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Class Actions — Tolling of Statutes of Limitations — Adequate Representation — Haas v. Pittsburgh National Bank

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Class Actions—Tolling of Statutes of Limitations—Adequate Representation—*Haas v. Pittsburgh National Bank*[1]—On November 13, 1972, the plaintiff Haas instituted a class action in federal district court alleging that three banks—Pittsburgh National, Mellon, and Equibank—had exacted an unlawfully high finance charge on revolving credit accounts because they (1) applied a nominal rate of interest above that authorized by Pennsylvania law, (2) used the previous balance method of computing interest, and (3) compounded the interest.[2] The purported class included all credit cardholders of the three banks who had paid interest[3] within the two-year limitations period set by the National Bank Act.[4] Haas, who was the only named representative of the class, possessed revolving credit accounts with Pittsburgh National Bank and Mellon, but not with the defendant Equibank.[5]

On January 21, 1974, the district court, reversing an earlier decision for certification of the class under Rule 23 of the Federal Rules of Civil Procedure,[6] concluded that Haas could not represent Equibank cardholders because she did not herself have a claim against that defendant.[7] Mitchell was therefore added to represent the class on this claim[8] and certification was again granted.[9] Summary judgment was then ordered for the defendants on each of the credit card issues, the court holding that the 1¼ percent per month service charge, the previous balance method of computing interest, and the compounding, were all authorized by Pennsylvania law.[10] In addition it held that the two-year statute of limitations was not tolled against Equibank until the January 21, 1974 order adding Mitchell.[11] Since Equibank had discontinued use of the previous balance method prior to January 21, 1972, the court found that the claim based on this method was time-barred.[12]

The plaintiffs initially appealed all claims to the Third Circuit.

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[1] 526 F.2d 1083 (3d Cir. 1975).

[2] *Id.* at 1085-86. The action was brought in federal court under the National Bank Act. *See* 12 U.S.C. § 38 *et seq.* (1970), which makes state banking laws applicable to the national banks. *Id.* § 85.

[3] 526 F.2d at 1086.

[4] 12 U.S.C. § 86 (1970); *see* 526 F.2d at 1096 n.16.

[5] *Id.* at 1086. The revolving charge accounts involved were Master Charge and BankAmericard. *Id.* at 1085.

[6] *Id.* at 1095. The district court initially certified the class in Hass v. Pittsburgh Nat'l Bank, 60 F.R.D. 604 (W.D. Pa. 1973).

[7] 526 F.2d at 1095. The court based its reversal on O'Shea v. Littleton, 414 U.S. 488 (1974) and LaMar v. H & B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973), which were not decided until after the original certification order. 526 F.2d at 1095.

[8] 526 F.2d at 1095.

[9] *See* Haas v. Pittsburgh Nat'l Bank, 381 F. Supp. 801, 803 (W.D. Pa., 1974).

[10] *Id.* at 806-09.

[11] *See id.* at 807-08. The complaint was actually amended to add Mitchell on February 19, 1974, 526 F.2d at 1095, but the court appears to have related the amendment back to the date of its order.

[12] Haas v. Pittsburgh Nat'l Bank, 381 F. Supp. 801, 807-08 (W.D. Pa. 1974).

While the appeal was pending, however, the Third Circuit decided in *Acker v. Provident National Bank*[13] that the 1¼ percent interest rate charged by banks on revolving credit accounts is lawful, at least on consumer transactions.[14] In light of this ruling, the plaintiffs dropped their interest rate claim as to consumer transactions, but continued to assert that the 1¼ percent rate was unauthorized on commercial dealings.[15] No indication was given on the record, however, that either Haas or Mitchell had participated in any commercial transactions.[16] Therefore, the court in *Haas* was presented with the question of whether the named plaintiffs, without such participation, could be proper representatives on this claim.[17]

The Court of Appeals for the Third Circuit HELD: (1) a party is not as a matter of law an improper class representative on a claim for which he has no standing if he possesses closely related claims in the same suit;[18] (2) compounding and the previous balance method for computing interest are unauthorized by Pennsylvania law in revolving credit card accounts;[19] and (3) the statute of limitations is tolled for a class at the original filing of a suit even though the class action is subsequently held not maintainable because of improper representation.[20] The court reasoned that the close relationship between the named plaintiffs' interests in the previous balance method and compounding claims and the interests of the class members who had engaged in commercial transactions allowed a conclusion that the latter would be adequately protected;[21] therefore, the approval of representative status for the named plaintiffs would not be an abuse of the district court's discretion.[22] On the tolling question, the court stated that Rule 23's[23] policy of economy and efficiency of litigation—as expressed by the United States Supreme Court in *American Pipe & Construction Co. v. Utah*[24]—required the tolling of the statute of limitations against

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[13] 512 F.2d 729 (3d Cir. 1975).

[14] *Id.* at 739.

[15] 526 F.2d at 1087.

[16] *Id.* Since the issue of Haas' or Mitchell's involvement in commercial transactions was not raised at trial, the court of appeals had to make its own conclusions on the basis of the record. *See id.* at 087-88. It concluded that as a matter of law the plaintiffs' transactions with Mellon Bank were not commercial. *Id.* at 1088. The court found no evidence in the record of the nature of plaintiffs' transactions with Pittsburgh National Bank or Equibank and therefore left that issue to the trial court of remand. *Id.* at 1087.

[17] *See id.* at 1088.

