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SUPREME COURT RAMIFICATIONS

A RETURN TO TECHNICAL PLEADINGS? — *SCHIAVONE v. FORTUNE*

The primary purpose of the Federal Rules of Civil Procedure¹ is to always assist, rather than deter, the disposition of litigation on the merits.² Federal Rule of Civil Procedure 15(c) furthers this

¹ The Federal Rules of Civil Procedure were enacted by the Supreme Court under the authority granted to it by the Rules Enabling Act of 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (1976)). The Act gave the Supreme Court "the power to prescribe, by general rules, for district courts . . . the practice and procedure in civil actions at law," provided, however, that the "rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant." *Id.*; see Note, *Erie R.R. v. Tompkins and the Federal Rules*, 62 HARV. L. REV. 1030, 1030-31 (1949).

Prior to the Rules Enabling Act, the civil procedure in the district courts was divided into separate practices for actions at law and suits in equity. See 2 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 1.02 [1] (2d ed. 1985). Actions at law were mainly governed by the Conformity Act of 1872 which required that a federal district court apply "as near as may be" the procedure governing actions at law in the state in which the federal district court was held. *Id.*; see Conformity Act, 17 Stat. 197 (1872). Suits in equity were mainly governed by the Equity Rules of 1912. 37 Stat. 464 (1912).

² 3 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 15.02[1] (2d ed. 1985).

Rule 1 provides that the Rules "shall be construed to secure the just, speedy and inexpensive determination of every action." *Id.* Rule 8(f) states the canon of construction: "All pleadings shall be construed as to do substantial justice." *Id.* Furthermore, Rule 61 states in unmistakable terms that non-prejudicial error must be disregarded. *Id.*; see *Conley v. Gibson*, 355 U.S. 41, 48 (1957). "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41, 48 (1957). In *Maty v. Grasselli Chemical Co.*, 303 U.S. 197, 200-01 (1938), the Court stated that "[p]leadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end." *Id.* See generally J. MOORE, *supra*, at ¶ 15.02[1] (pleadings are not an end in themselves, but are only the means to a proper presentation of a case). The importance of pleadings ought to be solely in their effectiveness as a means to reach a just result. See Comment, *Amendment of the Pleadings After the Statute of Limitations Has Run*, 4 MO. L. REV. 49 (1939). An overly technical approach only obstructs

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objective by allowing an amended pleading to relate back to the date of the original pleading for statute of limitations purposes.⁸ However, this rule sometimes conflicts with the primary purpose

justice. *Id.* at 51.

The courts have liberally construed the rules so as to maintain their spirit. *See, e.g., Foman v. Davis*, 371 U.S. 178, 182 (1962) (refusal to grant leave to amend without justifiable reason is abuse of discretion). In *Foman*, the Court stated that to avoid a decision on the merits because of a mere technicality is entirely contrary to the spirit of the Federal Rules of Civil Procedure. *Id.* at 181. The Court also acknowledged that "[t]he Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.'" *Id.* at 182 (quoting Fed. R. Civ. P. 1); *see also* *Beacon Theatres v. Westover*, 359 U.S. 500, 507 (1959) (liberal construction of a pleading is in line with Federal Rule 8). The liberality of the federal procedure rules is in accord with many state codes. *See* J. MOORE, *supra*, at ¶ 1.13[1]; *see, e.g.,* N.Y. CIV. PRAC. L. & R. § 104 (McKinney 1972) ("The civil practice laws and rules shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding.").

⁸ *See* FED. R. CIV. P. 15(c). Concerning the relation back of an amended pleading changing the defendant, Rule 15(c) provides:

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 the party to be brought in by amendment, that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a 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 the party.

Id. Rule 15(c) was amended on March 2, 1987, but the changes were of a technical nature only and did not affect the previous case law. *See* 55 U.S.L.W. 4269.

Prior to the 1966 amendments of Rule 15(c), the general rule was that amendments which substituted or added new parties would not relate back. *See* J. MOORE, *supra* note 2, at ¶ 15.15[4.-1]. Some courts strictly adhered to the general rule, reasoning that if an amendment were allowed to relate back, the purpose of the statute of limitations would be defeated. *Id.*; *see, e.g.,* *Union Pac. Ry. v. Wyler*, 158 U.S. 285, 298 (1895) (amendment to change from negligence to violation of state statute barred by statute of limitations). Many courts, however, in the interest of justice, permitted the relation back of amendments changing parties. J. MOORE, *supra* note 2, at ¶ 15.15[4.-1]; *see, e.g.,* *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541 (5th Cir. 1983) (amendment adding defendant's insurance company permitted); *McDonald v. Chrysler Motors Corp.*, 27 F.R.D. 442 (W.D. Pa. 1961) (amendment to substitute manufacturer for distributor allowed where manufacturer had notice of action); *Adams v. Beland Realty Corp.*, 187 F. Supp. 680 (E.D.N.Y. 1960) (amendment substituting partnership for corporation should be allowed where corporation was dissolved and its assets transferred to partnership). These courts examined the facts of each case to ascertain whether allowance of such amendment would be inconsistent with the notice requirements inherent in the statutes of limitations. *Id.*; *see, e.g.,* *Shapiro v. Paramount Film Distrib. Co.*, 274 F.2d 743 (3d Cir. 1960) (amendment to correct corporation name related back); *Grooms v. Greyhound Corp.*, 287 F.2d 95 (6th Cir. 1961) (amendment to correct misnomer allowed to relate back). *But see* *Lomax v. United States*, 155 F. Supp. 354 (E.D. Pa. 1957) (amendment to correct name not allowed to relate back).

