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Comments

AMENDMENTS TO PLEADINGS AFTER THE STATUTE OF LIMITATIONS HAS RUN — A CHANGE IN MISSOURI

I. INTRODUCTION

On September 1, 1973, new rule 55.33(c) of the Missouri Rules of Civil Procedure became effective. The rule, which now governs the relation back of amended pleadings, provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.[1]

The adoption of the new rule, which duplicates the language of rule 15(c) of the Federal Rules of Civil Procedure, should result in significant changes in the circumstances under which pleadings amended after the applicable statute of limitations has run will be deemed to relate back to the date of the original pleading.

Before rule 55.33(c) was adopted, Missouri law on relation back of amendments was based upon a "cause of action" test. Under this test, amendments to the original pleading, made after the running of the statute, would be allowed if the amendments related to the same cause of action as asserted in the original pleading.[2] Amendments which were deemed to state a new and distinct cause of action would not relate back to the date of the original pleading and were thereby barred by the statute of limitations.[3] The inade-

1. Mo. R. CIV. P. 55.33(c).
2. Miller v. Werner, 431 S.W.2d 116 (Mo. 1968). The court indicated that "where an original petition is merely defective and is made good by amendment, after the running of the limitation period, the statute is held not to apply." *Id.* at 118.
3. *Id.*

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quacies of this theory became apparent when courts had to determine what constitutes a new cause of action. Various courts have utilized five basic tests when making that determination: (1) whether a judgment upon the claim set forth in either pleading would bar an independent action on the other; (2) whether the same evidence supports both the original and amended pleading; (3) whether the measure of damages is the same in each case; (4) whether the new allegation would deprive the other party of some substantive defense available under the earlier pleading; and (5) whether the same burden of proof would be required under the original and amended petitions.[4] The Missouri courts adopted the "evidence", "proof" and "damages" test to determine which amendments were barred by the statute of limitations.[5] Thus, the determination of whether an amendment would relate back to the date of the original pleading was based upon technical considerations, without regard to whether notice was actually communicated to the defendant of the factual situation upon which the cause of action was based.

In contrast to the "cause of action" test, the federal courts and other jurisdictions which have adopted the federal rule have used a different test. In *Jackson v. Airways Parking Co.*,[6] a federal district court spoke of the manner in which federal rule 15(c) is usually applied:

> Many decisions have held that if the amended complaint presented a new cause of action, it could not relate back to the date of the original pleading for statute of limitations purposes. . . .
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> . . . .
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> The point of rule 15(c) is that it is fair to have an amended complaint relate back if the initial complaint *put the defendant on notice* that a certain range of matters was in controversy and the amended complaint falls within that range. The "cause of action" doctrine is an unduly restrictive interpretation of rule 15(c). It does not do justice to the actual statutory language. Notice, not me-

4. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1497 (1971).

5. Laux v. Motor Carriers Council, 499 S.W.2d 805 (Mo. 1973); Miller v. Werner, 431 S.W.2d 116 (Mo. 1968); Coleman v. Ziegler, 248 S.W.2d 610 (Mo. 1952); Mitchell v. Health Culture Co., 349 Mo. 475, 162 S.W.2d 233 (1942); Arpe v. Mesker Bros. Iron Co., 323 Mo. 640, 19 S.W.2d 668 (1929). *But see* Miller v. Munzer, 251 S.W.2d 966 (St. L. Mo. App. 1952), where in a will contest action, an amendment introducing a new ground of contest did not state a new cause of action even though new evidence would be required to prove it, since a will contest is deemed to be only one cause of action.

6. 297 F. Supp. 1366 (N.D. Ga. 1969).

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chanical notions of cause of action for res judicata purposes is the key.[7]

The rationale espoused by courts applying the rule is that once the defendant has been notified of the facts upon which a claim is based, the defendant is able to prepare a defense to any claim which may arise from that factual situation.[8] In that respect the "notice" approach justified under the language of federal rule 15(c) is clearly more liberal in allowing amendments to pleadings than was the "cause of action" test formerly used in Missouri.

This comment will compare the treatment of typical factual situations under the notice and cause of action tests, concentrating on two main areas: the addition of factual material to pleadings and the addition of parties to the lawsuit after the statute of limitations has run. The general topic of additions of factual material will include such amendments as correction of defective pleadings, amplification of pleadings, changes in legal theories upon which relief is sought, and the addition of different claims to those set forth in the original petition. The second broad area, additions of parties, will cover such problems as the addition of parties plaintiff, addition of new defendants, notice requirements for the addition of corporate and noncorporate defendants, and the identity of interest requirement for the addition of new defendants.

II. TREATMENT OF SUPPLEMENTARY FACTUAL MATERIAL

A. *Amendments to Defective Pleadings*

The first type of situation to be considered arises where the original pleading failed to state sufficient facts to form a basis of

7. *Id.* at 1382 (emphasis added). *Accord*, Barthel v. Stamm, 145 F.2d 487 (5th Cir. 1944), *cert. denied*, 324 U.S. 878 (1945). *But see* Popovitch v. Kasperlik, 76 F. Supp. 233 (W.D. Pa. 1947), where the court based its decision on a "cause of action" test, but defined "cause of action" as the specified conduct of the defendant upon which the plaintiff tries to enforce his claim. *Id.* at 238.

8. Snoqualmie Tribe of Indians v. United States, 372 F.2d 951 (Ct. Cl. 1967). In *Snoqualmie* the court stated:

> [The rule] is based on the idea that a party who is notified of litigation concerning a given transaction or occurence is entitled to no more protection from statutes of limitations than one who is informed of the precise legal description of the rights sought to be enforced. . . . [T]hus notice is the test, and it is built into the rule's requirement that the amended pleading arise out of the same "conduct, transaction, or occurrence." In other words, the inquiry in a determination of whether a claim should relate back will focus on the notice given by the general fact situation set forth in the original pleading.

