UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 65 | Number 3 Article 6

3-1-1987

Schiavone v. Fortune: Notice Becomes a Threshold Requirement for Relation Back under Federal Rule 15(c)

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Schiavone v. Fortune: Notice Becomes a Threshold Requirement for Relation Back under Federal Rule 15(c)

Easy answers rarely satisfy. The United States Supreme Court recently clarified the notice requirement of Federal Rule of Civil Procedure 15(c), which applies when a plaintiff seeks to change defendants by amending the original complaint.[1] Rule 15(c) permits the amended pleading to relate back to the date of the original pleading if, among other requirements, the joined defendant receives notice of the action "within the period provided by law for commencing the action against him."[2] In *Schiavone v. Fortune*[3] the Court held that the relation-back defendant brought in under rule 15(c) must receive notice prior to the expiration of the applicable statute of limitations.[4] Furthermore, the Court expressly rejected an interpretation of the rule that would have allowed notice to occur within the time for service of process under local law in addition to the statute of limitations period.[5]

The Court viewed *Schiavone* as a question of statutory construction. Consistent with the principles for statutory interpretation, the Court adhered to the rule's plain language.[6] The *Schiavone* Court's emphasis on interpretation, however, understates the problem that created a split among the circuit courts applying rule 15(c). When literally applied to the notice requirement, the phrase, "within the period provided by law for commencing the action against [the relation-back defendant]," produces a double standard: the relation-back defendant possesses more rights than the original defendant and he or she benefits from a more stringent notice requirement than might be called for under local law if the original complaint had named the proper party in the first instance. Furthermore, a plain language interpretation of the phrase necessarily implicates *Walker v. Armco Steel Corp.*,[7] in which the Court held that state law determines

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1. Schiavone v. Fortune, 106 S. Ct. 2379 (1986).
2. FED. R. CIV. P. 15(c). The full text of rule 15(c) reads:

> Relation Back of Amendments. 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.
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> The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

Id. (emphasis added).
3. 106 S. Ct. 2379 (1986)
4. *Id.* at 2385.
5. *Id.*
6. *Id.*
7. 446 U.S. 740 (1980).

when an action was commenced for statute of limitations purposes.[8] The *Schiavone* Court, however, failed to acknowledge that precedent. This Note examines the inherent defect in rule 15(c) that created a division among the circuit courts and reviews the *Walker* analysis that undermines the basis of the Court's decision. It concludes that the Court's emphasis on the technical requirement of notice threatens rule 15(c)'s effectiveness and signals the need to amend the rule.

On May 9, 1983, plaintiff in *Schiavone* filed a diversity action against Fortune magazine in the United States District Court for the District of New Jersey.[9] The complaint alleged that defamatory statements had appeared in the lead article of the magazine's May 30, 1982 issue.[10] Under New Jersey law the date of substantial distribution determines publication and triggers the one year statute of limitations.[11] In *Schiavone* substantial distribution of the May 30, 1982, issue occurred, at the latest, on May 19, 1982. The district court chose this date because newsstand copies of the issue were available for sale on May 17, and subscribers received the magazines between May 13 and May 19. Thus, the statutory period for libel suits arising out of the May 30, 1982, issue of Fortune expired on May 19, 1983.[12] On May 20, 1983, the day after New Jersey's one year statute of limitations for libel had expired, plaintiff mailed process to Time Inc.'s New Jersey agent.[13] The agent received process on May 23, but refused to accept it because the complaint did not designate Time as defendant.[14] Plaintiff amended the complaint on July 19, changing defendant to " 'Fortune, also known as Time, Incorporated.' "[15]

Time moved to dismiss the action for failure to comply with the statute of

8. For a discussion of *Walker*, see *infra* notes 103-07 and accompanying text.

9. Schiavone v. Fortune, 38 Fed. R. Serv. 2d (Callaghan) 71 (D.N.J. 1983), *aff'd*, 750 F.2d 15 (3d Cir. 1984), *aff'd*, 106 S. Ct. 2379 (1986). The *Schiavone* Court considered three separate complaints simultaneously filed against Fortune. The three plaintiffs (Ronald A. Schiavone, Genaro Liquori, and Joseph DiCarlos) were executives of the Schiavone Construction Company.

10. *Id.* at 73; *see* Rowan, *The Payoff Charges Against Reagan's Labor Secretary*, FORTUNE, May 30, 1982, at 80, 85-86. Fortune's article chronicled allegations against former Labor Secretary Raymond J. Donovan, who owned part of the Schiavone Construction Company. *Id.* The alleged defamatory statements described the scene of a bribe during a lunch meeting and placed plaintiffs at the table. *Id.* Plaintiffs denied being present at the lunch. *Schiavone*, 38 Fed. R. Serv. 2d (Callaghan) at 73.

11. *Schiavone*, 38 Fed. R. Serv. 2d (Callaghan) at 73.

12. *Id.*

13. *Id.* The state statute provides: "Every action at law for libel or slander shall be commenced within 1 year next after the publication of the alleged libel or slander." N.J. STAT. ANN. § 2A:14-3 (West 1952).

14. *Schiavone*, 38 Fed. R. Serv. 2d (Callaghan) at 73. Each complaint named Fortune as defendant and described the entity as " 'a foreign corporation having its principal offices at Time and Life Building, Sixth Avenue and 50th Street, New York, New York 10020.' " *Schiavone*, 106 S. Ct. at 2381 (quoting petitioner's complaint). This case arose under rule 15(c) because Fortune is merely the trade name for Time, the publisher, and on appeal, plaintiff did not claim that Fortune could be sued as a separate legal entity. *Schiavone*, 750 F.2d at 17; *Schiavone*, 38 Fed. R. Serv. 2d (Callaghan) at 72, 76. Clearly, plaintiff should have named Time as a party. Arguably, plaintiff intended to sue Time because plaintiff served process on Time's agent. *Schiavone*, 38 Fed. R. Serv. 2d (Callaghan) at 73. Furthermore, Time's agent noted the " 'discrepancy in corporate title' " and implicitly acknowledged that Time was the proper defendant. *Schiavone*, 106 S. Ct. at 2387 (Stevens, J., dissenting) (quoting from cover letter written by Time's agent). Justice Stevens, in dissent, argued that plaintiff's misdescription amounted to no more than a misspelling. *Id.* at 2388 (Stevens, J., dissenting). For discussion of misnomers and misdescriptions, see *infra* notes 81-92 and accompanying text.

15. *Schiavone*, 38 Fed. R. Serv. 2d (Callaghan) at 72 (quoting plaintiff's amended complaint).

limitations. Plaintiff invoked Federal Rule of Civil Procedure 15(c), arguing that the designation of Time in the amended complaint related back to the date of the original complaint.[16] The district court, agreeing with Time, dismissed the complaint. The court declined to apply rule 15(c) because plaintiff had failed to show that Time received notice of the libel suit within the one year statutory period.[17] The United States Court of Appeals for the Third Circuit affirmed this holding.[18] The appellate court read the clear and unequivocal language of the rule as requiring that the added defendant receive notice within the statute of limitations period.[19]

The United States Supreme Court upheld the ruling of the court of appeals.[20] Agreeing with the district court's analysis, the Court held that the phrase "within the period provided by law for commencing the action against [the relation-back defendant]" required the receipt of notice by the joined party before the expiration of the applicable statute of limitations.[21] The Court based its decision on rule 15(c)'s plain language. Because Time did not receive notice of the action until served with process four days after the statute of limitations had run, plaintiff failed to fulfill the notice requirement of rule 15(c) and the amended complaint could not relate back to the date of the original pleading. The statute of limitations thus barred the action.[22]

Rule 15(c) permits the amendment changing the defendant to relate back to the date of the original pleading if the "claim . . . in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading . . . and, within the period provided by law for commencing the action against" the added defendant, two requirements are met: (1) the new defendant received notice so that "he will not be prejudiced in maintaining his defense on the merits"; and (2) the new defendant "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."[23] The circuit courts split in the application of rule

16. *Id.* at 73-75. The district court did not consider whether the period for notice under rule 15(c) includes reasonable time for service of process. *Id.* at 75 n.1. On appeal, plaintiff raised the issue of rule 15(c)'s notice requirement. *Schiavone*, 106 S. Ct. at 2382-83; *Schiavone*, 750 F.2d at 17-18.

17. *Schiavone*, 38 Fed. R. Serv. 2d (Callaghan) at 75.