For Rule 15(c) to apply, Rule 15(a) must be complied with. *See* *Yorden v. Flaste*, 374 F. Supp. 516, 518-19 (D. Del. 1974). Rule 15(a) provides that "a party may amend his pleading by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." FED. R. CIV. P. 15(a).

behind the statute of limitations, which is to assure fairness to the defendant⁴ by compelling the commencement of an action against the defendant within a reasonable time.⁵ Since the relation back doctrine is necessarily intertwined with the statute of limitations,⁶ courts have considered the purposes of the statute of limitations in determining whether to allow an amendment adding or changing a party to an action to relate back.⁷

⁴ *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1965); *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974); see *Developments in the Law - Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950).

The Supreme Court has frequently emphasized the purposes of the statutes of limitations in the federal system. In *Order of Railroad Telegraphers v. Railway Express Agency Inc.*, 321 U.S. 342, 348-49 (1944), the Court stated that the statutes of limitations are designed "to promote justice by preventing surprises through the revival of claims." *Id.* The rationale is that even if a party has a valid claim, fairness requires that the defendant receive notice within the limitations period. *Id.*; see also *Wood v. Carpenter*, 101 U.S. 135, 139 (1879) (a bar to stale claims and protection against erosion of evidence).

⁵ See Note, *Federal Rule of Civil Procedure 15(c): Relation Back of Amendments*, 57 MINN. L. REV. 83, 84 (1972).

The statute of limitations will usually prevent a plaintiff from amending his complaint to add a new party after the limitations period has run unless the amendment relates back to the filing of the original complaint. *Id.* Reasons underlying the statute of limitations are (1) to assure fairness to defendant by requiring that actions be commenced within a reasonable time, (2) to avoid stale claims, (3) the unavailability of evidence or witnesses after a period of time, (4) the possibility of faulty memory, and (5) a psychological end to possible litigation with respect to possible defendant. *Id.* When a court permits a plaintiff to amend the complaint to add a party, after the statute expires, the court is technically violating the statute of limitations. *Id.* However, Rule 15(c) tries to balance the conflicting policies underlying the federal rules and the statute of limitations by allowing amendments only when it will not prejudice the parties. *Id.*; see also FED. R. CIV. P. 15(c) advisory committee note, 39 F.R.D. 82 (1966) (in certain situations, policy of statute of limitations would not be offended by allowing relation back).

Recent court decisions have been decided both ways when faced with the conflicting aims of Rule 15(c) and the statute of limitations. Compare *Itel Capital Corp. v. Cups Coal Co.*, 707 F.2d 1253 (11th Cir. 1983) (amendment adding owner of corporation as defendant related back since he knew or should have known he would be named) and *Hunt v. Broce Constr. Co.*, 674 F.2d 834 (10th Cir. 1982) (amendment correcting name of corporate defendant related back when summons had been served on corporate officers who were charged with knowledge of action) with *Norton v. International Harvester*, 627 F.2d 18 (7th Cir. 1980) (amendment would not relate back when plaintiff could not claim he mistakenly failed to name defendant, where he was aware of its identity before suit was filed, and waited 3 years to seek amendment).

⁶ See FED. R. CIV. P. 15(c) advisory committee note, 39 F.R.D. 82 (1966) ("Relation back is intimately connected with the policy of the statute of limitations"); J. MOORE, *supra* note 2, at ¶ 15.15[2] (if original pleading gives fair notice, defendant will not be deprived of protections of statute of limitations).

⁷ See *Vargas v. McNamara*, 608 F.2d 15 (1st Cir. 1979) (amendment permitted if just and not prejudicial to adverse party.); *Marks v. Prattco, Inc.*, 607 F.2d 1153 (5th Cir. 1979) (amendment to substitute true corporate name allowed because defendant had notice of action and was not prejudiced.); see also J. MOORE, *supra* note 2, at ¶ 15.15[2] (protection of

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In federal court, an action is commenced upon the filing of a complaint.⁹ A summons and complaint must then be served⁹ within 120 days of the original filing.¹⁰ If the complaint is filed within the statute of limitations period but the defendant is served after the statute of limitations has expired, yet within the time allowed for service, the action is still timely even though the defendant did not receive actual notice of the action within the statute of limitations.¹¹ The conflict occurs when the action is filed within the statute of limitations period and the plaintiff seeks to amend the complaint to change the party and the new party is served after the statute of limitations has run but within the 120 day period allowed for service of process.¹² The issue then becomes whether Rule 15(c) allows the amendment to relate back to the original filing date. The courts of appeals have not taken a unanimous approach to the interpretation of Rule 15(c)'s notice provision.¹³ Recently, in *Schiavone v. Fortune*,¹⁴ the Supreme Court

statute of limitations does not include taking advantage of plaintiff's pleading mistakes).

⁹ FED. R. CIV. P. 3. Rule 3 provides that a civil action is commenced by "filing a complaint with the court." *Id.*

In some jurisdictions, such as New York, state statute mandates that an action is commenced when the summons is served upon the defendant; the mere filing of the complaint does not commence the action. N.Y. CIV. PRAC. L. & R. § 203(b)(1) (McKinney 1972).

The Supreme Court has held that in a diversity action, the question of when an action is "commenced" is governed by the forum state law rather than the Federal rules. *See Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980).

⁹ FED. R. CIV. P. 4(a).

¹⁰ FED. R. CIV. P. 4(j). Federal Rule 4(j) provides in part:

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Id.

¹¹ *But see supra* notes 8-10 and accompanying text. *See generally* Note, *supra* note 5, at 103-04 (action against defendant timely commenced by filing even though he may not have notice until after the limitations period has elapsed).

¹² *See, e.g.,* *Cooper v. U.S. Postal Serv.*, 740 F.2d 714, 716 (9th Cir. 1984) (conflicting interpretation on whether amended party may be served after the statute of limitations period but within the 120 day period allowed for service), *cert. denied*, 105 S. Ct. 2034 (1985).