[18] *Id.* at 1089. The issue was therefore remanded to the trial court for decision. *Id.*

[19] *Id.* at 1093, 1095. The court did not decide the commercial interest rate issue since it had determined that its existence on appeal depended on a ruling by the trial court on the propriety of the plaintiffs' representation. *Id.* at 1089-90.

[20] *Id.* at 1097-98.

[21] *Id.* at 1088-89.

[22] *Id.* at 1089.

[23] FED. R. CIV. P. 23.

[24] 414 U.S. 538 (1974).

Equibank at the time of the original filing by Haas.[25]

The *Haas* case is significant because it is the first court of appeals analysis of the tolling principles of *American Pipe*, and because of its substantial liberalization of the representation requirements of Rule 23. This note will analyze both of these class action issues. First, the decision on the tolling of the statute of limitations will be analyzed to determine if the decision in *Haas* is consistent with the policies expressed in *American Pipe*. Next, inquiry will be made as to whether the question of the adequacy of representation on the commercial transaction issue was properly left to the discretion of the trial court, or whether it should have been decided as a matter of law by the court of appeals. It will ultimately be submitted that the *Haas* court was correct in its broad interpretation of *American Pipe* but incorrect, in light of the policies of Federal Rule 23, in its decision not to declare the representation inadequate.

I. TOLLING OF THE STATUTE OF LIMITATIONS

The primary issue raised in *Haas* concerned the application and functioning of the statute of limitations in Federal Rule 23 class actions. The tolling of a statute of limitations is a well-settled procedure in the federal courts.[26] The tolling operation is considered an integral part of the functioning of a statute of limitations[27] and is used only when a strong policy requires it.[28] In class action situations there is a strong policy in favor of the promotion of litigative efficiency.[29] Therefore, the statute of limitations had been held to toll at the commencement of a "spurious" class suit filed under the pre-1966 Rule 23 for intervenors who would nevertheless not have been bound by an adverse decision.[30] For similar reasons, it is now settled that under the present Rule 23 the statute is tolled for all absent class members at the filing of the suit, provided the class status is ultimately maintained.[31]

The specific problem which faced the court in *Haas* was whether a statute of limitations is tolled at the filing of an action for purported

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[25] 526 F.2d at 1096-98.

[26] *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 463-64 (1975); Burnett v. New York Cent. R.R., 380 U.S. 424, 426-27 (1965).

[27] Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 463 (1975).

[28] *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 466-67 & n.13 (1975); International Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 708 (1966). For example, courts have held that limitations periods have been tolled where a defendant's fraud prevented a plaintiff from discovering his injury, Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946), or where a timely-filed claim was dismissed for lack of venue after the statutory period had run. Burnett v. New York Cent. R.R., 380 U.S. 424, 434-35 (1965).

[29] See text at notes 54-57 *infra*.

[30] Escott v. Barchris Constr. Corp., 340 F.2d 731, 733-34 (2d Cir. 1965).

[31] *American Pipe*, 414 U.S. at 550-52; Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 246 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); Minnesota v. United States Steel Corp., 44 F.R.D. 559, 573 (D. Minn. 1968).

class members whose class status is subsequently denied because of improper representation.[32] This decision turned on a determination of the breadth of the holding of the recently-decided United States Supreme Court case of *American Pipe & Construction Co. v. Utah.*[33] *American Pipe* presented the Supreme Court with the question of tolling the statute of limitations for absent class members where the subsequent denial of class status was due to a failure of numerosity.[34]

The plaintiff state of Utah filed a complaint in federal district court alleging violations of section 1 of the Sherman Act by the defendant pipe dealers.[35] The suit purported to be a class action, with the named plaintiff representing all Utah state departments that had dealt with the defendants, as well as any similarly situated Western states that had not already commenced like actions.[36] On motion by the defendant under Rule 23 (c)(1), the district court held that the action could not continue as a class suit because the plaintiff class did not satisfy the numerosity requirement of Rule 23 (a)(1).[37] The Utah state departments then moved to intervene as named plaintiffs in the suit either as of right under Rule 24 (a)(2),[38] or by permission under Rule 24 (b)(2).[39] The court denied intervention as of right,[40] and held that permissive intervention by the parties was now time-barred since the limitations period had run out.[41] On appeal, the excluded members argued that the statute of limitations was tolled for them at the commencement of the original suit.[42] The Court of Appeals for the Ninth Circuit agreed with this contention and reversed the lower court.[43]

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[32] 526 F.2d at 1095. In addition to the tolling argument, the appellants in *Haas* also contended that the addition of Mitchell as a named plaintiff should relate back to the initial filing of the complaint under FED. R. CIV. P. 15(c). *Id.* at 1096. Brief of Appellant at 39-41, Haas v. Pittsburgh Nat'l Bank, 526 F.2d 1083 (3d Cir. 1975). The court did not deal with this contention, but a similar argument has been rejected by the Tenth Circuit. Monarch Asphalt Sales Co. v. Wilshire Oil Co. of Tex., 511 F.2d 1073, 1079 (10th Cir. 1975). The issue was also raised and rejected by the district court in *American Pipe.* Utah v. American Pipe & Constr. Co., 50 F.R.D. 99, 108-09 (C.D. Cal. 1970).

[33] 414 U.S. 538 (1974).

[34] *See* 414 U.S. at 552.

[35] *Id.* at 541.

[36] *Id.*

[37] Utah v. American Pipe & Constr. Co., 49 F.R.D. 17, 21 (C.D. Cal. 1969). For text of FED. R. CIV. P. 23 (a)(1), see note 75 *infra.*

[38] Utah v. American Pipe & Constr. Co., 50 F.R.D. 99, 101-02 (C.D. Cal. 1970). FED. R. CIV. P. 24(a)(2).