18. *Schiavone*, 750 F.2d at 15.

19. *Id.* at 18. The court of appeals said,

> While we are sympathetic to plaintiff's arguments, we agree with the defendant that it is not this court's role to amend procedural rules in accordance with our own policy preferences. We hold, therefore, that the period within which defendant must receive notice under rule 15(c) does not include the time provided for service of process.

Id.

20. *Schiavone*, 106 S. Ct. at 2386.

21. *Id.* at 2385.

22. *Id.*

23. *See, e.g.*, Trace X Chem. Inc. v. Gulf Oil Chem. Co., 724 F.2d 68, 70 (8th Cir. 1983). For the full text of rule 15(c), see *supra* note 2.

Prior to 1966, rule 15(c) provided:

> Relation Back of Amendments. 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.

15(c) when the amendment changed the defendant after the statute of limitations had run.[24] The controversy among the circuit courts focused on whether the phrase, "within the period provided by law for commencing the action against [the relation-back defendant]," could be viewed flexibly.[25]

The majority position construed rule 15(c) strictly.[26] This literal interpretation viewed the clear, explicit language of the rule as requiring that the relation-back defendant receive notice prior to the running of the statute of limitations.[27] The majority of courts read the express words of the rule as leaving no room for deviance because "the period provided by law for commencing the action" omits any mention of the period allowed for service of process.[28] Thus, a court adhering to the literal approach would require a plaintiff seeking the procedural benefits of rule 15(c) to satisfy each unambiguous provision and

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See FED. R. CIV. P. 15(c) advisory committee notes.

Rule 15(c) was revised because some courts had refused to allow amendments that added new parties after the statute of limitations had run. *See* Martz v. Miller Bros. Co., 244 F. Supp. 246, 249 (D. Del. 1965); Kerner v. Rackmill, 111 F. Supp. 150, 151 (M.D. Pa. 1953). These courts reasoned that the addition of a new party created a new cause of action; therefore, the amendment did not arise out of the original pleading, and the statute of limitations barred the change. *Martz*, 244 F. Supp. at 249; *Kerner*, 111 F. Supp. at 151. Rule 15(c), in its present form, attempts to remedy what commentators perceived as harsh results that defeated claims on a mere technical basis. *See* FED. R. CIV. P. 15(c) advisory committee notes ("[C]haracterization of the amendment as a new proceeding is not responsive to the reality, but is merely question-begging; and to deny relation-back is to defeat unjustly the claimant's opportunity to prove his case."); 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1498, at 504-07 (1971). By expressly allowing for the change of parties, the Advisory Committee hoped to correct the inconsistent application of Rule 15(c) so that actions would be decided on the merits. 6 C. WRIGHT & A. MILLER, *supra*, § 1498, at 504-07. For discussion of the historical treatment of changing parties under rule 15(c) and the separate standard that developed for misnomers, see *infra* notes 82-85 and accompanying text.

24. Some courts focused on the explicit requirements of the rule. *E.g.*, Weisgal v. Smith, 774 F.2d 1277, 1279 (4th Cir. 1985); Cooper v. United States Postal Serv., 740 F.2d 714, 716 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2034 (1985); Watson v. Unipress, Inc., 733 F.2d 1386, 1390 (10th Cir. 1984); Trace X Chem. Inc. v. Gulf Oil Chem. Co., 724 F.2d 68, 70 (8th Cir. 1983); Hughes v. United States, 701 F.2d 56, 58 (7th Cir. 1982); Ringrose v. Engelberg Huller Co., 692 F.2d 403, 405 (6th Cir. 1982); Odence v. Salmonson Ventures, 108 F.R.D. 163, 170 (D.R.I. 1983). Other courts and judges, however, construed the rule as having a broader policy. *E.g.*, Hendrix v. Memorial Hosp., 776 F.2d 1255, 1257 (5th Cir. 1985); *Ringrose*, 692 F.2d at 410-11 (Jones, J., concurring); Kirk v. Cronvich, 629 F.2d 404, 407-08 (5th Cir. 1980); Ingram v. Kumar, 585 F.2d 566, 571-72 (2d Cir. 1978), *cert. denied*, 440 U.S. 940 (1979); United States *ex rel.* Arrow Elecs., Inc. v. G.H. Coffey Co., 100 F.R.D. 413, 416 (D. Me. 1983).

25. *See* Cooper v. United States Postal Serv., 105 S. Ct. 2034, 2036 (1985) (White, J., dissenting) (disagreeing with the Court's denial of certiorari and discussing the split among the lower courts).

26. *See* Weisgal v. Smith, 774 F.2d 1277, 1279 (4th Cir. 1985); *Cooper*, 740 F.2d at 716; Watson v. Unipress, Inc., 733 F.2d 1386, 1390 (10th Cir. 1984); Trace X Chem. Inc. v. Gulf Oil Chem. Co., 724 F.2d 68, 70 (8th Cir. 1983); Hughes v. United States, 701 F.2d 56, 58 (7th Cir. 1982); Ringrose v. Engelberg Huller Co., 692 F.2d 403, 405 (6th Cir. 1982); Odence v. Salmonson Ventures, 108 F.R.D. 163, 170 (D.R.I. 1985).

27. *See, e.g.*, *Weisgal*, 774 F.2d at 1279 ("The language of the Rule requires, in plain and in clear terms, that the notice be given 'within the limitations period.' "); *Odence*, 108 F.R.D. at 170 ("When a change in the identity of parties is in prospect, 'notice of the institution of the action' must be received [within the limitations period].").

28. *See Weisgal*, 774 F.2d at 1279); Tretter v. Johns-Manville Corp., 88 F.R.D. 329, 332 (E.D. Mo. 1980); FED. R. CIV. P. 15(c); *cf. Walker*, 446 U.S. at 752-53 (state law defines "commencement" in diversity actions brought in federal court). For further discussion of *Walker*, see *infra* notes 103-107 and accompanying text. For state law problems with the *Schiavone* Court's definition of "commencement," see *infra* notes 102-22 and accompanying text.

would refuse to grant a time extension through an unwarranted judicial gloss.[29]

The minority approach expanded—by judicial construction—the specified period for notice under the rule.[30] In *Ingram v. Kumar*[31] the United States Court of Appeals for the Second Circuit broke from the literal interpretation by ruling that "the period provided by law for commencing the action against" the added defendant includes an allowance of time for service of process during which notice could be received.[32] The *Ingram* court permitted, under rule 15(c), plaintiff's amendment that changed the designated defendant from Vijaya N. Kumar to Vijay S. Kumar even though the added defendant did not receive notice until several weeks after the statute of limitations had run.[33] The court recognized that this flexible reading of rule 15(c)'s language would extend the notice period beyond the statute of limitations in jurisdictions that allow service after the statutory period's expiration. However, the court justified its result as consistent with rule 15(c)'s purpose.[34] To serve justice and avoid unduly harsh results, the *Ingram* court adopted a flexible approach that would permit a decision on the merits.[35]

On a superficial level, the conflict over the notice provision in rule 15(c) raises a question of statutory construction. The *Schiavone* Court identified the issue as a choice "between recognizing or ignoring what the Rule provides in plain language";[36] it thus adopted the literal interpretation.[37] Although this re-

29. *See, e.g., Weisgal*, 774 F.2d at 1279; *Hughes*, 701 F.2d at 58 ; *Odence*, 108 F.R.D. at 171.

30. *See* Hendrix v. Memorial Hosp., 776 F.2d 1255, 1257 (5th Cir. 1985); Ringrose v. Engelberg Huller Co., 692 F.2d 403, 410-11 (6th Cir. 1982) (Jones, J., concurring); Kirk v. Cronvich, 629 F.2d 404, 407-08 (5th Cir. 1980); Ingram v. Kumar, 585 F.2d 566, 571-72 (2d Cir. 1978), *cert. denied*, 440 U.S. 940 (1979); United States *ex rel.* Arrow Elecs. Inc. v. G.H. Coffey Co., 100 F.R.D. 413, 416 (D. Me. 1983).

31. 585 F.2d 566 (2d Cir. 1978), *cert. denied*, 440 U.S. 940 (1979).

32. *Id.* at 571-72.

33. *Id.* at 567-68, 571-72.

34. *Id.* at 571. The court relied on the language of rule 15(a) to support its position. The rule states:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calender, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and *leave shall be freely given when justice so requires.* A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

FED. R. CIV. P. 15(a) (emphasis added).