Id. at 960.

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recovery for damages. Neither the notice nor cause of action test would allow an amendment to sustain recovery where the statute of limitations had run at the time the original petition was filed.[9] For example, in *Jackson v. Ideal Publishing Corp.*, an action for invasion of privacy, plaintiff filed her original complaint on January 19, 1966, 10 days after the statute of limitations for such claims had run. In an attempt to save her action, the plaintiff tried to amend her original petition to include two more publications occuring in March and April of 1964, which were within the statutory period if the amendment were allowed. The court disallowed the amendments and dismissed the suit. The statute of limitations had run on the two latter publications by the date of the amendment, and the two latter publications, being separate and distinct, did not relate to the same transaction or occurence.

Where the original petition is timely and states sufficient facts to notify the defendant of the nature of the suit but fails to state sufficient facts for recovery, and the correcting amendment is filed after the statute would otherwise have run, the notice test courts and the cause of action test courts differ. The federal courts allow the amendment to correct the deficiency while the cause of action courts usually do not.[11] For example, in *United States v. Somers Construction Co.*,[12] the plaintiff brought an action in federal court under the Miller Act for work performed by it under contract, but failed to specify in the complaint what work had been done or what materials had been furnished. Both allegations were prerequisites to recovery under the Miller Act. After the limitation period had elapsed, the plaintiff attempted to correct the deficiencies by amending its complaint to specify what labor had been performed and what materials had been supplied. In allowing this amendment, the court observed that "the complaint gave the defendants fair warning that suit was being brought against them under the Miller Act, and the amendment does nothing more than particularize the general allegations set forth in the complaint."[13]

Likewise, the failure to allege particular negligent acts on the

9. McCandish v. Estate of Timberlake, 497 S.W.2d 191 (Mo. App., D.K.C. 1973).

10. 274 F. Supp. 318 (E.D. Pa. 1967). *See* Griggs v. Farmer, 430 F.2d 638 (4th Cir. 1970); Wiren v. Paramount Pictures, 206 F.2d 465 (D.C. Cir 1953), *cert. denied*, 346 U.S. 938 (1954); Stafford v. Roadway Transit Co., 165 F.2d 920 (3rd Cir. 1948). *But see* Gretkowski v. Coppola, 26 Conn. Sup. 294, 222 A.2d 41 (1966); *In re* Miller's Estate, 229 Ore. 618, 368 P.2d 327 (1962).

11. Otto v. Kansas City Star Co., 368 S.W.2d 494 (Mo. 1963).

12. 184 F. Supp. 563 (D. Del. 1960).

13. *Id.* at 567.

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part of the defendant was not fatal in *United States v. Johnson.*[14] The plaintiff brought an action under the Federal Tort Claims Act for negligence on the part of the United States Air Force, but failed to allege the occurence of any specific crash or instances of illegally low flying or that the United States was negligent with respect to any crash of its planes. After the statute had run the plaintiff was allowed to amend her complaint to describe seven crashes of aircraft on routine missions from Foster Air Force Base.[15]

The federal courts have also allowed amendments to defective complaints even though the statute under which relief is sought has been repealed. In *Junso Fujii v. Dulles*,[16] where the plaintiff sought to be declared a citizen of the United States, the original complaint failed to allege that the plaintiff had been denied registration as a citizen of the United States. The plaintiff's amended petition supplied that missing allegation, but it was filed after the statute of limitations had run. The court nevertheless allowed the amendment, even though the statute under which Fujii was proceeding had in the interim been repealed.[17]

However, one state court, applying a relation back rule similar to federal rule 15(c), adopted the position that a defective pleading which fails to state a cause of action does *not* toll the running of the statute of limitations.[18] Consequently, an amendment correcting the deficiency after the statutory period had passed would not save the action.

The essence of the approach of notice courts when dealing with amendments or supplements of deficient pleadings is that "an amended pleading relates back to the original pleading if a 'claim for relief' was made or attempted within the statutory period."[19] That test is broad enough to apply equally to second amendments which amend or add to facts alleged as a basis of recovery raised for the first time in the first amendment to the original petition, so long

14. 288 F.2d 40 (5th Cir. 1961).

15. *Id.* at 41; *accord*, Eberts Cadillac Co. v. Miller, 10 Mich. App. 270, 159 N.W.2d 217 (1968).

16. 224 F.2d 906 (9th Cir. 1955).

17. *Id.*

18. Lund v. Trojanski, 29 Conn. Sup. 69, 271 A.2d 123 (1970). The court in *Lund* considered the original complaint a nullity, since it failed to state a claim either at common law or under the Connecticut dogbite statute, and was, therefore, insufficient to toll the statute of limitations.

19. Brito v. Carpenter, 81 N.M. 716, 472 P.2d 979, 981 (1970). *See* Wirtz v. Atkins, 247 F. Supp. 503 (E.D. Va. 1965); United States v. Somers Constr. Co., 184 F. Supp. 563 (D. Del. 1960); Field v. United States, 158 F. Supp. 580 (Ct. Cl.), *cert. denied*, 357 U.S. 926 (1958).

as the first amended petition had been filed before the statute of limitations had run against recovery upon that transaction. Thus, in *Hoffman v. A. B. Chance Co.*,[20] the plaintiff's original complaint did not contain any claim of strict liability based on the alleged defectiveness of a truck and aerial platform. Within the limitations period the plaintiff amended his complaint to include such a claim. The court allowed a second amendment adding related facts because the defendant received notice of the strict liability claim within the statutory period.[21]

B. *Amplification of the Original Pleading*

The second typical pattern whereby supplementary factual material is sought to be added to pleadings occurs when an amendment would only "amplify" the original cause of action, rather than correct deficient pleadings. In such situations it is assumed that the original complaint did state a cause of action. Under both the old Missouri rule and the notice test, merely changing the date designated in the pleadings on which a specified event or events was alleged to have occurred will not keep an amendment from relating back to the date of the original pleading. Thus, amendments changing the dates upon which various occurrences supposedly took place,[22] such as an alleged preferential transfer,[23] the performance of certain personal services[24] or a layoff from work,[25] have been allowed by both notice and cause of action courts, even though the statute had run since the original pleadings were filed.