¹³ *Compare, e.g.,* *Cooper v. U.S. Postal Serv.*, 740 F.2d 714, 717 (9th Cir. 1984) (amendment substituting Postmaster General for United States Postal Service did not relate back because Postmaster General did not receive notice of action within statutory period), *cert. denied*, 471 U.S. 1022 (1985) *and* *Watson v. Unipress, Inc.*, 733 F.2d 1386, 1390 (10th Cir. 1984) (amendment substituting corporation for "John Doe" defendant did not relate back because corporation did not receive notice within the statutory period) *and* *Hughes v.*

of the United States resolved the conflict by adopting a literal construction of Rule 15(c).¹⁵

This article will discuss the policy considerations raised by amendments that add a party and how the *Schiavone* decision relates to these considerations. Part I will trace the history of Rule 15(c). Part II will discuss the *Schiavone* decision and the arguments against it. Part III will discuss the possible ramifications of *Schiavone*.

I. HISTORICAL DEVELOPMENT OF RULE 15(C)

At common law,¹⁶ the courts allowed an amendment of a pleading to relate back to the original filing date only if the new claim arose from the identical "cause of action."¹⁷ Gradually, the courts

United States, 701 F.2d 56, 58 (7th Cir. 1982) ("the period provided by law for commencing the action" does not include time allowed under the Federal Rules for service of process) with *Ringrose v. Engelberg Huller Co.*, 692 F.2d 403, 410 (6th Cir. 1982) (Jones, J., concurring) ("no reason to require more expeditious notice to an added party than it would have had if it had been correctly named") and *Kirk v. Cronvich*, 629 F.2d 404, 408 (5th Cir. 1980) (period under Rule 15(c) within which party to be brought in must receive notice of action includes reasonable time after filing of complaint for service of process) and *Ingram v. Kumar*, 585 F.2d 566, 571-72 (2d Cir. 1978) (literal interpretation unjustified where timely service of process can be effected after statute of limitations has run since even accurately named defendant may not receive actual notice prior to expiration of limitations period), *cert. denied*, 440 U.S. 940 (1979).

The Supreme Court of the United States granted certiorari to clear up the conflict among the circuit courts. See *Schiavone v. Fortune*, 106 S. Ct. 56 (1985).

¹⁵ *Schiavone v. Fortune*, 106 S. Ct. 2379 (1986).

¹⁶ See *id.* at 2385.

¹⁷ See J. MOORE, *supra* note 2, at ¶ 15.15[1]; *Bowles v. Pure Oil Co.*, 9 Fed. R. Serv. (Callaghan) 341, 345 (E.D. Pa. 1946) (relation back doctrine existed long before adoption of Rules of Civil Procedure, but Rule 15(c) broadened its application); see also Comment 7 U. CHI. L. REV. 733, 734 (1940) (where statute of limitations expired, courts may consider policies of statute in determining whether amendment related back). See generally Note, *supra* note 5, at 85 (discussion of relation back doctrine at common law).

¹⁷ J. MOORE, *supra* note 2, at ¶ 15.15[1].

Prior to the adoption of the Federal Rules, federal courts, whether of equity or of law, allowed amendments to relate back to the initial filing only if the "cause of action" remained the same. *Id.* If the court found that the amendment asserted a new cause of action, relation back would not be allowed since it would violate the purpose of the statute of limitations. See *Union Pac. Ry. v. Wylor*, 158 U.S. 285, 296-97 (1895) (amendment disallowed because of change of legal theory and thus, held to be a new cause of action). But see *Missouri, Kansas & Texas Ry. Co. v. Wulf*, 226 U.S. 570, 576 (1913) (plaintiff sued as individual for son's death under one statute allowed to amend to sue as administratrix under another statute even though statute of limitations expired). The major problem involved the determination of whether a new cause of action was asserted. See generally Note, *supra* note 5, at 85-94 (operation of relation back doctrine prior to 1966 amendment).

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expanded this by allowing amendments to relate back under more liberal circumstances.¹⁸ In 1938, the original Rule 15(c) was adopted,¹⁹ effectively broadening the application of the relation back doctrine.²⁰

Under both common law and the original Rule 15(c)²¹, an amendment substituting or adding a new party did not relate back to the initial filing date because this would prejudice the new party by defeating the purposes of the statute of limitations.²² However, some courts recognized that in certain situations, when it was clear that the party before the court was the party that the plaintiff intended to sue initially, and this party was informed of the action from the beginning, the amendment seeking to correct the mere "misnomer" or "misdescription" of a defendant should be allowed to relate back.²³

¹⁸ See, e.g., *New York Cent. & Hudson River R.R. v. Kinney*, 260 U.S. 340, 346 (1922) (where defendant has notice of plaintiff's claim from the beginning, reasons for statute of limitations do not exist); *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 67-69 (1933) (court approved less restrictive view of relation back).

¹⁹ FED. R. CIV. P. 15(c) (1938). Original rule 15(c) stated "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." *Id.*

²⁰ See Note, *supra* note 5, at 83.

After Rule 15(c) was adopted in 1938, the test became whether or not the new matter asserted by amendment arose out of the "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." *Id.* Under Rule 15(c), courts examined the "relevant facts of each case" rather than apply the conceptual cause of action standard. *Id.* Rule 15(c) gave courts broad discretion in deciding whether an amendment should relate back. *Id.* at 88-89.

²¹ See *supra* note 19.

²² See *United States ex rel Stratham Instruments, Inc. v. Western Casualty & Sur. Co.*, 359 F.2d 521, 523 (6th Cir. 1966); *Lewis v. Lewis*, 358 F.2d 495, 502 (9th Cir. 1966); *James v. Dr. P. Phillips Co.*, 115 Fla. 472, 155 So. 661 (1934); J. MOORE, *supra* note 2, at ¶ 15.15[4.-1]; J. FRIEDENTHAL, *CIVIL PROCEDURE*, § 5.26, at 306 (1985); R. LAVINE & G. HORNING, *MANUAL OF FEDERAL PRACTICE*, § 3.61, at 267 (2d ed. 1979). *But see* *United States v. A. H. Fischer Lumber Co.*, 162 F.2d 872, 874 (4th Cir. 1947) (occasionally amendments may be allowed "notwithstanding the running of the statute of limitations").