The *Ingram* court reasoned that the "when justice so requires" language of rule 15(a) applied to all amendments. Thus, plaintiff's amendment under rule 15(c) would be allowed because justice required the court to reach the merits of the case. *Ingram*, 585 F.2d at 571-72.

35. *Ingram*, 585 F.2d at 571. For further elaboration of the *Ingram* decision, see *infra* notes 53-58 and accompanying text; *see also supra* note 23 (rule 15(c) amended to permit change of parties and thus avoid defeating actions on technicalities).

36. *Schiavone*, 106 S. Ct. at 2385. The Court refused to view the issue as "a choice between a 'liberal' approach toward Rule 15(c), on the one hand, and a 'technical' interpretation of the Rule, on the other hand." *Id.*

37. *Id.* This Note does not consider the *type* of notice that the relation-back defendant must receive under the literal interpretation. *Compare* Hughes v. United States, 701 F.2d 56, 58 (7th Cir. 1982) (requiring *actual* notice prior to the expiration of the statute of limitations) *with* Kirk v.

sult is consistent with the principles of statutory construction,[38] the Court failed to resolve the more basic issue that had split the circuit courts: the literal interpretation of rule 15(c) creates a double standard under which a relation-back defendant possesses more rights than the original defendant.[39] In jurisdictions that permit service of process after the statute of limitations has expired, the original defendant may receive notice of the suit when served after the statutory period. The action is still commenced in a timely manner.[40] In contrast, under the Court's decision in *Schiavone*, a relation-back defendant must receive notice prior to the running of the statute of limitations.[41] Thus, the added defendant not only benefits from a more stringent notice requirement than the original defendant, but also receives more rights than the law would provide had the original complaint designated the relation-back defendant as the proper party in the first instance.[42] Why the double standard? Not surprisingly, courts and commentators have argued both sides of the double standard issue.[43] The *Schiavone* Court, however, dismissed the minority position without discussing the double standard or the accompanying policy ramifications of the double standard problem. The double standard remains; easy answers rarely satisfy.

The inherent defect in rule 15(c) did not suddenly emerge in *Ingram*. Before the adoption of the proposed amendment that inserted the notice requirement in rule 15(c),[44] a "curious but minor difficulty of interpretation [arose] over the language of the rule referring to the limitations period."[45] In *Martz v. Miller Brothers Co.*,[46] the United States District Court for the District of Delaware applied the proposed rule and discovered an "anomalous result" that threatened to defeat the purpose for amending the rule.[47] In *Martz* a common agent for the original defendant and the relation-back defendant received process three days after the statute of limitations had expired.[48] Discussing the

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Cronvich, 629 F.2d 404, 407 (5th Cir. 1980) (viewing *constructive* or informal notice as sufficient under rule 15(c)).

38. *See* Weisgal v. Smith, 774 F.2d 1277, 1279 (4th Cir. 1985) (court's responsibility is to apply the rule as written); Cooper v. United States Postal Serv., 740 F.2d 714, 716 (9th Cir. 1984) (adhering to literal interpretation), *cert. denied*, 105 S. Ct. 2034 (1985); Odence v. Salmonson Ventures, 108 F.R.D. 163, 170 (D.R.I. 1985) ("[C]onstruction of a rule of procedure must start with the verbiage of the rule . . . . There is nothing uncertain or amphibolous in the plain wording of the rule.").

39. *E.g.*, *Ingram*, 585 F.2d at 571 ("There is no reason why a misnamed defendant is entitled to earlier notice than he would have received had the complaint named him correctly."). Plaintiff in *Schiavone* argued that the literal interpretation of rule 15(c) created a "double standard" of notice between the new defendant and the original defendant. Record at 5, *Schiavone* (No. 84-1839). Thus, the Court was aware of the issue.

40. *Ingram*, 585 F.2d at 571.

41. *Schiavone*, 106 S. Ct. at 2385.

42. *Ingram*, 585 F.2d at 571.

43. *See infra* notes 59-70 and accompanying text.

44. For the text of rule 15(c) prior to amendment and the reason for the amendment, see *supra* note 23.

45. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 410 (1967). Mr. Kaplan served as reporter for the Advisory Committee from its organization in 1960 until he joined the Committee on July 1, 1966. *Id.* at 356.

46. 244 F. Supp. 246 (D. Del. 1965).

47. *Id.* at 254. For the purpose behind the rule's amendment, see *supra* note 23.

48. *Martz*, 244 F. Supp. at 254.

proposed rule the court explained that even though the delayed service timely commenced the action against the original defendant, the theory of notice inserted into the rule prevented the amendment joining the new defendant from relating back.[49] The rule produced this inconsistent treatment because state statutes of limitations concentrate on filing the complaint rather than notifying the defendant within the prescribed period.[50] Thus, by gearing notice to the statutory period, rule 15(c) determines joinder of the relation-back defendant according to a standard that fails to appear in the statutes of limitations. Effecting a significant transformation in the role of a state statute, the rule inserts a notice provision where none had existed, and relation-back becomes more difficult for the plaintiff.[51]

After rule 15(c)'s adoption, courts applying the notice provision of the rule confronted this anomalous result. The majority of courts opted for the literal approach despite the resulting double standard.[52] The *Ingram* court recognized the inherent defect and, given the compelling circumstances, sought an interpretation consistent with the rule's purpose.[53] In *Ingram* plaintiff filed a medical malpractice suit just before the statutory period's expiration and designated Vijaya N. Kumar as defendant.[54] Nearly fifteen weeks after the statute of limitations had run, plaintiff realized that the complaint named the incorrect physician. Thus, plaintiff served Vijay S. Kumar, the proper defendant, with the original complaint.[55] The second defendant moved to dismiss on limitations grounds. Plaintiff argued that, pursuant to rule 15(c), the amended complaint naming Vijay S. Kumar related back to the date of the original pleading.[56] Addressing the crucial notice element of rule 15(c), the court said:

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49. The *Martz* court stated:

> Thus, in this instance, under the proposed rule, we have the anomalous result that service on dePolo as an agent of Miller Brothers Company would properly commence a law suit although service on dePolo as an agent of Miller Brothers of Newark (should he be found to be an agent) would not.

Id.

50. Haworth, *Changing Defendants in Private Civil Actions under Federal Rule 15(c)—An Ancient Problem Lingers On*, 1975 WIS. L. REV. 552, 563. For discussion of the dual component of the statute of limitations, see *infra* notes 116-18 and accompanying text.

51. The *Martz* court questioned whether the inconsistent result under the notice requirement might defeat the purposes behind the change. *Martz*, 244 F. Supp. at 254 n.21. For proposed solutions to the double standard, see *infra* notes 123-27 and accompanying text; *see also infra* notes 116-18 and accompanying text (discussing the filing and service components of the statute of limitations).

52. *See* cases cited *supra* note 26.

53. *Ingram*, 585 F.2d at 571-72. The difficulties encountered with the language of rule 15(c) signaled the need for change in its application either by revised judicial interpretation or by further amendment to the rule. Note, *Federal Rule of Civil Procedure 15(c): Relation Back of Amendments*, 57 MINN. L. REV. 83, 104 (1972). For discussion of proposed amendments, see *infra* notes 123-27 and accompanying text.

54. *Ingram*, 585 F.2d at 567. Plaintiff sued on her own behalf and as administratrix of her husband's estate. *Id.*

55. *Id.* Vijaya N. Kumar, a physician in Valhalla, New York, never treated the decedent. After learning that Vijay S. Kumar resided in Jamestown, New York, plaintiff served defendant with the original complaint that still misnamed the proper party. An error by plaintiff's attorney apparently caused the confusion over the two physicians. *Id.*

56. *Id.* at 567-68. Plaintiff moved to amend under rule 15(c) to change defendant from Vijaya N. Kumar to Vijay S. Kumar. *Id.*

> Although on its face the phrase, "within the period provided by law for commencing the action against him," seems to mean the applicable statute of limitations period, such a literal interpretation is unjustified in jurisdictions where timely service of process can be effected after the statute of limitations has run. In those jurisdictions, even an accurately named defendant may not receive notice of the action against him prior to the running of the statute of limitations. Yet there is no doubt that the action against him is timely commenced. There is no reason why a misnamed defendant is entitled to earlier notice than he would have received had the complaint named him correctly.[57]

Finding that justice compelled relation-back and a decision on the merits, the *Ingram* court held that the period during which the relation-back defendant must receive notice includes the time allowed for service of process.[58]

Some courts have found the *Ingram* court's flexible approach consistent with the basic purpose of rule 15(c).[59] Those judges who advocate the elimination of the double standard have justified their position with several arguments. Because relation-back, in effect, treats the added defendant as if properly named in the original complaint, no valid purpose exists for requiring more expeditious notice than the defendant originally deserved under local law.[60] Furthermore, the rule's plain language supports the flexible interpretation.[61] The period provided by law for commencing the action against the defendant contains two components: first, the complaint must be filed within a specific period; and second, the action must be brought against the defendant through service of process.[62] Given the close historical relationship between the notice requirement and the statute of limitations, proponents of the *Ingram* standard incorporate

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57. *Id.* at 571. For analysis of the interaction between commencement in Rule 15(c) and state law in diversity cases, see *infra* notes 102-22 and accompanying text.