Federal courts will also typically allow the specified residence of the plaintiff to be changed to establish diversity of citizenship for federal jurisdictional purposes. In *O'Shatz v. Bailey*,[26] the original complaint alleged that plaintiff was a New York citizen residing in

20. 346 F. Supp. 991 (M.D. Pa. 1972).

21. *See* Halberstadt v. Harris Trust & Sav. Bank, 7 Ill. App. 3d 991, 289 N.E.2d 90 (1972), *aff'd*, 55 Ill.2d 121, 302 N.E.2d 64 (1973) (amendment asserting second count after statute had run held effective against two defendants who had been added by amendment before statute had run).

22. *See* Kimbro v. U.S. Rubber Co., 22 F.R.D. 309 (D. Conn. 1958), in which the plaintiff amended his complaint to allege defendant's negligence continuing to the date of an automobile accident through his representations that a tire was blowout-proof. *Accord*, Bregar v. Suggett, 7 Ill. App. 3d 325, 287 N.E.2d 162 (1972), in which the plaintiff was allowed to amend his petition to change the date on which a false arrest and malicious prosecution allegedly took place.

23. *In re* Ostrer, 216 F. Supp. 133 (E.D.N.Y. 1963).

24. Weston v. Acme Tool, Inc., 449 P.2d 887 (Okla. 1969).

25. Wilson v. Ex-Cell-O Corp., 12 Mich. App. 637, 163 N.W.2d 492 (1968).

26. 220 F. Supp. 444 (D. Md. 1963).

Washington, D.C.; the amended complaint changed the plaintiff's specified citizenship to Washington, D.C. The court approved the amendment, filed for the purpose of creating diversity of citizenship. Plaintiffs in *International Ladies' Garment Workers Union v. Donnelly Garment Co.*,[27] similarly attempted to establish diversity of citizenship by amending their original complaint. In allowing the amendment the court stated that "such an amendment . . . would be permissible even after judgment if the amendment did not result in eliminating indispensable parties defendant."[28]

Amendments changing the alleged residence of a party are accorded the same liberal treatment where the *defendant* wishes to establish diversity of citizenship in order to remove the case from the state court to a federal court. In *Handy v. Uniroyal, Inc.*[29] the defendant had failed in its removal petition to allege the principal place of business of either party, as it was required to do for the federal court to obtain diversity jurisdiction. The defendant's amended petition which added that missing element was granted and held to relate back to the time of filing of the original petition for removal.

Similarly, the addition of an acknowledgement missing in the original petition is allowed. In *Tehansky v. Wilson*[30] the plaintiff failed to include an acknowledgement of the pleading in proper person and the court allowed an amendment to correct this deficiency.

In both notice and cause of action jurisdictions an amendment in which the plaintiff asks for a greater *amount* of compensatory damages will relate back to the date of the original complaint.[31] Where the same negligent act or other occurrence is relied upon as a basis of recovery, the plaintiff may also amend the complaint to change the theory of damages in addition to increasing the amount of damages. For instance, in *Denver & Rio Grande Western R.R. v. Clint*,[32] the plaintiff initially brought a wrongful death action under a Colorado statute which authorized the recovery of only penal damages against a railroad for the negligence of its employees, up to a

27. 121 F.2d 561 (8th Cir. 1941).
28. *Id.* at 563 (dictum).
29. 298 F. Supp. 301 (D. Del. 1969); *accord*, Meyers-Arnold Co. v. Maryland Cas. Co., 248 F. Supp. 140 (D.S.C. 1965).
30. 83 Nev. 263, 428 P.2d 375 (1967).
31. William T. Burton, Inc. v. Reed Roller Bit Co., 214 F. Supp. 84 (W.D. La. 1963); Kansas v. Hartford Acc. & Indem. Co., 426 S.W.2d 720 (K.C. Mo. App. 1968).
32. 235 F.2d 445 (10th Cir. 1956).

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maximum of ten thousand dollars. After the two-year limitation period had run, the plaintiff amended her complaint to assert a claim under another statute which allowed recovery of compensatory damages for wrongful death. Since the amendment dealt with the same transaction as the original complaint, it was deemed to relate back to the filing of that original complaint so as not to be barred.

Where the purpose of an amendment is to change the *measure* of damages from that claimed in the initial petition, however, state courts which are bound by the cause of action test are much less likely to permit the amendment to relate back if the statute has run since the original claim was filed. Missouri courts applying the old test[33] held a change in the measure of damages sought to be a change in the cause of action.[34] The plaintiff's original complaint in *Mitchell v. Health Culture Co.*,[35] was based upon the nonpayment of a promissory note. The measure of damages for that claim would have been the face value of the note plus interest. The plaintiff sought to amend his original complaint to seek a recovery solely on the basis of an alleged wrongful diversion of corporate income, for which the measure of damages might not have equalled the amount recoverable under the original count. Therefore, the amendment was rejected because it stated a different cause of action and was filed after the statute of limitations had run.