²³ See J. MOORE, *supra* note 2, at ¶ 15.15[4.-1]; see also *Travelers Ins. Co. v. Brown*, 338 F.2d 229, 235 (5th Cir. 1964) (amendment to correct misnomer allowed to relate back); *Shapiro v. Paramount Film Distrib. Corp.*, 274 F.2d 743, 746 (3d Cir. 1960) (amendment to name Delaware corporation of same name who assumed liabilities of originally named New York corporation allowed to relate back); *Jackson v. Duke*, 259 F.2d 3, 7 (5th Cir. 1958) (amendment to correct error in initials allowed after statute of limitations had run); *Grandey v. Pacific Indem. Co.*, 217 F.2d 27, 29 (5th Cir. 1954) (amendment to correct misnomer allowed where no one misled by error). *But see also* *Martz v. Miller Bros. Co.*, 244 F. Supp. 246, 254 (D. Del. 1965) (amendment to add "of Newark" to Miller Brothers Company did not relate back); *Harris v. Stone*, 115 F. Supp. 531 (D.D.C. 1953) (initial

Another exception to the general rule occurred when the originally named party and the amended party had an "identity of interest"²⁴ such that allowing the amended complaint to relate back would not be prejudicial to the new defendant.²⁵ The underlying rationale of this exception was that where the real parties in interest were sufficiently alerted to the proceedings at the initial stage, the statute of limitations should not prevent the claim.²⁶ Under these exceptions, the courts' approach was to favor a decision on the merits rather than a decision on pleading technicalities.²⁷

complaint named Mr. and Mrs. Augustus Stone, amended complaint correctly named J. Austin Stone and Margaret Stone; court held amendment would not relate back).

²⁴ See R. LAVINE & G. HORNING, *MANUAL OF FEDERAL PRACTICE*, § 3.61, at 95 (1985 Supp.). "Identity of interest" has been described as follows:

The identity of interests principle provides that the institution of the action serves as constructive notice of the action to the parties added after the expiration of the limitations period, when the original and added parties are so closely related in business or other activities that it is fair to presume the added parties learned of the institution of the action shortly after it was commenced.

Id.

²⁵ See J. FRIEDENTHAL, *CIVIL PROCEDURE*, § 527, at 307 (1985) (amendment allowed where identical corporations with interlocking directors operate as if they were one and plaintiff sued wrong corporation); Note, *supra* note 5, at 91 (where parties closely related in their business activities, institution of action against one is notice to other); see, e.g., *Gifford v. Wichita Falls & So. Ry. Co.*, 224 F.2d 374, 376-77 (5th Cir.) (amendment allowed to substitute a company which had acquired all of original defendant company's assets), *cert. denied*, 350 U.S. 895 (1955). *But see* *Cooper v. U.S. Postal Serv.*, 740 F.2d 714, 715 (9th Cir. 1984) (plaintiff not allowed to substitute Postmaster General for U.S. Postal Service), *cert. denied*, 105 S. Ct. 2034 (1985); *Robbin v. Esso Shipping Co.*, 190 F. Supp. 880, 885 (S.D.N.Y. 1960) (amendment from Esso Shipping Company to its owner Esso Standard Oil Company not allowed).

Where one defendant was a corporate subsidiary of the other, courts generally were willing to find an identity of interest. See, e.g., *Travelers Indem. Co. v. United States ex rel. Construction Specialties Co.*, 382 F.2d 103, 106 (10th Cir. 1967) (wholly owned subsidiary had identity of interest with parent company); *Lackowitz v. Lummus Co.*, 189 F. Supp. 762, 763-64 (E.D. Pa. 1960) (amendment allowed where original defendant corporation dissolved and assets transferred to substituted defendant corporation).

²⁶ See J. MOORE, *supra* note 2, at ¶ 15.15[4.-1] (where real parties in interest aware at early stage, statute of limitations should not be used mechanically to bar claim); see also Note, *supra* note 5, at 91 (where parties closely related in business activities, institution of action against one is notice of litigation to other).

²⁷ See *DeFranco v. United States*, 18 F.R.D. 156, 160 (S.D. Cal. 1955). The *DeFranco* court stated:

The primary function of the complaint is to notify the person against whom relief is sought of the claim or cause of action asserted; thus where the "defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist," . . . and an amendment should be allowed.

Id. (citation omitted).

Consistent with the spirit of the rules favoring a meritorious decision of a controversy,

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While many courts permitted the relation back of amendments changing parties, some courts still applied Rule 15(c) in a restrictive manner.²⁸ Thus, in 1966, Rule 15(c) was amended to clarify when an amendment of a pleading changing a named party shall relate back to the original filing date.²⁹ The amended rule requires that three conditions be satisfied before an amendment changing a party will relate back to the original filing date.³⁰ First, the claim asserted in the amendment must arise out of the "conduct, transaction or occurrence" set forth in the original pleading.³¹ Second, the new defendant must receive notice of the litigation within the limitation period so that he is not prejudiced in maintaining his defense on the merits.³² Finally, the new party must have known that, but for a mistake concerning his identity, the claim would have been brought against him originally.³³

Despite the clarifying amendment, an interpretation problem arose concerning the language of Rule 15(c)'s notice provision.³⁴ One view held that Rule 15(c) must be strictly applied and that the language mandates that the amended party receive notice within the statute of limitations period.³⁵ It is suggested that this

the courts have not hesitated to allow amendments where the moving party was acting in good faith and the opposing party will not be unduly prejudiced. *See* J. MOORE, *supra* note 2, at ¶ 15.08[2].