58. *Ingram*, 585 F.2d at 571-72. The court treated the amendment as a change of parties. Even though defendant did not receive notice until four months after the statute of limitations had lapsed, the court stated, "This case presents an excellent situation for specific application of the Rule's general admonition that 'leave [to amend] shall be freely given when justice so requires.' " *Id.* at 571 (quoting FED. R. CIV. P. 15(a)). For the full text of Rule 15(a), see *supra* note 34.

59. *See, e.g.*, Kirk v. Cronvich, 629 F.2d 404, 408 (5th Cir. 1980); United States *ex rel.* Arrow Elecs. Inc. v. G.H. Coffey Co., 100 F.R.D. 413, 416 (D. Me. 1983); *see also Schiavone*, 106 S. Ct. at 2389 (Stevens, J., dissenting) ("Moreover, the specific liberalizing purpose of the 1966 amendment to the Rule is frustrated if the added language is construed to cut back on the number of cases in which relation-back is permitted."); 3 J. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 15.15[2], at 15-146 (2d ed. 1985) ("[T]he general philosophy of the pleading rules is that they should give fair notice, should be liberally construed, be subject to liberal amendment, and that decisions should be on the merits and not on technical niceties of pleading."); 19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4509, at 156 (1982) ("The thrust of Rule 15(c), after all, is to preserve claims from extinction on technical limitations grounds while at the same time honoring the policies underlying statutes of limitations.").

60. *See Schiavone*, 106 S. Ct. at 2388-89 (Stevens, J., dissenting); Ringrose v. Engelberg Huller Co., 692 F.2d 403, 410 (6th Cir. 1982) (Jones, J., concurring); *see also* 3 J. MOORE, *supra* note 59, ¶ 15-15[2], at 15-144, 15-146 (notice provision involves consideration of the new defendant's rights if he or she had been named in original complaint).

61. *See Schiavone*, 106 S. Ct. at 2388 (Stevens, J., dissenting); *Ringrose*, 692 F.2d at 410-11 (Jones, J., concurring).

62. See *Schiavone*, 106 S. Ct. at 2388 (Stevens, J., dissenting); *Ringrose*. 692 F.2d at 410-11 (Jones, J., concurring); *see also infra* notes 116-18 (discussing the filing and the service provisions involved in "commencement").

the filing and service components of the statute of limitations.[63] Thus, *Ingram*'s progeny reject the overly mechanical, literal approach to rule 15(c) as not only producing harsh results, but also failing to account for all the "components" that determine the "period provided by law" for commencing the action against the defendant.[64]

Other courts have criticized the *Ingram* court's solution as contrary to settled principles of statutory construction.[65] For followers of the literal approach, the double standard does not undermine the purpose of rule 15(c).[66] Because the rule operates as a special dispensation to the plaintiff who errs in the original complaint, the plaintiff must comply with the rule's strict requirements.[67] Thus, the double standard poses no threat to rule 15(c)'s purpose, and courts rejecting *Ingram* have dismissed actions on limitations grounds when notice occurs after the statutory period.[68] Moreover, critics of the flexible approach argue that the

63. *See Schiavone*, 106 S. Ct. at 2389 (Stevens, J., dissenting) ("For the majority, relying so heavily on what it views as the clarity of the language before it, ignores the mission and history of Rule 15(c)."); *Ringrose*, 692 F.2d at 411 (Jones, J., concurring) ("[A] notice rule which accounts for the standard tolling period as part of the 'period provided by law for commencing the action' properly recognizes the intimate connection between relation-back rules and the policy of the statute of limitations."); *see also* FED. R. CIV. P. 15(c) advisory committee's notes ("Relation back is intimately connected with the policy of the statute of limitations.").

64. Because the defendant usually receives notice through service of process rather than the filing of the complaint, rule 15(c)'s notice provision should recognize the procedural devices allowed under service of process rules. *See Ringrose*, 692 F.2d at 410-11 (Jones, J., concurring) (timely service under state law should satisfy rule 15(c)); United States *ex rel.* Arrow Elecs. Inc. v. G.H. Coffey, Co., 100 F.R.D. 413, 416-17 (D. Me. 1983) (notice within the 120 days allowed for service of process under federal rules of civil procedure accommodates statute of limitations). For criticism of *Arrow*, see Note, United States *ex rel.* Arrow Electronics, Inc. v. G.H. Coffey Co.: *Judicial Interpretation of Timely Notice Under Federal Rule of Civil Procedure 15(c)*, 37 ME. L. REV. 153 (1985).

The question arises whether the arguably harsh results produced by the double standard parallel the unjust results that led to the amendment of rule 15(c) in 1966. For the text of pre-1966 rule 15(c) and the reason for its amendment, see *supra* note 23; *see also infra* notes 81-85 and accompanying text (rule 15(c) amended to eliminate the inconsistent treatment of misnomers and changing parties); *infra* notes 123-27 and accompanying text (proposed amendments to present rule 15(c)).

65. *E.g.*, Weisgal v. Smith, 774 F.2d 1277, 1279 (4th Cir. 1985) (court's responsibility is to apply the rule as written); Cooper v. United States Postal Serv., 740 F.2d 714, 716 (9th Cir. 1984) (adhering to literal interpretation), *cert. denied*, 105 S. Ct. 2034 (1985); Odence v. Salmonson Ventures, 108 F.R.D. 163, 170 (D.R.I. 1985) ("[C]onstruction of a rule of procedure must start with the verbiage of the rule . . . . There is nothing uncertain or amphibolous in the plain wording of the rule."). It is argued that rewriting a federal rule through judicial interpretation would invade the province of the legislature. *Cooper*, 740 F.2d at 716-17. *But cf.* 28 U.S.C. § 2072 (1982) (authorizing the United States Supreme Court to prescribe the Federal Rules of Civil Procedure under the Rules Enabling Act.); *infra* note 128 (discussing Supreme Court control over the Federal Rules of Civil Procedure).

66. By its express terms rule 15(c) distinguishes between the original and the relation-back defendant. Rule 15(c) focuses on the notice and the knowledge of the added defendant, although those factors would be irrelevant for analyzing the original defendant. *See* Tretter v. Johns-Manville Corp., 88 F.R.D. 329, 332 (E.D. Mo. 1980). In contrast, the *Ingram* court concentrated on the plaintiff's motive and intent. *See* Holden v. R.J. Reynolds Indus., 82 F.R.D. 157, 160-61 n.1 (M.D.N.C. 1979) (discussing *Ingram* at length). Thus, the flexible interpretation improperly shifts the court's attention from protecting the relation-back defendant's rights to mitigating the plaintiff's hardship. *Id.*

67. *E.g.*, Odence v. Salmonson Ventures, 108 F.R.D. 163, 171 (D.R.I. 1985).

68. *See* Weisgal v. Smith, 774 F.2d 1277 (4th Cir. 1985); Cooper v. United States Postal Serv., 740 F.2d 714 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2034 (1985); Odence v. Salmonson Ventures, 108 F.R.D. 163 (D.R.I. 1985). The court in *Odence* also stressed plaintiff's fault for the dismissal: "Had he not dawdled in the eleventh hour, he would not be caught in the time warp which he now brands as 'unfair.' " *Odence*, 108 F.R.D. at 172. The *Schiavone* Court echoed the belief that plaintiff

Ingram court's reformulation destroys the carefully structured prerequisites designed to allow relation-back despite the added defendant's limitations defense under local law.[69] The literal interpretation, on the other hand, strikes the proper balance under rule 15(c) by upholding the values of repose, certainty, and finality associated with the policy behind statutes of limitations, but permitting the court to reach the merits of the case when justice requires.[70]

The double standard inherent in rule 15(c) has evoked valid arguments for both sides. The *Schiavone* Court, however, failed to address the double standard.[71] The Court arguably alluded to the problem by stating: "The linchpin is notice, and notice within the limitations period. Of course, there is an element of arbitrariness here, but that is characteristic of any limitations period. And it is an arbitrariness imposed by the legislature and not by the judicial process."[72] If the "linchpin is notice," however, consideration of the double standard should have appeared at the forefront of the decision—especially because the inherent defect in the notice requirement touched off the dispute among the circuit courts.[73] A thorough decision would have discussed the minor difficulty that blossomed into a significant policy question concerning the purpose of rule 15(c).[74] Even though the notice issue can be neatly dispensed with thorough statutory construction, the double standard remains.