[39] 50 F.R.D. at 102. FED. R. CIV. P. 24(b)(2).

[40] 50 F.R.D. at 102.

[41] *Id.* at 108. The statute of limitations had eleven days to run on May 13, 1969, when Utah filed its class suit, 414 U.S. at 541. It was not until November, 1969, that the plaintiff's class status was terminated. *Id.* at 542.

[42] *See* Utah v. American Pipe & Constr. Co., 473 F.2d 580, 583-84 (9th Cir. 1973).

[43] *Id.* at 584.

The Supreme Court granted certiorari[44] and affirmed the appeals court's decision,[45] stating that the statute of limitations was tolled at the filing for all purported class members where the class suit was rejected because of a failure of numerosity:[46]

> We hold that in this posture, at least where class action status has been denied solely because of failure to demonstrate that "the class is so numerous that joinder of all members is impracticable," the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.[47]

As stated, therefore, the Court's holding goes no further than the facts of the case, limiting the tolling of the statute to situations where the plaintiffs fail to meet the numerosity requirement and subsequently file for intervention. Indeed, the Supreme Court quoted the court of appeals opinion which specifically distinguished such fact situations as that in *Haas* where class status denial was based on a lack of proper representation.[48] Nevertheless, the broad policy considerations which the Court used as the rationale for its decision seem equally applicable to circumstances beyond the limited facts of the *American Pipe* case.

The Court stated that the question of tolling in class actions should be resolved by a consideration of the policies underlying both Rule 23 and the statute of limitations.[49] This consideration involves three factors.[50] First, the tolling must serve to further the "economy and efficiency of litigation"—a principal purpose of Rule 23.[51] Second, essential fairness must be ensured to the defendants by proper notification within the limitations period.[52] Finally, the absent plaintiffs

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[44] American Pipe & Constr. Co. v. Utah, 411 U.S. 963 (1973).

[45] 414 U.S. at 561.

[46] *Id.* at 552-53.

[47] *Id.*

[48] *Id.* at 553. The court of appeals emphasized that insufficient numerosity was the defect causing class termination, stating that "[m]aintenance of the class action was denied not for failure of the complaint to state a claim on behalf of the members of the class . . . [and] not for lack of standing of the representative, or for reasons of bad faith or frivolity." Utah v. American Pipe & Contr. Co., 473 F.2d 580, 584 (9th Cir. 1973) (footnote omitted).

[49] 414 U.S. at 553-56.

[50] *Id.*

[51] *Id.* at 553.

[52] *Id.* at 554-55. The Court here cited the opinion in Burnett v. New York Cent R.R., 380 U.S. 424, 428 (1965), and stated that the policies of the statute of limitations were those of "ensuring essential fairness to defendants and of barring a plaintiff who has 'slept on his rights.'" 414 U.S. at 554. The requirement of notice was further emphasized in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), where the Court stated that "*American Pipe* . . . depended heavily on the fact that [the filing] involved exactly the same cause of action subsequently asserted." *Id.* at 467.

cannot be allowed to "sleep on their rights" to the detriment of the defendants.[53]

The first prerequisite, furtherance of litigative economy and efficiency, is operative where the class as initially set forth has a reasonable chance for certification.[54] Tolling of a statute of limitations serves the goal of litigative efficency by preventing superfluous protective motions for intervention by absent class members.[55] Such motions are superfluous when they are made in class suits that are subsequently certified, since in these suits the statute is tolled for the absent members at the filing.[56] If tolling is not to be provided, however, in class suits that were subsequently denied certification but that were submitted on nonfrivolous grounds, absent members in *all* class actions will justifiably feel the need to intervene prior to the running of the limitations period in order to protect themselves against a possible denial of class status. Therefore, members of a reasonably defined class should be protected by tolling. The same is not true, however, where the class action was frivolous and never had a significant chance of being certified. Intervention is superfluous only insofar as it occurs in class suits that are subsequently held maintainable. Since certification will not result where the class is unreasonably defined, no litigative efficiency will be lost if intervention is encouraged by not tolling the statute of limitations.

This suggested test places the burden on the district court to determine when a class was reasonably defined, even though certification was ultimately denied. One factor in this determination is the procedural context within which the class status was terminated. In *Haas*, the trial court initially certified the case as a class action and only later reversed itself and terminated the class status.[57] Similarly, class status could be granted at the trial level only to be overturned on appeal. In these situations the court's difficulty in determining the maintainability of the class aspect of the suit should be a sufficient indication that the class standing had a possibility of success. Therefore, it is submitted that in such cases, where an initial certification is followed by a termination of class status, the reasonableness of the class aspect of the claim should be found *per se*; the policy of litigative efficiency should be held to have been served. In all other cases, the district court judge, acting in his discretion, will have to determine if the

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[53] 414 U.S. at 554.

[54] *Cf.* 414 U.S. at 553-54; Goldstein v. Regal Crest, Inc., 62 F.R.D. 571, 579 (E.D. Pa. 1974).

[55] 414 U.S. at 553.

[56] *See id.* at 553-54.

[57] 526 F.2d at 1095. Goldstein v. Regal Crest, Inc., 62 F.R.D 571 (E.D. Pa. 1974), similarly presented a case where an initial certification of the class was reversed. In *Goldstein*, the court, relying on *American Pipe*, *id.* at 578-79, held that the statute was tolled at filing even though class status was denied because of a failure to meet the predominance requirements of FED. R. CIV. P. 23(b)(3). *Id.* at 580.

class was reasonably defined based on a thorough consideration of all factors.