Courts in notice jurisdictions do not appear so restrictive in the face of such amendments. Federal courts will permit a plaintiff to amend his complaint to add claims for puntitive damages in addition to the compensatory damages originally sought. In *Scalise v. Beech Aircraft Corp.*,[36] the plaintiff first sued for compensatory damages for the death of her husband in an aviation mishap. The action was based upon breach of warranty, defect in construction or design of the aircraft, and failure to issue adequate instruction for the use of the aircraft. After the statute of limitations had run, the plaintiff was allowed to amend her original complaint to add an allegation of willful and wanton misconduct by the defendants to increase her demand to include $500,000 for punitive damages in addition to the compensatory damages initially prayed for. The court looked only to whether the claim asserted in the amendment

33. *See* notes 4-5 and accompanying text *supra*.
34. Mitchell v. Health Culture Co., 349 Mo. 475, 162 S.W.2d 233 (1942).
35. *Id.*
36. 47 F.R.D. 148 (D. Del. 1969).

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arose out of the same conduct, transaction, or occurrence as set forth in the original complaint.[37]

A final situation in which federal courts treat amendments as merely "amplifying" the original cause of action is where the amendment states more facts which give greater specificity to the action charged. For example, in *Davis v. Yellow Cab Co.*,[38] the plaintiff alleged in her original complaint that the cabdriver was negligent in remaining seated in the driver's seat without exercising any effort to assist the plaintiff and her companions in retiring from defendant's cab or to help her in reentering it.[39] In the amended complaint, which was held only to make the allegation more specific, the plaintiff alleged that "while defendant's taxicab arrived at the intersection of 12th and Market Streets, the driver carelessly and negligently permitted the cab to move forward with plaintiff's foot partially in the door," and charged the driver with negligence in failing to operate the cab in a safe manner, in breaching the standard of care owed to the public, and in permitting the cab to move forward while its doors were open. Again, since the additional facts were still part of the same occurrence as described in the original pleading, the amendment related back.[40]

C. *Change in Legal Theories*

The third common category of amendments to pleadings involves attempts by plaintiffs to change the legal theory upon which they wish to base a recovery. Under the prior Missouri law a change in the legal theory would represent a change in the cause of action because different evidence would be needed to prove the new theory

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37. *Id.* at 152; *see* Cavanagh v. Trans World Airlines, Inc., 183 F. Supp. 370 (W.D. Pa. 1960), where the court stated:

> It is undoubtedly true that Pennsylvania authority [which follows a cause of action test] treats an allegation of willful and wanton misconduct as creating a new basis of action distinct and apart from an allegation of negligence . . . . The liberality of the Federal Rules, however, invokes the notice pleading concept which would entitle the plaintiff to all damages flowing from the occurrence out of which the action arose . . . .

Id. at 371; *cf.* Cohen v. Garland, 119 Ga. App. 333, 167 S.E.2d 599 (1969); Krieger v. Village of Carpentersville, 8 Ill. App. 3d 243, 289 N.E.2d 481 (1972).

38. 35 F.R.D. 159 (E.D. Pa. 1964).

39. *Id.* at 160.

40. *Id. See also* Blair v. Durham, 134 F.2d 729 (6th Cir. 1943); Williams v. Shipping Corp. of India, 354 F. Supp. 626 (S.D. Ga. 1973) (petition amended to further describe manner in which injuries occurred); Carroll v. Sterling Hotel Co., 16 F.R.D. 99 (M.D. Pa. 1954); LaBar v. Cooper, 376 Mich. 401, 137 N.W.2d 136 (1965). *Cf.* Ford v. American Brake Shoe Co., 252 S.W.2d 649 (St. L. Mo. App. 1952) (illustrating prior Missouri law).

of recovery.[41] Therefore, an amendment would not relate back to the original petition if it were an attempt to change the legal theory upon which recovery was based.[42] The notice courts will, on the other hand, allow an amendment to relate back where the amendment changes the legal theory for recovery, so long as the new theory is still based on the same transaction.[43] Thus, in *Bradbury v. Dennis*,[44] the plaintiff was allowed to amend his complaint, after the statute of limitations had run, in order to base recovery upon a money had and received theory instead of the statutory remedy for recovery of usurious interest relied upon in the original complaint.

The notice courts also allow a plaintiff to add a different theory of recovery to his original complaint if it is against the same defendant.[45] In *Clary v. Nivens*,[46] the plaintiff instituted an action seeking damages for false arrest. After the statute of limitations had run the plaintiff was allowed to add the theory of malicious prosecution, since the same general occurrence underlay both theories. The general approach of notice courts to the addition of theories by amendment is exemplified in *Zagurski v. American Tobacco Co.*,[47] in which the court stated:

> The defendant has had notice from the beginning that the plaintiff is trying to enforce a claim for damages sustained from smoking the cigarettes it manufactured and marketed. It is not unreasonable to require it to anticipate all theories of recovery and prepare its defense accordingly.[48]

D. *Addition of Different Claims*

Closely associated with the addition of another legal theory is the addition of different claims which are related to the original

41. McDaniel v. Lovelace, 439 S.W.2d 906 (Mo.1969).
42. Miller v. Werner, 431 S.W.2d 116 (Mo. 1968). *Accord*, Swartz v. Bly, 183 N.W.2d 733 (Ia. 1971).
43. *See* Bradbury v. Dennis, 368 F.2d 905 (10th Cir. 1966); Wall v. Chesapeake & O. Ry., 339 F.2d 435 (4th Cir. 1964); C. Corkin & Sons, Inc. v. Tide Water Ass'd Oil Co., 20 F.R.D. 402 (D. Mass. 1957); Tri-Part Mfg. Co. v. Michigan Consol. Gas Co., 1 Mich. App. 684, 137 N.W.2d 739 (1965).
44. 368 F.2d 905 (10th Cir. 1966).
45. *See* Hood v. P. Ballantine & Sons, 38 F.R.D. 502 (S.D.N.Y. 1965); Flaherty v. United Eng'rs & Constructors, Inc., 213 F. Supp. 835 (E.D. Pa. 1961); Gabaree v. Jay Ship Maintenance Corp., 166 F. Supp. 625 (E.D. Pa. 1958); Sikes Co. v. Swift & Co., 10 F.R.D. 68 (W.D.N.Y. 1949); Kohler v. Ford Motor Co., 187 Neb. 428, 191 N.W.2d 601 (1971); Briggs v. Merrell, 27 Conn. Sup. 60, 229 A.2d 550 (1966).
46. 12 N.C. App. 690, 184 S.E.2d 374 (1971).
47. 44 F.R.D. 440 (D. Conn. 1967).
48. *Id.* at 443.