The need to resolve the double standard becomes even more compelling

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had caused the predicament: "We cannot understand why, in litigation of this asserted magnitude, Time was not named specifically as the defendant in the caption and in the body of each complaint." *Schiavone*, 106 S. Ct. at 2383.

69. *See* Tretter v. Johns-Manville Corp., 88 F.R.D. 329 (E.D. Mo. 1980); Holden v. R.J. Reynolds Indus., 82 F.R.D. 157 (M.D.N.C. 1979). Without rule 15(c)'s safeguards, depriving the relation-back defendant of the statute of limitations defense might raise questions of procedural due process. *See* 6 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1498, at 250 (Supp. 1986). *But see infra* notes 94-101 and accompanying text (rule 15(c) necessarily involves issues of substance and procedure).

70. *See* Weisgal v. Smith, 774 F.2d 1277 (4th Cir. 1985); Cooper v. United States Postal Serv., 740 F.2d 714 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2034 (1985); Odence v. Salmonson Ventures, 108 F.R.D. 163 (D.R.I. 1985); *see also* Note, *supra* note 64, at 165 (the value of a definite period outweighs any potential problems of anomalous result). One court has even suggested that although *Ingram*'s interpretation works well in compelling situations, the potential for abuse in applying rule 15(c) is too great under the flexible analysis. Holden v. R.J. Reynolds Indus., 82 F.R.D. 157, 160-61 n.1 (M.D.N.C. 1979).

71. Plaintiff in *Schiavone* argued that the restrictive view of rule 15(c) operates to preclude

> relation-back, unless notice reaches the party to be brought in, before the Statute of Limitations has run, because, for some never articulated reason, it is essential that a new party, unlike the original party, have the running head start of knowing that he is in Court sooner than justice, under the Rules, commands for the original party.

Record at 24, *Schiavone* (No. 84-1839). Thus, plaintiff's double standard argument presented the Court with an opportunity to articulate some reason for the inconsistency.

72. *Schiavone*, 106 S. Ct. at 2385. Yet, the arbitrariness in the Federal Rules of Civil Procedure is imposed by the Supreme Court through its power under the Rules Enabling Act. *See infra* note 128 (noting power of Supreme Court over interpretation and amendment of the Federal Rules of Civil Procedure).

73. *See supra* text accompanying notes 32-35 (discussing the *Ingram* court's efforts to deal with this defect).

74. *See Schiavone*, 106 S. Ct. at 2389 (Stevens, J., dissenting) ("The principal purpose of Rule 15(c) is to enable a plaintiff to correct a pleading error after the statute of limitations has run if the correction will not prejudice his adversary in any way. That purpose is defeated—and the Rule becomes largely superfluous—if it is construed to require the correction to be made before the statute has run.").

when the original defendant and the relation-back defendant are essentially the same party. Plaintiff in *Schiavone* recognized that notice within the statutory period may involve valid concerns when a truly new defendant is joined. However, when both defendants are connected by an identity of interest, the notice requirement impedes justice.[75] The "identity of interest doctrine" holds that the institution of an action against the original defendant provides constructive notice to other parties subsequently added under rule 15(c) if the original and relation-back defendants are closely related in business operations or other activities.[76] Because Fortune is the trade name of its publisher, Time Inc., the *Schiavone* Court considered the identity of interest concept.[77] Consistent with the literal approach, the Court reasoned that even if the doctrine applied, plaintiff's failure to serve Fortune within the statute of limitations proved fatal.[78] For the notice imputed to the added defendant to be effective under rule 15(c), the original defendant must have received notice prior to the lapse of the statutory period.[79] In *Schiavone* no proper notice could be imputed under the identity of interest doctrine because both Fortune and Time received process after the one year period.[80]

Another identity-related issue that arises from *Schiavone* concerns the treatment of misnomers and misdescriptions under rule 15(c).[81] Historically, a separate, liberal standard existed for misnomers such that an amendment correcting a minor misdescription merely had to arise out of the same occurrence to relate back under rule 15(c).[82] When the Advisory Committee amended the rule to provide expressly for changing defendants, the Committee consciously abolished

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75. Record at 27, *Schiavone* (No. 84-1839).

76. *E.g.*, Hernandez Jimenez v. Calero Toledo, 604 F.2d 99, 102-03 (1st Cir. 1979); 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 69, § 1499, at 268. The *Hernandez* court stated,

> The identity of interest principle is often applied where the original and added parties are a parent corporation and its wholly owned subsidiary, two related corporations whose officers, directors, or shareholders are substantially identical and who have similar names or share office space, past and present forms of the same enterprise, or co-executors of an estate.

Hernandez, 604 F.2d at 103.

77. *Schiavone*, 106 S. Ct. at 2384.

78. *Id.*

79. The Court described the doctrine as an "exception . . . to avoid the application of the statute of limitations when no prejudice would result to the party sought to be added." *Id.* However, even though the delayed service caused no prejudice to Time, the Court nevertheless required compliance with the notice requirement. The Court's view of notice and prejudice thus creates a dual standard under rule 15(c). Notice is no longer tied to prejudice, but becomes instead a technical requirement that in itself can prevent application of relation-back principles. *See infra* notes 90, 129 and accompanying text.

80. *Schiavone*, 106 S. Ct. at 2384.

81. The *Schiavone* Court failed to deal with the misnomer issue. Justice Stevens, in dissent, noted this flaw in the majority's opinion. *Id.* at 2389-90 (Stevens, J., dissenting); *see also Schiavone*, 750 F.2d at 17 (expressing no opinion whether the literal interpretation applies to misnomers).

82. *See* Archuleta v. Duffy's, Inc., 471 F.2d 33, 35 (10th Cir. 1973) (distinguishing between misnomers and the substitution of parties, with a more lenient standard applying to misnomers); *Martz*, 244 F. Supp. at 249 (recognizing misnomer analysis differs from that applied to changing parties); *see also* Armijo v. Welmaker, 58 F.R.D. 553, 555 (D. Ariz. 1973) (transposition of the defendant's name on the original complaint tolls the statute of limitations for amendment); Wentz v. Alberto Culver Co., 294 F. Supp. 1327, 1328-29 (D. Mont. 1969) (misnomers and misdescriptions can be corrected under the standard of the first sentence of Rule 15(c)).

the dichotomy that previously had existed between correcting misnomers and adding new defendants.[83] Under the present form of rule 15(c), which includes the notice requirement, an amendment that corrects a misnomer or a misdescription of the defendant is treated as changing a party.[84] Given this historical union of misnomers and changing a party for relation-back purposes, the separate standard for misnomers is a dead letter.[85] Thus, rule 15(c)'s notice requirement applies to situations involving misnomers and misdescriptions as well as to situations in which defendants are truly changed.

Under *Schiavone* a court must scrutinize misnomers and misdescriptions in the original complaint under the literal interpretation when the plaintiff seeks to relate back the amended pleading.[86] Therefore, the court must dismiss the plaintiff's action when an incorrect description of the defendant appears in the original complaint, if the defendant did not receive notice within the statute of limitations.[87] A hypothetical illustrates *Schiavone*'s application to misnomers and misdescriptions. Suppose plaintiff in *Schiavone* had named "Time Incorporated" as defendant in the original complaint. Suppose further that "Time Inc.," not "Time Incorporated" was the accurate description of the corporate

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83. The Advisory Committee noted, "Rule 15(c) is amplified to state more clearly when an amendment of a pleading changing the party against whom a claim is asserted (*including an amendment to correct a misnomer or misdescription of a defendant*) shall 'relate back' to the date of the original pleading." FED. R. CIV. P. 15(c) advisory committee's notes (emphasis added). By prescribing the procedure for changing the defendant, the Committee hoped to correct the inconsistent treatment of misnomers and of the addition of new parties that had developed under the old rule 15(c). *Id.* For the text of rule 15(c) prior to amendment and its application to amendments changing parties, see *supra* note 23.

