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OPINION

■ CLASS ACTIONS ■

Are you a class member?

By Mark Herrmann SPECIAL TO THE NATIONAL LAW JOURNAL

RIDDLE ME THIS: How many putative class actions are currently pending in which you are an unnamed class member?

That is, of course, a terribly unfair question; virtually no one has any idea what the answer might be.

Limit the question further: How many class actions of which you have not received notice in the mail are now pending on your behalf?

That question is even less fair; no one has a clue. And readers of this article are uniquely well informed on this subject; they are lawyers. How many nonlawyers could identify class actions currently pending on their behalf?

The honest answer is, of course, almost none. (Rare exceptions might exist in exceptionally high-profile cases, such as those involving Enron Corp. or WorldCom Inc., where shareholders might assume, without actually knowing, that surely there must be pending litigation.)

Class action complaints are typically filed quietly and receive little publicity, and absent class members are not aware that the cases are pending. Everyone knows this—everyone except, apparently, one group of people—judges.

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Equitable class action tolling

Recently, the Maryland Court of Special Appeals adopted the doctrine of equitable class action tolling. See *Christensen v. Philip Morris USA Inc.*, 875 A.2d 823 (Md. Ct. Spec. App. 2005). That rule tolls the statute of limitations for unnamed class members while a putative class action is pending. The Maryland intermediate-level court adopted this rule, in part, because without class action tolling, absent class members would have no alternative but to protect their interests by intervening in the class action as named plaintiffs or filing individual lawsuits. The filing of such suits would undermine the purpose of the class action rule by generating "needless duplication" of litigation, thus subverting the "efficiency and economy of litigation" that the class action device was meant to achieve.

The Maryland court was not breaking new ground with this holding. The U.S. Supreme Court relied on similar reasoning when it adopted equitable tolling in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). In *Crown Cork & Seal*, the Supreme Court reasoned that failure to accord equitable tolling would prompt each unnamed class member "to file a separate action prior to the expiration of his own period of limitations." Id. at 351.

A legal fiction

This is, to put it nicely, a "legal fiction." Absent class members simply do not know that class actions have been filed on their behalf. Those ignorant absent class members are not restraining themselves from suing in reliance on a pending class action; they simply don't know about the class action. The absent class members are choosing not to sue for some other reason. Whatever the reason, it is not the one identified by the courts.

Perhaps equitable class action tolling is a good idea. Perhaps not. But it is surely not justified by the reasoning relied upon by the courts. Courts should not rely on factual assumptions that every cognizant person knows to be untrue.

Courts should instead recognize that the current equitable class action tolling emperor has no clothes. The tolling doctrine should be analyzed by acknowledging the facts that everyone knows to be true, and equitable class action tolling should be embraced or rejected on the basis of that reality, not the current fiction. NLJ