The second condition for the tolling of the statute of limitations is that the tolling not interfere with the purposes of the statute.[58] An important consideration here is the specific requirement of Rule 23 which resulted in the termination of the plaintiffs' class status.[59] The policy of the statute of limitations requires that the defendant be given notice of the action being brought against him.[60] Such notice is clearly provided where the only failure of the class was to meet the numerosity requirement of Rule 23(a)(1), as in *American Pipe.*[61] Likewise, it appears that where class status is denied solely because of a failure to meet the section (a)(3) and (a)(4) representation requirements, as in *Haas*,[62] tolling should be applied. In such cases the identity of the real plaintiffs, the class members, is known to the defendant upon the commencement of the suit, as is the nature of the substantive claims. The defendant banks in *Haas* were well aware of the nature of the claims that were being made against them, and of the identity of the plaintiff cardholders, as soon as the suit was filed. Whether Haas or Mitchell or some other individual represented the class was irrelevant to the question of whether the defendant received fair notice of the pending action. Therefore, the notice being sufficient to satisfy the policy of the limitations period, the statute should be tolled.

An expansion of this tolling policy to cases where the class status was terminated for failure to meet the (a)(2) requirement of commonality, or the (b)(3) requirement that common questions predominate or that the class action be superior to other procedures, presents harder questions and must be dealt with by examining the individual complaints on a case-by-case basis. The same considerations of notice apply, but in these situations there exists a real possibility that a complaint may be so unclear as to either the substantive claim or the identity of injured class members that the defendant would not be provided with a picture of the essential nature of the action being brought against him. One post-*American Pipe* court did find the statute tolled after a termination for lack of predominance under (b)(3), but in so doing seemed heavily influenced by the closeness of the certification question in the case.[63] Cases of this type appear to be properly

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[58] *See* 414 U.S. at 554; 526 F.2d at 1097 n.19. *American Pipe* looks to the general policies of the statutes of limitations. Where a particular statute of limitations has a purpose that is unique, however, this purpose should also be analyzed. *See* Burnett v. New York Cent. R.R., 380 U.S. 424, 426-27 (1965).

[59] *See* Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 461 (E.D. Pa. 1968). The *Philadelphia Electric* court stated that tolling would not be proper where class status was denied because of unsatisfactory representation, but might be supported if the denial were based on reasons of "judicial housekeeping." *Id.*

[60] 414 U.S. at 554.

[61] *Id.* at 554-55.

[62] See text at note 7 *supra.*

[63] Goldstein v. Regal Crest, Inc., 62 F.R.D. 571, 579 (E.D. Pa. 1974).

a matter for the trial court's discretion.

Also relevant to the consideration of fair notice is the limitation in the holding of *American Pipe* which would appear to confine tolling to those absent members who chose to intervene rather than to bring a separate suit or, as in *Haas*, to proceed in the original suit as part of the amended class.[64] The propriety of such a rule seems to be dependent upon the question of proper notice to the defendant. Unless action other than intervention would present issues that were not raised by the original class filing, or otherwise seriously inconvenience or prejudice the defendant, there appears no reason why the statute should not toll for members using such different procedures.[65]

The third policy consideration underlying Rule 23 and the statute of limitations is that a plaintiff should not be allowed to "sleep on his rights."[66] It appears that the nature of class actions precludes this factor from being an important consideration in most class situations. The *American Pipe* Court emphasized the essential character of the class suit as a representative action the judgment in which is generally res judicata as to absent class members.[67] Because of this res judicata effect, absent class members should be considered as much a part of the suit as are the named parties,[68] and accordingly should not be regarded as "sleeping on their rights" while the action is pending. It is especially unfair to regard plaintiffs as having slept on their rights where a reasonable class is subsequently denied class status, absent any bad faith.

One further factor should be considered by the courts where a lack of clarity in the initial filing is sufficient to deprive the defendant of notice and therefore to preclude the imposition of the tolling doctrine.[69] In such situations, the courts might balance the interests of the parties by holding that the statute would be tolled only for those absent members who *relied* on the pending class suit. This approach was taken by many of the courts that decided the issue prior to the Supreme Court's decision in *American Pipe*.[70] The Court in *American Pipe* ruled out reliance as a distinguishing factor where the plaintiff's

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[64] 414 U.S. at 553.

[65] In *Haas* the appellees, quoting Wheeler, *Predismissal Notice and Statutes of Limitations in Federal Class Actions After American Pipe and Construction Co. v. Utah*, 48 S. CAL. L. REV. 771, 782-83 (1975), contended that the membership requirement stated in the holding of *American Pipe* precluded tolling where representation failed, since no class ever existed. *See* Supplemental Brief for Appellee Equibank N.A. at 2-4, Haas v. Pittsburgh Nat'l Bank, 526 F.2d 1083 (3d Cir. 1975). It is difficult to understand, however, why this rationale, once accepted, would not operate to preclude tolling in *all* class action situations, including that decided to the contrary in *American Pipe*.

[66] 414 U.S. at 554.

[67] *Id.* at 551-52.

[68] *Id.*

[69] See text accompanying notes 59-63 *supra*.

[70] *See, e.g.*, Abercrombie v. Lum's Inc., 345 F. Supp. 387, 394 n.13 (S.D. Fla. 1972); Ratner v. Chemical Bank N.Y. Trust Co., 54 F.R.D. 412, 414 n.4 (S.D.N.Y. 1972); Buford v. American Fin. Co., 333 F. Supp. 1243, 1252 (N.D. Ga. 1971).

class status was successfully certified.[71] It reasoned that since the class action is a truly representative suit, the benefits of the filing should accrue to all members, whether with or without knowledge of the action.[72] The same rationale, however, should not work in the contrary situation to frustrate the interests of the relying members where there exists no opportunity to protect the entire class.