²⁸ *See* FED. R. CIV. P. 15(c), advisory committee's note; 39 F.R.D. 82, 83 (1966) ("incorrect criteria have sometimes been applied, leading sporadically to doubtful results"); *see, e.g.*, *Martz v. Miller Bros. Co.*, 244 F. Supp. 246, 255 (D. Del. 1965) (amendment to name second corporation as defendant did not relate back, even though both corporations had overlapping officers); *Murfkan v. Kahn*, 11 F.R.D. 520, 522 (S.D. Fla. 1951) (amendment to substitute widow of plaintiff not allowed to relate back); *see generally* J. MOORE, *supra* note 2, at ¶15.15[4.-2] (relation back was being misapplied in a number of cases).

²⁹ FED. R. CIV. P. 15(c), advisory committee's note; 39 F.R.D. 82, 82-84 (1966). The 1966 amendment was made to clarify "when an amendment of a pleading changing the party against whom a claim is asserted (including an amendment to correct a misnomer or misdescription) shall 'relate back' to the date of the original pleading." *Id.*; *see* J. MOORE, *supra* note 2, at ¶ 15.15[4.-2] (1966 amendment makes clear that amendments which change parties relate back to the date of filing in certain situations); Note, *supra* note 5, at 96 ("The Advisory Committee essentially combined the criteria used by some courts prior to 1966 and refined these to accommodate the policies of the statute of limitations."); *see also supra* note 3 (amended version of Rule 15(c)).

³⁰ FED. R. CIV. P. 15(c), advisory committee's note; 39 F.R.D. 82, 84 (1966).

³¹ FED. R. CIV. P. 15(c).

³² FED. R. CIV. P. 15(c)(1).

³³ FED. R. CIV. P. 15(c)(2).

³⁴ *See supra* notes 12-15 and accompanying text.

³⁵ *See Cooper v. U.S. Postal Serv.*, 740 F.2d 714 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2034 (1985); *Watson v. Unipress, Inc.*, 733 F.2d 1386 (10th Cir. 1984); *Hughes v. United*

view effectively entitles an amended party to earlier notice than the original party is entitled to.³⁶ The opposing view advocates that Rule 15(c) cannot be read literally to require that the amended party have notice within the statute of limitations period.³⁷ This position is premised on the belief that the original party and the amended party are entitled to the same notice; therefore, notice to the amended party is valid after the statute of limitations period as long as it is still within the 120 day period allowed for service of process.³⁸

II. THE *Schiavone* DECISION

The conflict concerning the proper interpretation of Rule 15(c) was resolved by the Supreme Court in *Schiavone v. Fortune*.³⁹

In *Schiavone*, the plaintiffs separately filed timely complaints in federal court⁴⁰ alleging libel, naming Fortune as the sole defend-

States, 701 F.2d 56 (7th Cir. 1982).

³⁶ See *Ingram v. Kumar*, 585 F.2d 566, 571 (2d Cir. 1978), *cert. denied*, 440 U.S. 940 (1979).

³⁷ See *Ringrose v. Engelberg Huller Co.*, 692 F.2d 403 (6th Cir. 1982); *Kirk v. Cronvich*, 629 F.2d 404 (5th Cir. 1980); *Ingram v. Kumar*, 585 F.2d 566 (2d Cir. 1978), *cert. denied*, 440 U.S. 940 (1979).

³⁸ See *supra* note 37.

³⁹ 106 S. Ct. 2379 (1986).

⁴⁰ *Id.* at 2381. Three plaintiffs instituted a diversity action, filing their respective complaints in United States District Court for the District of New Jersey. *Id.*

In a diversity action, a federal court must apply the forum state's substantive law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). The Supreme Court has held that state statutes of limitations govern in a diversity action and if, under state law, the statute of limitations is tolled by service of process, then mere filing of the complaint is not sufficient. See *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949). Some conflict exists, however, in whether state or federal relation back doctrine governs in a diversity case. See J. MOORE, *supra* note 2, at ¶ 15.15[2]. Most courts have applied federal rule 15(c) either by employing the substance-procedure analysis, established by *Erie* and its progeny, to conclude that rule 15(c) is procedural or by simply assuming that rule 15(c) applies without any explicit consideration of state law. *Id.*; see also *Simmons v. Fenton*, 480 F.2d 133 (7th Cir. 1973); *Slack v. Treadway Inn, Inc.*, 388 F. Supp. 15 (M.D. Pa. 1974). *But see* *Marshall v. Mulrenin*, 508 F.2d 39 (1st Cir. 1974) (Massachusetts rule applicable since state rule partially substantive); *Rumberg v. Weber Aircraft Corp.*, 424 F. Supp. 294, 298 (C.D. Cal. 1976) (California's *Doe* defendant relation back law substantive and therefore applicable). See generally *Easton, Doe Defendants and Other State Relation Back Doctrines in Federal Diversity Cases*, 35 STAN. L. REV. 297 (1983) (discussion of relation back doctrine in federal diversity cases). Many commentators have agreed that Federal Rule 15(c) should be applied in diversity situations. See J. MOORE, *supra* note 2, at ¶ 15.15[2]; C. WRIGHT, *LAW OF FEDERAL COURTS* 384 (4th ed. 1983).