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claim. On this point there has been a split of authority in the notice courts but the differences of treatment seem largely dependent upon the facts in each case. In one case, *Green v. Wolf Corp.*,[49] the initial claim was based on an alleged violation of the Securities Exchange Act; after the statute of limitations had run, the court allowed an amendment which alleged that the corporation paid its shareholders a cash distribution which inflated the price of the stock and operated as a fraud on the subsequent purchasers. However, in *Artman v. International Harvester*,[50] the court denied an amendment which sought to add a claim for violation of the Sherman Act to the original complaint based on a breach of contract. The court found that the original complaint dealt with the issue of a bad faith breach of contract by the defendant in terminating the plaintiff as a dealer of its products and only brought into issue the dealings between the parties. The proposed amendment, alleging a Sherman Act violation, put in issue the dealings and marketing practices of the defendant and other dealers of its products. Since the two claims dealt with different factual situations, the court held that granting the amendment would prejudice the defendant in its ability to defend against the action.[51]

III. Treatment of Additions of Parties[52]

The second general area of concern with rule 55.33(c),[53] after its effect on supplementary factual material, is with the relation back of amendments to pleadings which attempt to add or change parties to the lawsuit.[54] Two obvious categories of factual situations arise

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49. 50 F.R.D. 220 (S.D.N.Y. 1970).
50. 355 F. Supp. 476 (W.D. Pa. 1972).
51. *Compare* Coleman v. Ziegler, 248 S.W.2d 610 (Mo. 1952).
52. *See generally* Annot., 11 A.L.R. Fed. 269(1972).
53. *See* rule quoted at pt. I of this comment.
54. In 1966, Fed. R. Civ. P. 15(c) was amended by the addition of the concluding sentence, which states the rule to be applied when parties to a lawsuit are sought to be changed.

> Rule 15(c) is amplified to state more clearly when an amendment of a pleading changing the party against whom a claim is asserted shall "relate back" to the date of the original pleading.
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> . . . .
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> In actions between private parties, the problem of relation back of amendments changing defendants has generally been better handled by the courts, but incorrect criteria have sometimes been applied, leading sporadically to doubtful results. . . . Rule 15(c) has been amplified to provide a general solution.

Fed. R. Civ. P. 15(c), Committee Comments to 1966 Amendments. As the court in Traveler's Indem. Co. v. United States, 382 F.2d 103, 106 (10th Cir. 1967), stated: "The 1966

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under this topic. Amendments of this type must add either parties plaintiff or defendant. The remainder of this comment will discuss the more common factual variations on the theme, and their probable treatment under the new notice rule.

A. *Additions of Parties Plaintiff*

The addition by amendment of plaintiffs in the notice courts does not present a major problem since the defendant has already received notice of the factual situation upon which relief is sought. Consequently, in cases where the plaintiff wishes to bring a second cause of action, but in a different representative capacity, the amendment to the original complaint has typically been allowed in the federal courts. The rationale given is that the defendant already knows the facts upon which the plaintiff's suit is brought. *Snoqualmie Tribe of Indians v. United States*[55] offers an example of such an amendment. Because the plaintiff Snoqualmie Tribe had merged through intermarriage with the Skykomish Tribe, the plaintiff was permitted to amend its pleadings to include the other tribe's claim for compensation for territory ceded to the United States in the 1800's.

Amendments adding new plaintiffs on the same claim have been allowed in situations where the defendant had notice that those plaintiffs could bring actions of their own. Thus, where necessary to save his own action, one partner may make his other partners parties plaintiff through the use of an amendment after the statute of limitations has run. In *De Franco v. United States*,[56] a partner suing for a refund of taxes paid by the partnership was allowed to bring in the other partners as parties plaintiff, since they were essential to the action and the government had full notice that the suit was for the recovery of taxes paid by the partnership.

The joinder of a personal representative when required for recovery under a statute is also permissible. A widow, in *Holmes v. Pennsylvania New York Central Transportation Co.*,[57] was allowed to amend her petition to add the personal representative of the decedent, whose joinder was necessary for recovery under the Indiana wrongful death statute. Conversely, where the statute used for

amendment simply clarifies, by explicitly stating the permissive procedure and its appropriate safeguards which have existed under Rule 15(c) since its promulgation."

55. 372 F.2d 951 (Ct. Cl. 1967).

56. 18 F.R.D. 156 (S.D. Cal. 1955).