Significantly, this solution would satisfy the policy of Rule 23 in preventing needless motions for intervention since anyone in a position to make such a motion could refuse to do so, claim reliance, and be protected if class status were subsequently denied.

In sum, it appears that the *Haas* court's broad interpretation of *American Pipe* was correct. The rationale underlying the decision in *American Pipe* dictates that the statute be tolled for absent members where class status fails because of representation defects, as well as commonality or manageability problems, provided the proposed class had a reasonable chance of certification. Where the satisfaction of the policies for tolling are less clear, a court may consider reliance by the intervenor in making its decision.[73]

II. ADEQUACY OF REPRESENTATION

The Third Circuit's decision in *Haas* concerning the propriety of Haas' representation on the commercial transaction issue was based upon its interpretation of Rule 23 of the Federal Rules of Civil Procedure.[74] Subsection (a) of Rule 23 sets out the prerequisites for the maintenance of any class action.[75] Subsection (b) describes the

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[71] 414 U.S. at 551-52.

[72] *Id.*

[73] It has been assumed in the previous discussion that the absent members asserting the tolling of the statute did so shortly after their class status was terminated. The same tolling question may be raised, however, where the absentees chose to appeal the unfavorable class determination rather than to intervene. There have been no cases since *American Pipe* directly deciding this matter, but in the recent case of *Jimenez v. Weinberger*, 523 F.2d 689 (7th Cir. 1975), the Seventh Circuit stated by way of dicta that it thought that the tolling would continue if the plaintiffs appealed the ruling. *Id.* at 696. An analogous situation arose in Burnett v. New York Cent. R.R., 380 U.S. 424 (1965), where the Supreme Court, holding that the filing of a FELA suit in a state court tolled the statute of limitations even though the action was subsequently dismissed for lack of venue, stated that the statute would remain tolled until a final judgment on appeal. *Id.* at 434-35. This approach seems to be correct, since a determination that tolling is warranted where the member intervenes implies that the defendant has received sufficient notice of the suit to satisfy the policies of the statute of limitations. A further delay in the final decision of the case would not significantly prejudice the defendants.

[74] 526 F.2d at 1088-89.

[75] FED. R. CIV. P. 23(a) provides:

(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.

three particular types of class suits that may be brought and provides conditions necessary for each.[76] Finally, subsections (c), (d), and (e) establish the procedures by which a class suit will be processed in the courts.[77]

The *Haas* court interpreted subsections (a)(3) and (a)(4), the representation requirements of Rule 23, as not precluding, as a matter of law, Haas' representation on the commercial transaction claim.[78] The court decided that the two claims in which Haas had an interest—the previous balance method claim and the compounding claim—were so closely related to the commercial transaction issue that the representation was justified.[79] The court based this finding on three factors: (1) all three claims arose under the same statutory provisions of the National Bank Act; (2) the underlying cardholder agreements were the same in each case; and (3) the damages to be recovered for each violation would be largely identical.[80] It appears, however, that the relationship which existed between the commercial rate claims and the other two issues was insignificant for the purpose of determining representation, and that Haas should have therefore been found an improper representative for the commercial class as a matter of law.

The nature of the relationship that must exist between the interests of the representative and the interests of the class can be discerned only by examining the language of the Rule, the policies upon which the rule is based, and the mandates of due process which apply to class actions. Turning first to an examination of the language of Rule 23, subsection (a)(1) requires that the representative be a member of the class.[81] In conjunction with subsection (a)(2), this requirement ensures that the representative possesses common questions of law or fact with the class since (a)(2) mandates such in all class

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[76] FED. R. CIV. P. 23(b). Subsection 23(b) provides that a class action is maintainable where the prerequisites of 23(a) are met and either (1) separate actions would create a risk of inconsistent adjudications or be dispositive of the rights of non-party class members, (2) the party opposing the class has acted in a way applicable to the whole class and injunctive or declaratory relief is appropriate, or (3) questions of law or fact common to the class predominate and a class action is superior to all other methods of adjudication. *Id.*

[77] FED. R. CIV. P. 23(c), (d), (e). Subsection 23(c) provides that the court shall determine the maintainability of the class action as soon as possible after its commencement, that notice shall be directed to all class members in a suit under subdivision (b)(3), that the judgment will bind all members who did not withdraw from the class, and that subclasses may be formed. Subsection (d) describes the circumstances under which a court may issue orders in a class suit, and what these orders may accomplish. Subsection (e) specifies the procedures for dismissing or settling class suits. *Id.*

[78] 526 F.2d at 1088-89. The representation question was therefore remanded to the district court for a decision by the trial judge acting within his discretion. *Id.* at 1089.

[79] *Id.*

[80] *Id.* Section 86 of the National Bank Act, 12 U.S.C. § 86 (1970), specifies that damages would be an amount equal to twice the full interest charge paid by the claimant.