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ant.⁴¹ After the limitations period expired,⁴² but within the time allowed for service, the plaintiffs attempted to serve Time, Inc., the corporate entity of which Fortune is merely a division.⁴³ Time refused service because the complaint did not name Time as a defendant.⁴⁴ Subsequently, but still within the time period allowed for service, the complaint was amended and service accepted by Time.⁴⁵ Time moved to dismiss the amended complaints, claiming that it could not be named as a party after the statute of limitations period had expired.⁴⁶ The district court granted Time's motions and dismissed the claims.⁴⁷ The court of appeals affirmed the judgment of the district court,⁴⁸ finding Rule 15(c) to be "clear and unequivocal" in requiring notice to the defendant within the statutory period.⁴⁹ Furthermore, the court held that the statutory period does not include the time provided under the federal rules for service of process.⁵⁰

The Supreme Court of the United States granted Schiavone's

⁴¹ *Schiavone*, 106 S. Ct. at 2381. Plaintiffs' complaints alleged that they were libeled in a story which appeared in the May 31, 1983, issue of Fortune magazine. *Id.* The complaints each named Fortune as the sole defendant, even though Fortune is only a division of Time, Incorporated, a New York corporation. *Id.* The three individual actions were consolidated on appeal. *Id.* at 2382.

⁴² *Id.* at 2381-82. Under New Jersey law, a libel action must be commenced within one year from publication of the alleged libel, running from the date of substantial distribution. See N.J. STAT. ANN. 2A: 14-3 (West 1952). The court of appeals determined that the statute of limitations ended on May 19, 1983. *Schiavone*, 106 S. Ct. at 2382.

⁴³ *Schiavone*, 106 S. Ct. at 2381. On May 20, 1983, plaintiffs mailed the complaints to Time's registered agent in New Jersey and they were received on May 23, 1983. *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* On July 19, 1983, plaintiffs amended their complaints to name as defendant "Fortune, also known as Time, Incorporated." *Id.* On July 21, 1983, the amended complaints were successfully served by certified mail on Time. *Id.*

⁴⁶ *Id.* at 2381-82. Time took the position that in order for the amendment to relate back to the original filing date, a party must be substituted within the limitations period. *Id.* at 2382.

⁴⁷ *Id.* at 2381. In granting Time's motions to dismiss, the district court concluded that the amendments to the complaints did not relate back to the filing of the original complaints because it had not been shown that Time received notice of the institution of the actions within the period provided by law for commencing an action against it. *Id.* at 2381-82.

⁴⁸ *Schiavone v. Fortune*, 750 F.2d 15 (3d Cir. 1984), *aff'd*, 106 S. Ct. 2379 (1986).

⁴⁹ *Id.* at 18. In affirming, the court of appeals stated that while they were sympathetic to plaintiffs' persuasive policy argument, they found the language of Rule 15(c) to be dispositive. *Id.* Further, the court felt that it was not their role "to amend procedural rules in accordance with our own policy preferences." *Id.*

⁵⁰ *Id.*

petition for writ of certiorari⁶¹ and affirmed,⁶² stating that under Rule 15(c), relation back is dependent on satisfying four requirements.⁶³ First, the claim must have arisen from the conduct set forth in the original pleading; second, the added party must have received notice so that the party will not be prejudiced in maintaining his defense; third, the added party should have known that, but for a mistake concerning identity, the action would have been brought against it; and finally, the second and third requirements must have occurred before the statute of limitations expired.⁶⁴ The Court concluded that Time did not have the required notice "within the period provided by law for commencing the action" and thus petitioners were precluded from bringing the action against Time.⁶⁵

A three-justice dissent⁶⁶ maintained that Rule 15(c) does not apply "unless the amendment is one changing the party against whom a claim is asserted"⁶⁷ and in the instant case, the amendment added nothing to either party's understanding of whom the claim was against.⁶⁸ Additionally, Justice Stevens stated that even

⁶¹ *Schiavone v. Fortune*, 106 S. Ct. 56 (1985).

⁶² *Schiavone v. Fortune*, 106 S. Ct. 2379, 2386 (1986).

⁶³ *Id.* at 2384.

⁶⁴ *Id.*

⁶⁵ *Id.* at 2385 (quoting Rule 15(c)). The Court found that Time first learned about the institution of the suits after May 19, 1983, the date the statute of limitations ran. *Id.* at 2384. Time's registered agent did not receive the original complaints until May 23, 1983, at which time the agent refused acceptance. *Id.* at 2384-85. Then on July 19, 1983, the plaintiffs amended their complaints and on July 21, 1983, the amended complaints were served on Time. *Id.*; see *supra* note 45. The Court held that the Rule 15(c) requirements of knowledge and notice did not occur "within the period provided by law for commencing the action against" Time. *Id.*

⁶⁶ *Id.* at 2386 (Stevens, J., joined by Burger, C.J., and White, J., dissenting).

⁶⁷ *Id.* at 2387. Justice Stevens stated that the majority ignored the "critical antecedent point" that the four pronged test of Rule 15(c) is "utterly irrelevant unless the amendment is one 'changing the party against whom a claim is asserted.'" *Id.*

⁶⁸ *Id.* Justice Stevens stated that in the instant case, there was merely a "technical correction" which "added absolutely nothing to any party's understanding of 'the party against whom' the claims were against." *Id.* He felt that Time understood that the claim was aimed at them. *Id.* This was indicated by a letter written by Time's agent the day the agent received the original summons and complaints. *Id.* The cover letter, which was sent to Time's law department along with the summons and complaints, stated, "Discrepancy in corporate title noted. Letter from attorney indicates papers are for Time, Incorporated as publisher of Fortune. Service was made by mail pursuant to Rule 4(c) of FRCP." *Id.* Justice Stevens felt that the difference between the description of the publisher of Fortune in the original complaints and the description of the publisher of Fortune in the amended complaints was insignificant. *Id.* at 2388.