84. The court in *Ingram*, although known for its flexible approach to rule 15(c)'s notice provision, concluded that the rule's history and the weight of authority required amendments correcting misnomers to be analyzed under a changing the party standard. Further, the court observed, "Analysis of 'relation back' . . . is better accomplished through application of specific guidelines in the second sentence of Rule 15, than by attempting to draw an arbitrary line between misnomers and changes of party." *Ingram*, 585 F.2d at 570.

85. The Advisory Committee's elimination of the separate standard for misnomers is given even more weight in light of the *Schiavone* decision. Equating the notice requirement with the statute of limitations, the Court relied heavily on the Advisory Committee's comments. *Schiavone*, 106 S. Ct. at 2385. To be consistent with the significance placed on the Advisory Committee's notes in *Schiavone*, the Court would have to uphold the union of standards under the second sentence of rule 15(c) in future cases involving misnomers. *But see* Archuleta v. Duffy's Inc., 471 F.2d 33, 35 (10th Cir. 1973) (recognizing a liberal standard for misnomers under present rule 15(c)); Wentz v. Alberto Culver Co., 294 F. Supp. 1327, 1328-29 (D. Mont. 1969) (changing the party criteria inapplicable to misnomers).

86. *Schiavone* requires that the relation-back defendant receive notice prior to the expiration of the statute of limitations. *Schiavone*, 106 S. Ct. at 2385. The notice requirement applies to amendments correcting misnomers that relate back under rule 15(c). For treatment of misnomers under rule 15(c), see *supra* notes 83-85 and accompanying text.

87. *E.g.*, Archuleta v. Duffy's, Inc., 471 F.2d 33 (10th Cir. 1973). Plaintiff in *Archuleta* filed suit within the statutory period against "Denver Pop Company, . . . formerly known as and d/b/a/ Duffy's Inc." *Id.* at 34. Plaintiff served process after the statute of limitations had run. *Id.* Although the same person owned both Denver Pop and Duffy's, the two corporations were separate and unrelated. Plaintiff should have named Duffy's as defendant, but the Colorado Secretary of State incorrectly described the entities when contacted by plaintiff's attorney. *Id.* at 34 n.2. The United States Court of Appeals for the Tenth Circuit refused to apply rule 15(c) to plaintiff's amended complaint naming Duffy's as defendant, and the statute of limitations barred the action.

The dissent in *Archuleta* recognized that plaintiff sued the right party under the wrong name and criticized the majority's rigid view of the notice requirement as "not only unjust, but out of tune with the philosophy as well as the terms of Rule 15(c)." *Id.* at 39 (Doyle, J., dissenting).

entity that published Fortune.[88] If plaintiff served the named defendant after the statutory limitations period had expired, Time could defend the action successfully on limitations grounds. Because Time did not receive notice within the period prescribed by the literal interpretation, plaintiff's amended complaint correcting the inaccuracy could not relate back under rule 15(c).[89] Under *Schiavone* the case would be dismissed.[90] The same inequitable result would follow had plaintiff described Fortune as a subsidiary or division of Time.[91] Despite plaintiff's plain and unequivocal intent to sue Time, the court, bound by *Schiavone*, would have to dismiss the action because the inaccuracies in the complaint could not be cured by rule 15(c).[92]

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88. The *Schiavone* Court said, "An examination of the magazine's masthead clearly would have revealed the corporate entity responsible for the publication." *Schiavone*, 106 S. Ct. at 2383-84. Throughout its opinion the Court referred to "Time Incorporated." Yet, examination of the masthead of several magazines distributed by Time (including Time, People, Life, and Fortune) reveals that "Time Inc.," with its principle office at the Time & Life Building in New York, publishes the work. Even though "Inc." and "Incorporated" differ only in form, not substance, the *Schiavone* Court's literal interpretation concentrates on form: notice is a technical requirement. The hypothetical's reasoning applies to any deviation in the original complaint that fails to designate precisely the defendant's specific identification.

89. The dissent in *Schiavone* recognized the inequity caused by a mere discrepancy in corporate title:

> Because petitioners committed the 'fatal' error of identifying the defendant by its name of publication rather than by its name of incorporation, however, the Court finds that they fell through a trap door—despite the fact that the magazine publisher's agent contemporaneously noted his understanding that the suits were directed against the magazine publisher (Time Incorporated) fully as much as if the petitioners had included the magic words.

Schiavone, 106 S. Ct. at 2386 (Stevens, J., dissenting) (citations ommitted).

90. Does *Schiavone* drastically shift the focus in rule 15(c) from prejudice to notice, thereby twisting the application of relation-back? For a discussion of the prejudice element in the rule, see *infra* note 129 and accompanying text. Surely, the plaintiff believes that the original complaint names the correct adversary. Yet, even though no doubt exists concerning the intended defendant, the cautious (and intelligent) plaintiff will avoid *Schiavone*'s application by serving the named defendant prior to the expiration of the statute of limitations. In such a case rule 15(c) will permit relation-back provided that a misnomer exists, or the original defendant and the relation-back defendant have an identity of interest. For a discussion of identity of interest, see *supra* notes 75-80 and accompanying text; for a discussion of misnomers, *see supra*, notes 81-87 and accompanying text. Thus, *Schiavone*'s effect on the notice requirement severely limits the application of rule 15(c) unless the plaintiff discovers the mistake and remedies it before the statutory period expires, or by some stroke of luck, the relation-back defendant received notice within the statute of limitations. The availability of rule 15(c) thus is sharply curtailed. Moreover, what effect will *Schiavone* have in jurisdictions that allow the plaintiff to serve process on the defendant after the statutory period? For state law implications of the *Schiavone* decision, see *infra* notes 118-22 and accompanying text.

91. In *Schiavone* plaintiff's amended complaint failed to join Time as a separate defendant, but only designated the adversary as "Fortune, also known as Time Incorporated." *Schiavone*, 106 S. Ct. at 2380. The Court reacted to this amended description: "While the statement, 'Fortune, also known as Time Incorporated, was and is a corporation of the state of New York,' is not a model of accuracy, it does focus on Time and sufficiently describes Time as the targeted defendant." *Id.* at 2384. Does the literal approach allow the Court to consider the plaintiff's intent or target? Clearly, plaintiff intended to include Time in the libel suit because plaintiff served Time's New Jersey agent. *Id.* at 2380. Also, plaintiff's amended complaint still failed to name defendant correctly because Fortune did not exist as a corporate entity. *See supra* note 88 (discussing Time's specific title). Because misnomers and misdescriptions must comply with all requirements of rule 15(c), the defendant incorrectly designated in the original complaint must receive notice regardless of the plaintiff's intent. *See supra* notes 83-85 and accompanying text. Thus, the notice requirement provides a technical loophole allowing the original defendant to escape when the plaintiff's complaint is not a model of accuracy.

92. The question arises whether the framers of rule 15(c) intended this result. For the intent of

Not only did the *Schiavone* Court fail to address the double standard and misnomer problems, it also failed to consider questions concerning the application of state law. The district court in *Schiavone* exercised jurisdiction based on diversity of citizenship.[93] In *Erie Railroad Co. v. Tompkins*[94] the Supreme Court held that under the Constitution federal courts hearing diversity cases must apply state law when deciding substantive issues.[95] Rule 15(c), although a procedural device, involves state substantive rights because relation-back deprives the added defendant of the limitations defense under state law.[96] In *Hanna v. Plumer*,[97] however, the Court rejected the *Erie* doctrine's application to the Federal Rules of Civil Procedure.[98] The *Hanna* Court presumed the validity of the federal rules under the Rules Enabling Act and held that federal procedure prevails over contrary state practice.[99] Rule 15(c) is thus presumed valid under *Hanna*.[100] Even though rule 15(c) is valid in terms of *Erie*'s consti-

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the Advisory Committee to Rule 15(c), see *supra* notes 23, 83. Given the potentially unjust results that may occur when courts apply the literal interpretation to misnomers and misdescriptions, another split may surface in the circuit courts. To avoid *Schiavone* courts might apply only the first sentence of rule 15(c) to minor inaccuracies. *See* Archuleta v. Duffy's, Inc., 471 F.2d 33, 35 (10th Cir. 1973); Wentz v. Alberto Culver Co., 294 F. Supp. 1327, 1328-29 (D. Mont. 1969); *Martz*, 244 F. Supp. at 253-54; Armijo v. Welmaker, 58 F.R.D. 553, 555 (D. Ariz. 1973). For the possibility of amending rule 15(c) to provide a separate standard for misnomers and misdescriptions, see *infra* notes 126-27 and accompanying text.