[81] Bailey v. Patterson, 369 U.S. 31, 32-33 (1962). For text see note 75 *supra*.

actions.[82] Specific prerequisites for representation are defined in subsections (a)(3) and (a)(4) of the rule. Subsection 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class."[83] This provision had been the only requirement for representation prior to the 1966 amendments to the rule.[84] In the 1966 revision subsection 23(a)(3) was added, requiring that "[t]he claims or defenses of the representative parties are typical of the claims or defenses of the class . . . ."[85]

The specific language of subdivision 23(a) does, therefore, require some relationship of interest between the named and unnamed plaintiffs. In order that subsection (a)(3) be more than a repetition of the (a)(2) prerequisite,[86] "typical claims or defenses" must be construed to require a closer similarity of interests between the representative and the class than "common questions of law or fact" that (a)(2) mandates among members.[87] The precise extent to which this similarity must be achieved, however, is left uncertain by the Rule. Similarly, the "adequate protection" mandate of subsection (a)(4), while generally construed to require at least a competent, experienced counsel,[88] does not clearly delineate the interest relationship that must exist for proper representation.[89] The policy of the rule must be examined, therefore, to clarify the nature of this relationship.

Two of the principle policies supporting the Rule normally mitigate in favor of the certification of class suits. First, the Rule is intended to promote the "economy and efficiency of litigation" by the consolidation of claims involving the same causes of action.[90] The judicial system has a serious stake both in the production of consistent judgments in cases involving the same facts and in the elimination of duplicitous actions.[91] Where this policy is involved the courts should

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[82] *See* Vernon J. Rockler & Co. v. Graphic Enterp., 52 F.R.D. 335, 343 n.14 (D. Minn. 1971). For text see note 75 *supra*.

[83] FED. R. CIV.P. 23(a)(4). For text see note 75 *supra*.

[84] Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 94-95 (1966).

[85] *Id.* at 96. For text see note 75 *supra*.

[86] It is a general canon of statutory construction that a statute should not be given an interpretation that makes it redundant. Singer v. United States, 323 U.S. 338, 344 (1945).

[87] Vernon J. Rockler & Co. v. Graphic Enterp. 52 F.R.D. 335, 343 n.14 (D. Minn. 1971). *But see* 3B J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 23.06-2, at 23-325 (2d ed. 1975), to the effect that subsection 23(a)(3) does duplicate other provisions of Rule 23 and is therefore unnecessary.

[88] *See, e.g.*, Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); Joseph v. Norman's Health Club, Inc., 336 F. Supp. 307, 319 (E.D. Mo. 1971).

[89] For text see note 75 *supra*.

[90] *American Pipe*, 414 U.S. at 553.

[91] *See id.*; Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 560 (2d Cir. 1968), *vacated on other grounds*, 417 U.S. 156 (1974). This opinion was one of several which were issued in the *Eisen* case. Initially, the class action was held not maintainable at 41 F.R.D. 147 (S.D.N.Y. 1966). The Court of Appeals for the Second Circuit held that the denial was appealable at 370 F.2d 119, 121 (2d Cir. 1966) and certiorari was denied. 386 U.S.

construe the prerequisites to the Rule liberally.[92]

Similarly, Rule 23 is designed to allow the vindication of claims too small to warrant the expenses involved in an individual suit.[93] Parties with large claims have no need to resort to class actions since their expected damages will justify the costs of individual litigation. In many circumstances, however, the expense of a suit would outweigh the potential reward to the claimant. In such cases, where other parties are similarly situated, a class action may be brought to satisfy the claims. The Rule should also not be strictly construed to discourage this practical purpose of class litigation.[94]

The requirement of due process, however, mitigates against, and in some cases totally eclipses, these two policy considerations.[95] In the United States Supreme Court case of *Hansberry v. Lee,*[96] the Court rejected the binding effect of a class suit on absent members because the

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1035 (1967). The Second Circuit then reversed and remanded in the opinion cited here. 391 F.2d 555 (2d Cir 1968). On remand the district court determined that further information should be elicited, 50 F.R.D. 471 (S.D.N.Y. 1970), held that the action was maintainable, 52 F.R.D. 253 (S.D.N.Y. 1970), and required the defendants to bear 90 percent of the cost of notice, 54 F.R.D. 565 (S.D.N.Y. 1972). The Court of Appeals reversed the certification of the class action, 479 F.2d 1005 (2d Cir. 1973), and the United States Supreme Court vacated and remanded, holding that notice must be given and paid for by defendants. 417 U.S. 905 (1974).

[92] Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 560, 563 (2d Cir. 1968), *vacated on other grounds,* 417 U.S. 156 (1974); *see* Escott v. Barchris Constr. Corp., 340 F.2d 731, 733 (2d Cir. 1965).

[93] Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 560, 563 (2d Cir. 1968), *vacated on other grounds,* 417 U.S. 156 (1974); Escott v. Barchris Constr. Corp., 340 F.2d 731, 733 (2d Cir. 1965); *In re* Caesar's Palace Sec. Litigation, 360 F. Supp. 366, 397-98 (S.D.N.Y. 1973); Dolgow v. Anderson, 43 F.R.D. 472, 495 (E.D.N.Y. 1968). It should be noted that the National Bank Act has been held to be an act regulating commerce, Cupo v. Community Nat'l Bank & Trust Co., 438 F.2d 108, 109 (2d Cir. 1971), and therefore jurisdiction is based on 28 U.S.C. § 1337 and no $10,000 minimum amount is required.

[94] Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968), *vacated on other grounds,* 417 U.S. 156 (1974); *see* Escott v. Barchris Constr. Corp., 340 F.2d 731, 733 (2d Cir. 1965); *In re* Caesar's Palace Sec. Litigation, 360 F. Supp. 366, 397-98 (S.D.N.Y. 1973).