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if he agreed that there was a change of parties, and Rule 15(c) applied, he would still disagree with the majority's interpretation of the rule.⁵⁹ Under his analysis, "the period provided by law for commencing the action" includes two components: the time for commencing by filing a complaint and the time in which the action must be implemented by service of process.⁶⁰

After *Schiavone*, it is clear that Rule 15(c) requires that the amended defendant receive notice within the limitations period,⁶¹ even though in any given case the original defendant may not receive notice until after the statute of limitations expired.⁶² While the Court purported to recognize the plain language of Rule 15(c),⁶³ it is submitted that the Court failed to adequately consider the purpose and the history of the rule in reaching its decision.⁶⁴

The paramount goal of the Federal Rules of Civil Procedure is to facilitate the disposition of litigation on the merits rather than on mere technicalities.⁶⁵ Consistent with this goal, the aim of Rule 15(c) is to protect parties not named in the original pleading only if prejudice will result when they are subsequently brought in by amendment.⁶⁶ Additionally, the Supreme Court has long rejected the approach "that pleading is a game of skill in which one misstep may be decisive."⁶⁷ Yet the *Schiavone* Court held that by virtue of the fact that in the original complaint, the plaintiffs named "Fortune" as defendant, instead of "Fortune, also known as

⁵⁹ *Id.* at 2388. Justice Stevens stated that even if he agreed that there was a change of parties and Rule 15(c) applied, he still found the "majority's plain language analysis unpersuasive." *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 2385.

⁶² See *supra* notes 8-11. See generally Note, *supra* note 5, at 103 (in jurisdictions where filing complaint tolls statute of limitations, action against defendant will be timely commenced by filing even though he may not have actual notice of suit until after statute of limitations expired).

⁶³ See *Schiavone v. Fortune*, 106 S. Ct. at 2385.

⁶⁴ See *supra* notes 16-38 and accompanying text.

⁶⁵ See J. MOORE, *supra* note 2, at ¶ 15.08[2]; see also *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir.) (federal rules designed to adjudicate actions on merits, not on technical aspects of pleading), *cert. denied*, 448 U.S. 911 (1980).

⁶⁶ See *supra* notes 16-38 and accompanying text.

⁶⁷ See *Foman v. Davis*, 371 U.S. 178, 181 (1962). "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Id.*; *Conley v. Gibson*, 355 U.S. 41, 48 (1957).

Time, Incorporated," Time is entitled to have known about the action prior to the end of the limitations period.⁶⁸ It is submitted that the *Schiavone* Court undermined the goal of a decision on the merits by unduly restricting the applicability of Rule 15(c) in a situation where allowing the amendment would not have prejudiced the defendant in any way.⁶⁹ In *Schiavone*, the original defendant and the amended defendant were the same party.⁷⁰ The same agent for Time was served each time and the agent was fully aware that the initial service was aimed at Time.⁷¹ Time would not have received notice any earlier had it been named correctly in the initial complaint and unquestionably, the action would have been timely.⁷² Time would not have been prejudiced by the allowance of the amendment and therefore, should not have been entitled to the protections of the statute of limitations.⁷³

Furthermore, it is suggested that the restrictive interpretation of the notice requirement reached in *Schiavone* was unnecessary and unjust in light of the history and purpose of the Federal Rules of Civil Procedure in general and Rule 15(c) in particular.⁷⁴ In

⁶⁸ *Schiavone*, 106 S. Ct. at 2385. The Supreme Court held that Time could not be added as a party after the statute of limitations period expired. *Id.*

⁶⁹ *See id.* at 2387 (Stevens, J., dissenting). The obvious purpose of Rule 15(c) is to protect parties from prejudice when they are added as defendants. *Id.* When "the identification of the defendant is so inaccurate or ambiguous that a reading of the complaint itself would not enable the defendant himself to realize that he was the party being sued," there is a risk of prejudice. *Id.* at 2388. "By any standard of fair notice, the difference between the description of the publisher of Fortune in the original complaints and the description of the publisher of Fortune in the amended complaints is no more significant than a misspelling" *Id.*

⁷⁰ *See id.* at 2381. Fortune is the name of an internal division of Time, Incorporated. *Id.* In his dissent, Justice Stevens stated that Rule 15(c) did not even apply because this was not an amendment "changing the party." *Id.* at 2388.

⁷¹ *See Schiavone*, 106 S. Ct. at 2381. The initial complaints were mailed to Time's registered agent in New Jersey on May 20, 1983 and the amended complaints served on Time's registered agent on July 21, 1983. *Id.* "There is no, and has never been any, suggestion that the caption confused or misled any agent of the defendant." *Id.* at 2387 (Stevens, J., dissenting). On the day the agent received the initial complaint, the agent notified Time of receipt and that the service was for Time, Incorporated as publisher for Fortune. *Id.*

⁷² *See supra* notes 8-11 and accompanying text; *Schiavone*, 106 S. Ct. at 2387 (Stevens, J., dissenting).

⁷³ *See supra* notes 69-72; *Schiavone*, 106 S. Ct. at 2387 (Stevens, J., dissenting). There is no suggestion that the amendment from "Fortune" to "Fortune, also known as Time, Incorporated" could have caused Time, Incorporated any prejudice in maintaining its defense on the merits. *Schiavone*, 106 S. Ct. at 2387.

⁷⁴ *See supra* notes 1-3, 16-38 and accompanying text.

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Schiavone, the threshold question centered on the interpretation of the requirement that the new defendant receive notice within the limitation period so that he is not prejudiced in maintaining his defense on the merits.⁷⁵ The majority interpreted the requirement to mean that the amended party must have had notice before the statute of limitations period expired even though the original defendant may have received timely notice up to 120 days after the statutory period.⁷⁶ The majority's view effectively entitles an amended defendant to earlier notice than the original defendant under the identical circumstances.⁷⁷ It is suggested that this interpretation runs contrary to the spirit of the Federal Rules of Civil Procedure.⁷⁸ Rule 1 provides that "these rules . . . shall be construed to secure the just, speedy and inexpensive determination of every action."⁷⁹ Rule 8(f) provides that "[a]ll pleadings shall be so construed as to do substantial justice."⁸⁰ In addition, Rule 15(a) declares that leave to amend "shall be freely given when justice so requires."⁸¹ The Supreme Court has consistently favored a determination on the merits whenever possible.⁸² Despite these mandates, the *Schiavone* Court disposes of the instant case by strictly construing the notice requirement of Rule 15(c), thereby precluding a decision on the merits.⁸³

III. RULE 15(C) AFTER *SCHIAVONE V. FORTUNE*

As a result of the *Schiavone* decision, only timely filing and no-

⁷⁵ See *Schiavone*, 106 S. Ct. at 2384.

