is substantive law which accords a substantive right to be joined to a party whose interests may be affected by the outcome of an action; therefore, rule 19[156] of the Federal Rules of Civil Procedure could not, consistently with the Enabling Act, alter the standards by which the existence of an indispensable party is determined. The *Provident* court[157] relied in part on the reasoning in *Perry v. Allen*,[158] a case involving a taxpayer's suit against the collector for recovery of taxes allegedly erroneously assessed. The then existing provision in rule 25(a)(1) requiring substitution within two years after the death of a party was held invalid insofar as it attempted to abridge the taxpayer's substantive right to bring his civil action to trial on its merits by placing a categorical and inflexible time limit upon his right to substitute the collector's administrator.[159] The court stated:

> It is plain that these Rules are designed to provide the machinery for the administration of justice, the modes of proceeding by which legal rights are enforced; and do not purport to deal with the law which gives or defines such rights, or their character, or the existence or boundaries of the remedies vouchsafed for the establishment of those rights. . . .[160]

The instant problem is closely analogous to the *Provident* and *Perry* situations. If the federal rules may not be used to deny joinder when joinder is deemed a substantive right, a fortiori the rules should not be used to allow a class member to become a party in the face of a substantive statute of limitations which would prohibit it.

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153. 380 U.S. at 471.

154. 365 F.2d 802 (3d Cir. 1966), *cert. granted*, 386 U.S. 940 (1967).

155. 58 U.S. (17 How.) 129 (1854). The court defined indispensable parties as persons who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience. *Id.* at 139.

156. The case involved the indispensable party doctrine of Old Rule 19; however, it is felt that the decision is also applicable to New Rule 19. *See* 12 VILL. L. REV. 672, 673 (1967).

157. 365 F.2d at 814.

158. 239 F.2d 107 (5th Cir. 1956).

159. *Id.* at 112. *Cf.* Local 370, Hotel & Restaurant Employees v. Delaware, L. & W. R.R. Co., 157 F.2d 417 (2d Cir. 1946).

160. 239 F.2d at 111-12.

The *Provident* case is presently being reviewed by the Supreme Court.[161] In light of the superior status accorded the federal rules by *Hanna,* the *Provident* decision may not be standing on solid ground. After *Hanna,* there could be little argument that it is within the scope of the Enabling Act "to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."[162] Both the indispensable party doctrine and the statute of limitations were designed, at least in part, to facilitate the orderly dispatch of judicial business, and, in this sense, are clearly procedural and within the rule-making power.[163] In fact, the right-remedy, substance-procedure dichotomy of statutes of limitation has come under strong criticism,[164] and recently the substantive limitations concept has been abandoned in the case of fraud in the Fair Labor Standard area[165] and for fraudulent concealment in the antitrust area.[166]

As has been noted, the "substantive" characteristic of the statutes of limitation under scrutiny is that they are either embodied in a provision of the statute creating the liability or they apply specifically to a new cause of action.[167] In either situation there is believed to be little doubt of the legislative intent: "If Congress explicitly puts a limit upon the time for enforcing a right which is created, there is an end of the matter. The Congressional statute of limitation is definitive."[168] Thus, it is Congress' relating a specific statute of limitations to a specific statutory right that labels the statute substantive; however, this seems small justification for designating one statute procedural and another substantive. Because legislatures have formulated general statutes of limitation does not mean that they intended these to be less effective, or less substantive, than specific ones. Even a particular statute of limitations would seem to have little effect when viewed in light of the *Hanna* decision. Thus, the tolling of the statute of limitations by the institution of a class action would not appear to make New Rule 23 invalid in its application. However, if *Provident* is affirmed by the Supreme Court, a realistic argument might be raised that tolling a "substantive" statute of limitations violates the Enabling Act.[169]

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161. Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co., 365 F.2d 802 (3d Cir. 1966), *cert. granted,* 386 U.S. 940 (1967).

162. Hanna v. Plummer, 380 U.S. 460, 472 (1965).

163. *See* Joiner & Miller, *Rules of Practice and Procedure: A Study in Judicial Rule Making,* 55 MICH. L. REV. 623, 629–30, 648 (1957).

164. *Developments in the Law-Statutes of Limitations,* 63 HARV. L. REV. 1177, 1186–88 (1950).

165. Scarborough v. Atlantic Coast Line R. Co., 178 F.2d 253 (4th Cir. 1949), *noted in* 7 WASH. & LEE L. REV. 237 (1950).

166. Westinghouse Elec. Corp. v. Pacific Gas & Elec. Co., 326 F.2d 575, 579 (9th Cir. 1964); Kansas City, Mo. v. Federal Pac. Elec. Co., 310 F.2d 271, 283 (8th Cir. 1962).

167. *See* p. 389 & cases cited note 147 *supra.*

168. Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946).

169. New Rule 23 may also violate the limits of a procedural rule in that by providing that a judgment is binding on class members, it expressly states the substantive effect of the judgment. For a discussion of this point see Comment, 50 IOWA L. REV. 1135, 1164 (1965).

V. CONCLUSION

The proposal for an interest-balancing test stems from dicta in *York* and from the concurring opinion of Judge Friendly in *Escott*. Not until the *Escott* decision had there been a satisfactory discussion of the relationship between, and the conflicting policies of, class actions and statutes of limitation. Although the *Escott* court seemed complacent in allowing the class action to subordinate the statute of limitations, the incisive concurrence of Judge Friendly may indeed spark new life into the area. In light of the strong policy considerations underlying the statute of limitations, when the question of tolling the applicable statute is presented, it would appear to be more desirable under New Rule 23 to utilize the interest-balancing approach than to merely construe the rule as mandating tolling.

The question remains as to whether the interests underlying a class action should be balanced against: (1) the interests underlying statutes of limitation generally, or (2) the interests underlying the statute of limitations in a particular statutory scheme, or (3) the interests underlying the statute of limitations as applied to each absentee class member. Balancing against statutes of limitation generally would result in the greatest amount of predictability in that once the issue were authoritatively determined, no contrary argument could ever be advanced; however, this approach would completely ignore the interests of individual absentees. On the other hand, a case by case approach would appear to best protect the interests of individual parties; however, predictability would be minimal. It would seem, therefore, that the best approach would be to balance the interests underlying a class action against those underlying the statute of limitations for a particular statutory scheme. Such an approach encompasses the attributes of both other approaches in that it would result in a reasonable amount of predictability and a reasonable amount of protection of the interests of individual, similarly situated class members.

Absent any decisions on point, the language of New Rule 23 would lead the individually barred absentee to conclude that all possible avenues to redress have not been closed. Nevertheless, given the considerations underlying the statute by statute interest-balancing approach, the courts should not be denied the opportunity to foreclose inappropriate routes.

Barney B. Welsh