57. 48 F.R.D. 449 (N.D. Ind. 1969).

the basis of a suit calls for a "person aggrieved" to bring suit, an executor of an estate may amend his petition to substitute the legatee as a party plaintiff. This was done in *National Bank v. District of Columbia*,[58] in which the executor bank instituted suit to contest the valuation of shares of stock for inheritance tax purposes. When the executor appealed the decision of the tax court it lacked standing under the statute to challenge the assessment. But inasmuch as the executor had acted from the beginning for the legatee's benefit, the court held that she could be substituted as party plaintiff for review of the assessment. The court did not find direct guidance in its existing rule for substitution, but held the substitution to relate back to the original date of filing because of the "power of equity to grant relief against injustice caused by the rigidity of procedure . . . ."[59]

The allowance of amendments substituting plaintiffs also applies to situations in which the statute has run against certain types of parties but not against others. In *Crowder v. Gordons Transports, Inc.*,[60] a widow brought a wrongful death action in her capacity as the administratrix of her husband's estate. It was later determined that the statute of limitations had run on an action by the administratrix, but not on a suit by the children of the deceased. Therefore, the widow sought to amend her petition to substitute herself as mother and next friend of the two children of the deceased. The court granted the amendment and held it to relate back to the date of filing the original complaint, even though when the amendment was filed the statute of limitations had also run for wrongful death actions brought by the children of the deceased. The amendment related back because the original complaint had advised the defendant that the relief sought by the widow was for the benefit of the two children of the deceased; the defendant was not prejudiced by the failure to name the mother as next friend rather than as administratrix.[61]

Similarly, an insurance company which has been subrogated to the claim of an insured may be added as a plaintiff in a suit to recover for the partial loss of property. The court of appeals, in *Kansas Electric Power Co. v. Janis*,[62] upheld the allowance of an

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58. 226 F.2d 763 (D.C.1955).

59. *Id.* at 764; *see* American Fidelity & Cas. Co. v. All American Bus Lines, Inc., 190 F.2d 234 (10th Cir.), *cert. denied*, 342 U.S. 851 (1951).

60. 387 F.2d 413 (8th Cir. 1967).

61. *Id.* at 419.

62. 194 F.2d 942 (10th Cir. 1952).

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amendment adding two insurance companies as parties plaintiff after the statute of limitations had run, where the companies were real parties in interest, having been subrogated to the insureds who instituted the action. The court reasoned that the defendant was not prejudiced, because the cause of action and the relief demanded remained the same.[63] Logically, many amendments of this type would be accepted in both notice and cause of action jurisdictions, where the only defect is that the wrong party brought the action and the defendant is aware of the existence of the real party in interest.[64]

B. *Addition of Parties Defendant*

The last major factual pattern arising under the rule involves the addition or substitution of defendants. In order for an amendment adding new defendants to be allowed, there must be such identity of interest between the old defendants and the new defendant that the new defendant had notice of the suit and should have known that except for a mistake he would have been the original defendant.[65]

1. Requisite Identity of Interest and Notice in Corporate Relationships

One common situation in which the requisite identity of interest has been found is where a parent-subsidiary corporate relationship exists between the old and the new defendants. In *Travelers Indemnity Co. v. United States*,[66] the plaintiff materialman filed a suit to recover under a payment bond. An amendment was allowed which changed the defendant from the Travelers Insurance Company to the Travelers Indemnity Company, a wholly owned subsidiary. The requisite identity of interest was found by the court from the fact that both companies did business in Colorado, shared the

63. *Id.* at 944. There is some authority for the proposition that the notice theory would allow a new plaintiff with a different claim to be substituted for the original plaintiff. *See* Williams v. United States, 405 F.2d 234 (5th Cir. 1968). *But see* Higgins, Inc. v. Kiekhaeffer Corp. 246 F. Supp. 610 (E.D. Wis. 1965).

64. *See* Link Aviation, Inc. v. Downs, 325 F.2d 613 (D.C. Cir. 1963); American Fidelity & Cas. Co. v. All American Bus Lines, Inc., 190 F.2d 234 (10th Cir.), *cert. denied*, 342 U.S. 851 (1951). In *Downs*, the court allowed substitution of the insurance company after the statute had run on the theory that the insureds had brought the suit as nominal plaintiffs for the use of the insurer with subrogation rights. The *American Fidelity* case also allowed subtitution of the excess insurer which was subrogated to the insured plaintiff's rights against the primary insurer.

65. Mo. R. Civ. P. 55.13(c); Fed. R. Civ. P. 15(c).

66. 382 F.2d 103 (10th Cir. 1967).

same home office address and board of directors, and supplemented each other's activities. The facts established that "the [Indemnity Company] was the entity intended to be before the court and that the [Indemnity Company] was sufficiently apprised of the pendency of the action and given adequate notice."[67]

Service of process upon the parent corporation and the manager of the subsidiary corporation has satisfied the identity of interst requirements of the rule needed to have the subsidiary substituted as the sole corporate defendant. In *Wirtz v. Mercantile Stores, Inc.*,[68] the court found the subsidiary store, Muskogee Jones, to have received notice of the claim of the plaintiff, because its manager had been served with a copy of the complaint naming its parent as the defendant.[69]

The second common instance of sufficient identity of interest at the corporate level has been that between a named corporate defendant and its successor organization. It has frequently been held that a successor corporation should have known that a mistake had been made by the plaintiff if the plaintiff's complaint had been served upon it. Where the successor is the only corporation registered under the name set out in the complaints, the plaintiff should be granted leave to amend his pleadings to substitute the successor corporation as defendant. *Wentz v. Alberto-Culver Co.*[70] is illustrative. The plaintiff's initial pleading named the Alberto-Culver Company, an Illinois corporation, as defendant. However, the Illinois corporation had been dissolved in 1961 and its assets acquired by the Alberto-Culver Company, a Delaware corporation. The court allowed substitution of the latter corporation, since the words designating the state of incorporation were not a part of either name, at

67. *Id.* at 106.

68. 274 F. Supp. 1000 (E.D. Okla. 1967). *Accord,* Montalvo v. Tower Life Bldg., 426 F.2d 1135 (5th Cir. 1970).