93. *Schiavone*, 38 Fed. R. Serv. 2d (Callaghan) at 72; *see* 28 U.S.C.A. § 1332(a)(1) (1982) (diversity of citizenship jurisdiction).

94. 304 U.S. 64 (1938).

95. *Id.* at 78. "Congress has no power to declare substantive rules of common law applicable in a State . . . . And no clause in the Constitution purports to confer such a power upon the federal courts." *Id.*

96. Furthermore, rule 15(c) might permit relation-back when contrary state law is more restrictive. *See generally* 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 59, at § 4509 (discussing the relationship between *Erie* and Rule 15(c)).

97. 380 U.S. 460 (1965).

98. *Id.* at 470-72. *Hanna* decided the adequacy of service in a diversity suit. *Id.* at 462. The state law required service in hand but Federal Rule of Civil Procedure 4(d)(1) permitted service by leaving a copy of the complaint at the defendant's residence. *Id.* at 461-62. The *Hanna* Court held that Rule 4(d)(1) controls the method of service for diversity actions brought in the federal courts. *Id.* at 474.

99. The majority in *Hanna* stated:

> When a situation is covered by one of the Federal Rules, . . . the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

Id. at 471. The Rules Enabling Act provides that the Supreme Court shall have the power to prescribe procedural rules, but "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072 (1982). Adhering to *Hanna*, the Court has said that the *Erie* doctrine is not the appropriate test for analyzing the validity and applicability of the Federal Rules of Civil Procedure. *Walker*, 446 U.S. at 747-48 (citing *Hanna*, 380 U.S. at 470-72).

100. This Note does not attempt to discuss all the substantive and procedural implications of rule 15(c). *See generally* 3 J. MOORE, *supra* note 59, ¶ 15.15[2], at 15-141 to -142 (Rule 15(c) is solely procedural and outside scope of *Erie*); 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 59, § 4509, at 149-51 (balancing substantive intrusion under rule 15(c) with the need for comprehensive, uniform system of procedure in federal courts); Westen & Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 363-64 (1980) (federal rule presumed not to violate substantive right). Given the *Schiavone* decision, will the Court eventually face the substantive problems involved in Rule 15(c)'s application? For state law implications of Rule 15(c), see *infra* text accompanying notes 110-22; *see also* Marshall v. Mulrenin, 508 F.2d 39, 44-45 (1st Cir. 1974) (rejecting application of federal rule 15(c) in favor of more liberal state procedure). For a discussion of *Marshall*, see *infra* note 119.

tutional mandate and in terms of the Rules Enabling Act, the question still remains whether these facts address the precise issue before the Court in *Schiavone*.[101]

The exact issue before the *Schiavone* Court involved the interpretation of the phrase, "within the period provided by law for commencing the action against [the relation-back defendant]," for purposes of notice under rule 15(c).[102] To resolve this issue, the Court should have relied on precedent. In *Walker* the Court decided whether state law or the federal rule should determine "when the action is commenced for purposes of tolling the state statute of limitations" in a diversity suit.[103] Plaintiff in *Walker* contended that, pursuant to Federal Rule of Civil Procedure 3,[104] the diversity action commenced when the complaint was filed. State law did not deem the action "commenced" for tolling the statute of limitations until the plaintiff had served process on the defendant.[105] After considering *Hanna*, the Court held that the state statute defining commencement was "a statement of a substantive decision by that State that actual service on, and accordingly actual notice by, the defendant is an integral part of the several policies served by the statute of limitations."[106] Thus, rule 3's definition of commencement had no influence on the tolling of the state statute of limitations.[107]

In defining the notice period in *Schiavone*, the Court equated the statute of limitations with the language appearing in rule 15(c).[108] Justifying its refusal to extend the limitations period under the flexible approach, the Court stated:

> Rule 3 concerns the "commencement" of a civil action. Under Rule 15(c), the emphasis is upon "the period provided by law for commencing the action against" the defendant. An action is commenced by the filing of a complaint and, so far as Time is concerned, no complaint against it was filed on or prior to May 19, 1983.[109]

Why did the *Schiavone* court ignore *Walker*?[110] State law, not rule 3, deter-

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101. *See Walker*, 446 U.S. at 752 (*Hanna* inapplicable when federal rule not directly on point); C. WRIGHT, LAW OF FEDERAL COURTS § 59, at 385 (4th ed. 1983) (federal rule may not "[speak] to the precise issue before the court").

102. *Schiavone*, 106 S. Ct. at 2384-85.

103. *Walker*, 466 U.S. at 741.

104. Rule 3 provides simply that "[a] civil action is commenced by filing a complaint with the court." FED. R. CIV. P. 3.

105. *Walker*, 466 U.S. at 742-43.

106. *Id.* at 751.

107. *Id.* The Court said that rule 3 did not directly address the issue in *Walker* because the rule operates as a timing mechanism, not as a tolling provision. *Id.* at 750-51. Moreover, the *Hanna* analysis applies only to cases in which a direct conflict exists between the federal rule and state law. *Id.* at 752. Thus, the paramount question that a court must face when dealing with state substantive law and a federal rule is whether the rule covers the specific issue raised in the case. *See also* Ragan v. Merchants Transfer Co., 337 U.S. 530, 533 (1949) (state law determines when a diversity action is commenced in the federal courts).

108. *Schiavone*, 106 S. Ct. at 2384-85.

109. *Id.* at 2384.

110. Plaintiff in *Schiavone* raised the *Walker* question in the appeal from the district court decision, but the United States Court of Appeals for the Third Circuit declined to address the argument on the merits. *Schiavone*, 750 F.2d at 18-19.

mines the commencement of an action for tolling the statute of limitations.[111] Given the intimate connection between rule 15(c) and the statute of limitations, state law, rather than the federal rules, should control the interpretation of "the period provided by law for commencing the action against" the relation-back defendant.[112]

Other courts have recognized the precedential effect of *Walker* when applying rule 15(c).[113] In *Hunt v. Broce Construction Co.*[114] the United States Court of Appeals for the Tenth Circuit ruled that *Walker* controlled diversity suits involving rule 15(c) and that the state's definition of "commencement" determines "the period provided by law for commencing the action against" the relation-back defendant.[115] To commence an action under the state law applicable in *Hunt*, the plaintiff had to file the complaint and serve the defendant within two years after the incident. If the plaintiff attempted but failed to serve process during the prescribed period, state law extended the service period for an additional sixty days from the unsuccessful attempt, thus extending the statute of limitations.[116] The *Hunt* court permitted the action to relate back under rule 15(c) despite the added defendant's failure to receive notice within the two year statutory period because plaintiff had served defendant within the sixty day attempt-to-serve grace period.[117] "Commencement" for tolling the statute of limitations in *Hunt* thus involved two components: filing and service. By the same token, if state law "commencement" embodies both filing the complaint within the prescribed period and serving process during a reasonable time thereafter, that state law definition should determine whether the action is barred by the statute of limitations.[118] Moreover, should not "commencement" for tolling the

111. *Walker*, 446 U.S. at 751.

112. Even though rule 3 governs various timing provisions of the Federal Rules, the *Walker* analysis controls the definition of "commencement" under the statute of limitations. *Walker*, 446 U.S. at 751. The *Schiavone* Court viewed the plain language of rule 15(c) as mandating application of the state statute of limitations. *Schiavone*, 106 S. Ct. at 2385. Thus, even though the Court recognized the state law's substantive role in the rule by providing the period for notice, the Court overlooked *Walker* and defined "commencement" according to outdated legal reasoning.

113. *See, e.g.*, Watson v. Unipress, Inc., 733 F.2d 1386, 1388 (10th Cir. 1984); Ringrose v. Engelberg Huller Co., 692 F.2d 403, 405 (6th Cir. 1982); Odence v. Salmonson Ventures, 108 F.R.D. 163, 167 n.3 (D.R.I. 1985). Most courts find state law and rule 15(c) compatible, thereby avoiding the complex *Walker* issue. *See id.*

114. 674 F.2d 834 (10th Cir. 1982).

115. *Id.* at 836.