[95] Hansberry v. Lee, 311 U.S. 32, 41-42 (1940); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968), *vacated on other grounds,* 417 U.S. 156 (1974); C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1765, at 620 (1972). Subsection (c)(3) of Rule 23 provides that all members of a class in an action brought under 23(b)(1) or 23(b)(2) of the rule, as well as all members of a class under 23(b)(3) to whom notice was directed and who did not request exclusion, will be bound by a judgment in the action. FED. R. CIV. P. 23(c)(3).

[96] 311 U.S. 32 (1940). In *Hansberry,* the respondent brought suit to enforce an agreement restricting, on a racial basis, the sale of certain lands. *Id.* at 37. The petitioners claimed that the convenant was invalid in spite of an adjudication to the contrary in a class suit. *Id.* at 38. They contended that the prior determination should have no res judicata effect because, although they were included within the class described in the earlier suit, the representation for that class was inadequate and therefore an enforcement of the judgment on the absent class members would deprive them of their Fourteenth Amendment due process rights. *Id.* at 38. The Supreme Court of Illinois held for the plaintiffs, enforcing the prior judgment, Lee v. Hansberry, 372 Ill. 369, 24 N.E.2d 37 (1939), and the United States Supreme Court reversed. 311 U.S. at 46.

representation was inadequate.[97] The Court noted that representation would be proper only where "[t]he interests of those not joined are of the same class as the interests of those who are . . . ."[98] To bind absent members to a judgment where this standard is not met would be a violation of the due process rights of these members.[99]

In federal class actions, this due process imperative has become extremely important with the 1966 amendments to Rule 23. Prior to the changes, absent members in a "spurious" class suit[100] were considered bound by a judgment only if they had intervened in the suit.[101] The new rule, however, specified that members to whom notice was directed would be bound unless they affirmatively removed themselves from the action under the "opt-out" scheme.[102] In such circumstances, the court itself must provide for the protection of the interests of the absentees by assuring proper representation and a fair hearing of the members' claims.[103] To do otherwise would be an abuse of the class action procedure which exists in large part for the convenience of the judicial system and not the class members.[104]

In applying the representation requirements of Rule 23 and the due process clause, the courts have stated the representation test in a variety of ways.[105] It is accepted that the interests of the representatives and those of the class members must not be in conflict.[106] At least one court has indicated that the interests of the two groups must be identical,[107] but this standard is generally regarded as too strict.[108]

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[97] *Id.* at 42-44.

[98] *Id.* at 41.

[99] *See id.* at 41-42.

[100] The pre-1966 Rule provided three types of class suits based upon the jural relationship of the class members. 3B J. MOORE & J. LUCAS, *supra* note 87, ¶ 23.02-1, at 23-123. The "spurious" suit approximated the type action now available under subsection (b)(3). *Id.* at 23-124.

[101] Schatte v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators, 183 F.2d 685, 687 (9th Cir.), *cert. denied,* 340 U.S. 827 (1950); Oppenheimer v. F.J. Young & Co., 144 F.2d 387, 390 (2d Cir. 1944).

[102] FED. R. CIV. P. 23(c).

[103] *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968), *vacated on other grounds,* 417 U.S. 156 (1974).

[104] *See Hansberry,* 311 U.S. at 41; Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968), *vacated on other grounds,* 417 U.S. 156 (1974).

[105] *See* 7 C. WRIGHT & A. MILLER, *supra* note 95, §§ 1764-69.

[106] Schy v. Susquehanna Corp., 419 F.2d 1112, 1117 (7th Cir.), *cert. denied,* 400 U.S. 826 (1970); 7 C. WRIGHT & A. MILLER, *supra* note 95, § 1768, at 638.

[107] *See* Insley v. Joyce, 330 F. Supp. 1128, 1234-35 (N.D. Ill. 1971). Much of the confusion with the tests in this area has resulted from differing definitions of the term "coextensive." *Insley v. Joyce, supra* at 1234, used the term as a synonym for identical. Many other courts, however, have required coextensive interests between the representatives and class members, but have defined this requirement as merely an absence of conflict between the two groups, *In re* Caesar's Palace Sec. Litigation, 360 F. Supp. 366, 397 (S.D.N.Y. 1973), or as typicality. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968), *vacated on other grounds,* 417 U.S. 156 (1974); 3B. J. MOORE & J. LUCAS, *supra* note 87, ¶ 23.07[2], at 23-371.

[108] *See* 7 C. WRIGHT & A. MILLER, *supra* note 95, § 1769 at 612-13.

Most courts have specified that the standard requires that there be "a common basic element of fact or law" between the representative and the members,[109] or that the claims for relief be based on the same legal or remedial theory.[110] It is submitted that the common legal theory test and the requirements of due process mandate that the class members must have in common with at least one representative the basic legal or factual issue essential to their claim. If such is not the case, there exists no assurance, other than the vigor and competence of the counsel, that the rights of the absentees will be adequately protected. The proper presentation of an issue critical to a class member's claim is more certain where that issue is also a significant element in the claim of a representative. A representative with no personal stake in an issue would be inclined to turn his efforts away from the issue to a claim for which he may receive some reward.[111]

Contrary to the holding of the court in *Haas,* it does not appear that Haas or Mitchell possessed a sufficiently common nexus of facts and legal issues with the members who were involved in commercial transactions to satisfy the requirements of due process. The three factors relied on by the court in *Haas* to support its conclusion simply do not withstand close scrutiny. The main consideration relied on by the *Haas* court for its conclusion that the named plaintiffs' claims were related with the commercial transaction issue was that all three claims rested on the same statutory provision, section 85 of the National Bank Act.[112] This position, however, ignores the real issues upon which the action rested. It is true that all of the violations alleged were violations of section 85 of the National Bank Act; however, that provision merely adopted the state law governing local banking institutions and made it applicable to national banks.[113] Therefore, the disposition of the issues in the case depended not on a construction of section 85 but rather on the interpretation of the individual Pennsylvania statutes which the National Bank Act incorporated. Since each of the three claims in the case involved entirely different issues under Pennsylvania law,[114] they cannot properly be characterized as "closely related."