69. *But see* Jacobs v. McCloskey & Co., 40 F.R.D. 486 (E.D. Pa. 1966), where substitution of a wholly owned subsidiary for the named corporate defendant was not allowed after the lapse of the limitation period. The original complaint was served on the parent corporation, whose attorneys answered admitting the allegation that it owned a building involved in the litigation; in fact, the subsidiary owned the building, and the parent was allowed to amend its answer to deny ownership. In refusing plaintiff's attempt to substitute the subsidiary as defendant, the court relied on its characterization of the corporate subsidiary as a "distinct and separate entity" as reason not to bring it into the action after the statute had run. The court gave no indication that it had considered whether the subsidiary had in fact received notice of the claim and should have known that, but for mistake, it would have been included. *Id.* at 489.

70. 294 F. Supp. 1327 (D. Mont. 1969). *Accord,* Shapiro v. Paramount Film Distrib. Corp., 274 F.2d 743 (3rd Cir. 1960).

the time the suit was filed only the Delaware corporation had the name "Alberto-Culver Company," and the corporation had acknowledged receipt of the original summons by signing that name.

An amendment which names the successor organization as the new defendant will be allowed where it is the surviving corporation after a corporate consolidation or reorganization. In *Callahan v. American Sugar Refining Co.*,[71] the plaintiff brought suit against the American Sugar Refining Company, a New Jersey corporation which owned the premises on which plaintiff's husband was injured. Before suit was filed, that company had been acquired by Domino Sugar Company, a Delaware corporation. Domino, in turn, had changed its name to American Sugar Company, but remained a Delaware corporation. In this instance the court allowed the amendment substituting American Sugar of Delaware as defendant and held it related back to the original complaint, because the interest of the Delaware corporation were identical to those of the first named defendant, the same events were involved, and it had had full notice of the case and must have realized it would have been named as defendant if plaintiff had been aware of the merger.[72]

The third area where a prospective corporate defendant has been held to have a sufficient identity of interest to be added by amendment after the running of the statute is in the brother-sister corporate situation. In *Marino v. Gotham Chalkboard Manufacturing Corp.*,[73] the plaintiff moved to amend the pleadings to substitute Gotham Chalkboard & Trim Co., Inc., as the sole defendant, in place of the original defendant, Gotham Chalkboard Manufacturing Corporation. Both concerns were small New York corporations with identical organizers, officers, and directors. Because of that "identity of management and location," the court held that notice by service of process on one corporation was equivalent to notice to the other. The substituted party also should have known that but for plaintiff's mistake it would have been named the original defendant, because of the familiar facts and occurrences alleged in the complaint and its knowledge that the other corporation had never been active.[74]

71. 47 F.R.D. 359 (E.D.N.Y. 1969).

72. *Id.* at 361.

73. 259 F. Supp. 953 (S.D.N.Y. 1966). *See* Bernstein v. Uris Bldgs. Corp., 50 F.R.D. 121 (S.D.N.Y. 1970).

74. 259 F. Supp. at 954. Both notice and knowledge of mistake must be at least constructively present, however; the bare existence of a brother-sister relationship may not be enough. *See* Martz v. Millers Bros. Co., 244 F. Supp. 246 (D. Del. 1965), where despite the

2. Identity of Interest and Notice for Noncorporate Defendants

The same kinds of considerations are present when an attempt is made to add or substitute a noncorporate entity as defendant in pending litigation. If the prospective defendant is not to be prejudiced by his late joinder, he must have had notice of the action and such an identity of interest with the original defendant that he knew that he would have been made a party had the plaintiff not been mistaken about his identity.

Where suit is brought against an unincorporated business identified in the pleadings by its trade name, it is typical of courts to deem the sole proprietor of that business to have both the requisite notice of suit and identity of interest so not to be prejudiced by his addition as an individual defendant. In *Wynne v. United States ex. rel. Mid-States Waterproofing Co.*,[75] the plaintiff subcontractor, in a contract action against the primary contractor pursuant to the Miller Act, described the original defendant as "the Bering Company." After the statute of limitations had run the subcontractor was allowed to amend his complaint to show that J. C. Wynne, "a sole proprietorship, d/b/a The Bering Company Tank Division," was the proper sole defendant.

An insured party under an automobile liability policy has been held to have sufficient notice of a suit against his insurance company, on a claim arising from an accident involving the insured, to allow the plaintiff to substitute the insured as defendant in the suit. In *Angel v. Ray*,[76] the court seemed to rely principally upon the insurance company's obligation to defend its insured and protect his interests, in holding that the insured and insurance company had the requisite "identity of interests" to satisfy Federal Rule 15(c).

Where plaintiffs have attempted to amend their pleadings to add third party defendants to their own complaint as original party defendants, the early tendency of courts was to deny relation back treatment of the amendment if the statute of limitations had run on the cause of action. In *Horan v. Pope & Talbot, Inc.*,[77] the plaintiff sued Pope & Talbot, Inc., for injuries that he had sustained while working on that defendant's vessel. Pope & Talbot, Inc., in

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sharing of a majority of the officers and stockholders, an attempted substitution after the statute had run was disallowed. The court held that service upon the named corporation's secretary, who was neither an officer nor shareholder of the corporation sought to be substituted, was not sufficient to hold the latter corporation to notice of suit.

75. 382 F.2d 699 (10th Cir. 1967).

76. 285 F. Supp. 64 (E.D. Wis. 1968).

77. 119 F. Supp. 711 (E.D. Pa. 1953).