⁷⁶ See *id.* at 2385.

⁷⁷ See *supra* note 11 and accompanying text.

⁷⁸ See *supra* notes 2-3 and accompanying text.

⁷⁹ FED. R. CIV. P. 1.

⁸⁰ FED. R. CIV. P. 8(f).

⁸¹ FED. R. CIV. P. 15(a).

⁸² See *supra* note 67.

⁸³ See *Schiavone*, 106 S. Ct. at 2385. "Despite these worthy goals and loftily stated purposes," the *Schiavone* Court held that the plain language of Rule 15(c) required the amended party to be notified within the statute of limitations period. *Id.* at 2385. The Court noted that there was "an element of arbitrariness" in its decision, but found solace in the fact that it was an "arbitrariness imposed by the legislature and not by the judicial process." *Id.*; *But see Schiavone*, 106 S. Ct. at 2390 (Stevens, J., dissenting). Justice Stevens could not understand the Court's "willingness to aggravate, rather than alleviate, that arbitrariness, particularly when the decision to do so is demonstrably at odds with the language, purpose and history of the Rule." *Id.*

tice to the original defendant within the limitations period will permit imputation of notice to a subsequently named and sufficiently related party.⁸⁴ Therefore, to have any chance of relation back at all, the original defendant must have been served with notice before the statutory period expired.⁸⁵ The purpose of Rule 15(c) is to allow a plaintiff to amend an error in his complaint after the limitations period has run if the amendment will not prejudice the new party.⁸⁶ Thus, the utility of the rule is significantly limited if it requires that the amendment be made before the statutory period has run since the plaintiff could easily commence another action against the correct defendant.⁸⁷

Hopefully, the Court's strict interpretation of Rule 15(c) is limited to the particular facts of *Schiavone* and is only an isolated departure from the rule of liberal construction mandated by the Federal Rules of Civil Procedure.⁸⁸

In light of the goal of the Federal Rules of Civil Procedure favoring a decision on the merits and the inconsistent consequences of the *Schiavone* Court's interpretation of Rule 15(c),⁸⁹ it is suggested that an amendment to Rule 15(c) is warranted.⁹⁰ By amending Rule 15(c) to include the words "and serving him with notice of the action" after "within the period provided by law for

⁸⁴ See *Schiavone*, 106 S. Ct. at 2384. The majority found that "neither Fortune nor Time received notice of the filing until after" the limitations period. *Id.* As a result, "there was no proper notice to Fortune that could be imputed to Time." *Id.*

⁸⁵ See *id.*

⁸⁶ See *id.* at 2389 (Stevens, J., dissenting). If the purpose of Rule 15(c) is to allow a pleading to be amended after the statute of limitations period as long as the new party will not be prejudiced, that purpose is defeated if it is construed to require that the amendment be made before the limitation has run, since the plaintiff can institute a new action against the correct defendant without the need for relation back. *Id.* "[T]he Rule becomes largely superfluous." *Id.*; see also *Martz v. Miller Bros. Co.*, 244 F. Supp. 246, 254 n.21 (D. Del. 1965) (language of Rule 15(c) might be possible oversight). "Query whether this inconsistency in the [then] proposed Rule 15(c) would not frequently defeat the purposes which the change was intended to serve." *Schiavone*, 106 S. Ct. at 2384.

⁸⁷ See *supra* note 86.

⁸⁸ See *Schiavone*, 106 S. Ct. at 2386 (Stevens, J., dissenting). Justice Stevens stated that the majority's decision represents an aberrational and, hopefully "isolated return to the 'sporting theory of justice' condemned . . . 80 years ago." *Id.*

⁸⁹ See *supra* notes 69-83 and accompanying text.

⁹⁰ See *Martz v. Miller Bros. Co.*, 244 F. Supp. 246, 254 n.21 (D. Del. 1965). In *Martz*, the court suggested that the words "and serving him with notice of the action" could be added to Rule 15(c) after "within the period provided by law for commencing the action against him," to extend the time within which the new defendant could receive notice to include the time allowed under the federal rules for service. *Id.*; see also Note, *supra* note 5, at 105.

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commencing the action against him," this would include the time allowed under the federal rules for service of process during which the proposed defendant could receive notice.⁹¹ Such an amendment would correct the defect which resulted from the *Schiavone* Court's interpretation of the current Rule 15(c) language, while avoiding the risk of prejudice to the amended defendant.⁹²

CONCLUSION

By adopting the strict interpretation of Rule 15(c), the Supreme Court of the United States has significantly limited the utility of the rule in violation of the spirit and intent of the Federal Rules of Civil Procedure which favors a liberal application to promote a decision on the merits. Further, the Court's interpretation will allow an amended defendant to successfully plead the statute of limitations in situations where he has not been prejudiced in any way. Consequently, to remedy the unjust ramifications of the majority's ruling, an amendment to Rule 15(c) is suggested.

Ken C. Chin

⁹¹ See *supra* note 89.

⁹² See *supra* note 89; see, e.g., *Ingram v. Kumar*, 585 F.2d 566, 571 (2d Cir. 1978), cert. denied, 440 U.S. 940 (1979). In jurisdictions where timely service can be effected after the statute of limitations has run, an accurately named defendant may not receive notice of the action prior to the end of the limitations period, yet the action is timely against him. *Id.* There is no reason why an amended defendant is entitled to earlier notice than the originally named defendant. *Id.*