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[109] *In re* Caesar's Palace Sec. Litigation, 360 F. Supp. 366, 397 (S.D.N.Y. 1973). *See, e.g.,* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247-48 (3d Cir.), *cert. denied,* 421 U.S. 1011 (1975).

[110] *E.g.,* Gonzales v. Cassidy, 474 F.2d 67, 71 n.7 (5th Cir. 1973). *See also* 7 C. WRIGHT & A. MILLER, *supra* note 95, § 1769, at 655.

[111] Koos v. First Nat'l Bank, 496 F.2d 1162, 1164-65 (7th Cir. 1974).

[112] 526 F.2d at 1088.

[113] 12 U.S.C. § 85 (1970).

[114] On the commercial transaction claim the court had to interpret the Pennsylvania Banking Code, PA. STAT. ANN. tit. 7, § 309 (1967), and the Sales Act, PA. STAT. ANN. tit. 69, §§ 1101 *et seq.* (Supp. 1975), and decide which of the two statutes was intended to regulate the credit card transactions of banks. 526 F.2d at 1086-87. The previous balance claim turned on whether the Sales Act would be interpreted to allow that method of computation, *id.* at 1091-94, whereas the compounding issue depended on

Similarly, the other two bases for the court's finding of similarity between the issues, the identity of the cardholder agreements and of the potential damages, provide little to satisfy the due process demands created by class actions. The construction of the cardholder agreement was in dispute only on the compounding claim and only as to whether an authorization of compounding could be read from its language.[115] The agreement was of no relevance to the question of the proper interest rate in commercial transactions.[116] Therefore, it can hardly be said that Haas' possession of the agreement would affect the adequacy of her representation. This is also the case with the question of damages. The court asserted a similarity between the commercial claim and the claims of Haas and Mitchell because the measure of damages for all three was the same—twice the interest charge paid.[117] Again, however, the measure of damages was not in dispute in the commercial transaction issue.[118] Therefore, it cannot be relied on as a basis for finding the propriety of Haas' representation.

Due process requirements aside, the *Haas* court's decision on representation also pales in the face of the two policy considerations, enumerated above,[119] underlying Rule 23. The rejection of *Haas* as a representative would do little to hinder the "economy and efficiency" of the litigation since it is likely that the response by the class would merely be the addition of another named plaintiff. Nor would any superfluous protective motions for intervention be encouraged since the initial filing of the suit would have tolled the statute of limitations for all class members.[120] Therefore, Rule 23's policy of litigative economy would not be a factor and would not mitigate for the retention of Haas as the class representative. Similarly, the vindication of small claims would not be discouraged by requiring an additional representative since the major costs of the litigation would be present regardless of the addition.

In sum, the action by the *Haas* court in refusing to dismiss Haas as a representative on the claim for which she had no standing was contrary to the requirements of Rule 23. Haas did not have interests sufficiently similar to those of the absent class members who had participated in commercial transactions to adequately protect their rights. In light of its holding in a different portion of the opinion that the commencement of a class suit tolls the statute of limitations for the

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whether the defendants' cardholder agreements specified that interest would be compounded. *Id.* at 1094-95.

[115] *See* 526 F.2d at 1094-95.

[116] *See id.* at 1088-89.

[117] *Id.* at 1089. The damages were specified in § 86 of the National Bank Act, 12 U.S.C. § 86 (1970).

[118] *See id.* at 1088-89. The measure of damages was not in dispute on any of the claims raised. *See id.* at 1088-89, 1090-95.

[119] See text at notes 88-94 *supra.*

[120] *See* text at notes 26-73 *supra.*

entire class,[121] the court should have ordered that a new representative be named. This disposition would have ensured that the commercial claim would have proceeded with a representative who, since his interests would be much closer to those of the members of the class, would be more likely to assert their rights in an effective manner.[122]

CONCLUSION

The Third Circuit Court of Appeals in *Haas* made significant rulings on two class action issues. The court's broad interpretation of *American Pipe* is the more significant aspect of the case. As the first court of appeals analysis of that case, *Haas* should provide the impetus for further applications of the tolling doctrine in order to protect the interests of absent class members. It appears that the court's liberal interpretation of the representation prerequisites of Rule 23 was incorrect in light of the due process mandates underlying class suits. Since, however, the final decision on such representation questions always lies within the discretion of the trial court, the impact of the *Haas* ruling on this issue may merely be to change the grounds for a named plaintiff's dismissal.

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[121] 526 F.2d at 1097-98.

[122] La Mar v. H & B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973), which the *Haas* court distinguished, 526 F.2d at 1088, appears to present facts that more strongly warrant a finding of adequate representation than did those of *Haas*. In *La Mar*, representation was denied as a matter of law because the named plaintiff, although possessing a claim based on the same interests as the members, did not have standing against all the defendants. La Mar v. H & B Novelty & Loan Co., *supra* at 465. The identity of the defendant would seem to be unimportant in assuring the vigor of a representative's advocacy, however, so long as the claims of the members and the representative depended on a similar disposition of the legal issue. The *La Mar* court did find other bases for its decision to deny class status. *Id.* at 466-68.