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turn brought in Chester Stevedoring Company and Jarka Corporation as third party defendants. After the statute of limitations had run, the plaintiff attempted to amend his complaint to add those third party defendants as original party defendants. The plaintiff's motion for leave to amend was denied. The court reasoned that the purpose of the federal rules was not to deny third party defendants the defense of the statute of limitations and that plaintiff's request to file an amended complaint on the third party defendant was barred by the statute.[78] A similar effort to amend the plaintiff's claim so to assert a claim against a third party defendant also failed in *Hankinson v. Pennsylvania Railroad*.[79] Hankinson brought suit against the railroad under the Federal Employer's Liability Act. The defendant later joined the United States as a third party defendant. After the limitations period had passed, plaintiff for the first time tried to add the United States as a defendant in the original action. The court disallowed the amendment in its brief disposition of the case. "The amended complaint *began* the plaintiff's action on *his* claim against the United States too late. It is of no avail to the plaintiff that the railroad began its action on *its* claim against the government in time."[80]

In neither *Horan* nor *Hankinson* did the courts analyze the facts as would now be required under federal rule 15(c); there was no consideration whether the third party defendants had received notice of the original complaint and knew that they would have been made original parties if the plaintiffs had possessed full knowledge of the facts. Perhaps the results would have been the same even after such a consideration. But at least one federal district court has thus extended its inquiry where a third party defendant was sought to be made an original party defendant. In *Meredith v. United Air Lines*,[81] plaintiff's original claim, for personal injuries sustained when the airplane on which she was a passenger made an abrupt movement after a near-collision with another airplane allegedly operated by the government, was asserted against United Air Lines and the United States. After an investigation disclosed that Lockheed Aircraft Corporation may have been in control of the second airplane, the United States brought in Lockheed as a third party defendant, seeking indemnification if the government were held lia-

78. *Id.* at 712.
79. 160 F. Supp. 709 (E.D. Pa. 1958).
80. *Id.* at 710.
81. 41 F.R.D. 34 (S.D. Cal. 1966).

ble. Lockheed was made a party to the investigation and was fully informed of all the developments, including details of the instant suit. When the plaintiff requested permission to add Lockheed as an original party defendant after the statute had run, the court took note of all those facts. The court concluded that the operative tests of rule 15(c) had been met and that there was no reason to exclude attempts to change the status of third party defendants from the rule's coverage. Accordingly, the court allowed the amendment and held it to relate back.[82]

Conscious attempts by plaintiffs to avoid the literal requirements of the rule for adding parties to a pending action have been and will probably continue to be singularly unsuccessful. Plaintiffs have frequently desired to build flexibility into their pleadings by listing "John Does" in the caption as defendants, in the hope that their ploy would allow later additions of particular individuals as defendants in case new information came to light after the statute of limitations had run. For example, in *Bufalino v. Michigan Bell Telephone Co.*,[83] the plaintiff brought a damage suit for illegal wiretapping against the Michigan Bell Telephone Company, two named individuals, and "Does, One to Fifty, Inclusive." In his second amended complaint, made after the statute of limitations had run, the plaintiff named as additional defendants four Michigan Bell Telephone employees, a private detective, and fourteen police officers of the City of Detroit, and reduced the number of John Does from 50 to 31. The court dismissed this amendment and stated that "action was never commenced as to the 'Does' because they were not identified nor served with process."[84] Perhaps more important, there was no showing of evidence that those individuals had either notice or knowledge that they would have been made parties in the absence of mistake by the plaintiff.

In *Hoffman v. Halden*,[85] an action for the violation of civil rights arising out of an alleged conspiracy resluting in the wrongful incarceration of the plaintiff in the state hospital for the mentally ill, the plaintiff originally filed the complaint against four named individuals and "John Doe" and "Richard Roe." None of the defendants whom plaintiff sought to add by amendment had been named anywhere in the original complaint. In disallowing the amendment the

82. *Id.* at 39-41; *See* C. WRIGHT & A. MILLER, note 4 *supra*, § 1498, at 513.
83. 404 F.2d 1023 (6th Cir. 1968).
84. *Id.* at 1028.
85. 268 F.2d 280 (9th Cir. 1959).

court stated that there was no indication in the original complaint that the true identities of John Doe and Richard Roe were unknown, and that these defendants had not been given notice of the suit before the statute of limitations had run.[86]

An allegation that the true identities of the John Does listed in the caption were unknown *was* made in *Phillip v. Sam Finley, Inc.*,[87] but ultimately the allegation proved to be of little value. In *Phillips* the complaint named as defendants, "Sam Finley, Inc., Adams Construction Co., and John Doe, *et al.*, whose exact identities were unknown."[88] After the statute of limitations had run, the plaintiff attempted to add three named defendants for the John Does. The court disallowed the amendment, stating: "Plaintiff's use of the fiction, John Doe, et al. did not create a new right to freely amend. . . . Plaintiff cannot toll the running of the statute of limitations by filing a complaint against some fictional character."[89]

IV. CONCLUSION

As demonstrated by the above materials, the notice approach to relation back of amendments to pleadings after the statute of limitations has run is more liberal than the prior cause of action approach. It should be expected that the Missouri courts will focus more upon the basic factual situation underlying the claim than upon the formal pleadings when deciding whether an amendment will relate back. If the party has alleged sufficient factual material to allow the defendant to prepare his defense, the amendment should be allowed.

In the area of the addition of parties to the lawsuit, the courts generally look to see whether the defendant should have known that it was the intended defendant and what relationship it had with the named defendant. The courts will look at the circumstances of the case and determine whether the new defendant had notice of the claim and is familiar with the basic factual situation underlying the claim. If so, the courts will usually find that there will be no prejudice to the new defendant and therefore will allow the claim. As for the addition of parties plaintiff, these should be allowed since the defendant's defense would not be altered by the change in plaintiffs, since the underlying factual situation remains the same.

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86. *Id.* at 304.
87. 270 F. Supp. 292 (W.D. Va. 1967).
88. *Id.* at 293.
89. *Id.* at 294. *See* Craig v. United States, 413 F.2d 854 (9th Cir. 1969).