116. The original statute provided:

> An action shall be deemed commenced, within the meaning of this article, as to each defendant, at the date of the summons which is served on him .... An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure service; but such attempt must be followed by the first publication or service of the summons within sixty days.

OKLA. STAT. ANN. tit. 12, § 97 (West 1960) (repealed 1984). Oklahoma law now states: "A civil action is commenced by filing a petition with the court." OKLA. STAT. ANN. tit. 12, § 2003 (West Supp. 1987).

117. *Hunt*, 674 F.2d at 837-38.

118. *See* Ringrose v. Engelberg Huller Co. 692 F.2d 403, 407-09 (6th Cir. 1982) (Jones, J., concurring). The *Ringrose* concurrence acknowledged that Michigan law tolled the statute of limitations to allow service of process. *Id.* at 409 (Jones, J., concurring). The tolling provision for service, however, had been construed as merely procedural by the Michigan Supreme Court. *Id.* (citing

statute of limitations be equated with the commencement provision in rule 15(c)'s notice requirement? *Walker* commands consistent treatment of "commencement."[119]

The *Schiavone* Court overlooked the *Walker* implications when it interpreted "the period provided by law for commencing the action against" the relation-back defendant according to rule 3.[120] Even though rule 15(c) may be a procedural device protected under *Hanna*, the rule's plain language does not necessarily define the notice period. Because of the close relationship between the rule and the statute of limitations, the Court should have defined "commencement" under state law, especially if state law focuses on filing and service.[121] As valid precedent *Walker* establishes state law as the source for determining "the period provided by law for commencing the action against" the relation-back defendant under rule 15(c).[122]

Clearly, the notice provision in rule 15(c) implicates more than the question of statutory construction resolved by the *Schiavone* Court. Criticism without alternatives, however, is unresponsive. Because judicial interpretation provides an inadequate solution at best, commentators arguing to correct the inherent defect in the notice requirement have concentrated on the amendment pro-

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Busciano v. Rhodes, 385 Mich. 474, 189 N.W.2d 202 (1971)). Given that the federal procedure and state practice would yield the same result, the concurrence declined to decide the effect of *Walker* and *Hanna* on rule 15(c). *Id.*; *see also supra* note 90 (discussing *Schiavone's* practical impact on service of process by plaintiffs).

119. A more troublesome problem arises when state law is more liberal than the federal rules so that rule 15(c) bars the changing of a party that state law permits. *See, e.g.*, C. WRIGHT, *supra* note 101, § 59, at 384; 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 59, § 4509, at 152-59. The state's substantive policy decision in such cases favors resolving disputes on the merits and, in effect, tolls the statute of limitations through the procedure provided in the relation-back practice. *Id.*

In Marshall v. Mulrenin, 508 F.2d 39 (1st Cir. 1974), plaintiff sued in federal court based on diversity jurisdiction. The original complaint named the person whose name appeared in the town records as the proprietor of the business where the injury occured. The named defendant, however, had conveyed the business to another person several years before the accident, but had neglected to amend the certificate. *Id.* at 40. Plaintiff's amended complaint sought to add the present owner of the business after the statutory period had expired. *Id.* The United States Court of Appeals for the First Circuit faced the Massachusetts procedural rule that permitted relation-back to change a party whenever the amendment arose out of the same transaction or occurrence. *See* MASS. R. CIV. P. 15(c). The court interpreted the state rule as a tolling provision, reasoning that "an action is commenced within the meaning of the Massachusetts statute of limitations although the wrong defendant is named, so long as it appeared that the correct defendant had been the one intended." *Marshall*, 508 F.2d at 44; *see* 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 59, § 4509, at 153. Thus, despite the presumed validity of rule 15(c) under *Hanna*, the court applied the more liberal state rule. *Marshall*, 508 F.2d at 44; *see also* Covel v. Safetech, Inc., 90 F.R.D. 427 (D. Mass. 1981) (supporting the *Marshall* decision and reasoning). *But see* Comment, *Federal Rules of Civil Procedure—The* Erie *Doctrine—State Relation-Back Provision Found Controlling Over Rule 15(c)—* Marshall v. Mulrenin, 50 N.Y.U. L. REV. 952 (1975) (criticizing the court's analysis in *Marshall*).

120. *See Schiavone*, 106 S. Ct. at 2385. The Court's reliance on rule 3 indicates that it considered the definition of "commencement" under rule 15(c) as a purely federal question. The Court's position on commencement thus contradicts its emphasis on the connection between the statute of limitations and the rule's plain language.

121. *See supra* note 63 and accompanying text (relation of rule 15(c) and the statute of limitations).

122. Would partial scrutiny of rule 15(c) under *Walker* open the door for questioning the rule's underlying validity? *Walker* is valid precedent for determining the definition of "commencement" in diversity suits, and the Court eventually will have to consider the substantive aspects of rule 15(c). *See supra* note 96 and accompanying text for one substantive effect of rule 15(c).

cess.[123] To avoid the double standard, one proposal would amend the language in rule 15(c) to require notice " 'within the period provided by law for commencing the action against [the defendant] and serving him with notice of the action.' "[124] A second alternative would solve the controversy by replacing the phrase in rule 15(c) with a definite statement that notice must be received "within the statute of limitations."[125] A third approach would create a separate standard for misnomers and misdescriptions.[126] Under this alternative when an inaccuracy existed in the complaint, the court would concentrate on the plaintiff's intent as evidenced by the facts and determine objectively whether the plaintiff originally intended to sue the defendant sought to be added under rule 15(c). The standard for joining "new" defendants would remain unchanged.[127]

No amendment will be enacted until the United States Supreme Court realizes the inadequacy of its solution and takes the appropriate steps to remedy it.[128] Clearly, the easy answer offered by the Court fails to satisfy because the double standard remains. The Court's literal approach in *Schiavone* sharply curtails the availability of rule 15(c) to cure procedural defects and defeats the rule's purpose that amendments should be allowed when a mere technicality prevents reaching the merits of the action. Because the Court's decision forecloses change through judicial interpretation, rule 15(c) should be amended to strike a proper balance between the needs of the plaintiff and the rights of the

123. *See* Note, *supra* note 53, at 104. "Such difficulties with the language 'within the period provided by law for commencing the action against him' indicates [sic] a need either for a revised interpretation or for an amendment." *Id.* The Court's decision in *Schiavone* effectively precludes judicial interpretation as a means of reformation.

124. *Martz*, 244 F. Supp. at 254 n.21; *see also* Haworth, *supra* note 50, at 563-64 (discussing the need for specified time for service under the *Martz* approach); Note, *supra* note 53, at 105 (*Martz* proposal corrects defect, but avoids risk of prejudice).

Under *Walker* the *Martz* proposal would have to be tied to state law. Thus, the additional language would only extend the notice period in jurisdictions that permit service after the statute of limitations has expired. *See Ingram*, 585 F.2d at 571.

125. *E.g.*, Note, *supra* note 64, at 163 n.72. The *Schiavone* Court adopted this approach through judicial interpretation. *Schiavone*, 106 S. Ct. at 2385.

To be consistent with *Walker*, federal courts applying rule 15(c) in diversity actions must determine whether the state provision for service represents a procedural device or a substantive policy decision to toll the statute of limitations. *See supra* notes 113-18 and accompanying text. *Compare* Ringrose v. Engelberg Huller Co., 692 F.2d 403 (6th Cir. 1982) (period for service beyond the statute of limitations merely procedural) *with Hunt*, 674 F.2d 834 (10th Cir. 1982) (attempt-to-serve grace period tolled the statute of limitations).

126. *See* Haworth, *supra* note 50, at 559. This approach stems from a test proposed by Professor Moore for correcting misnomers in amendments. Moore wrote:

> In cases involving a misnomer of the defendant, the test should be whether, on the basis of an objective standard, it is reasonable to conclude that the plaintiff had in mind a particular entity or person, merely made a mistake as to the name, and actually served the entity or person intended, or whether plaintiff actually meant to serve and sue a different person.

2 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 4.44, at 4-418 (2d ed. 1986); *see also* Jackson v. Duke, 259 F.2d 3, 7 (5th Cir. 1958) (applying Moore's test prior to the adoption of the notice requirement in rule 15(c)).

127. *See supra* note 126. The objective test would, in limited circumstances, shift the court's focus from the relation-back defendant to the plaintiff's intent. *See supra* note 66 (criticism of *Ingram* for distorting the rule's intention).

128. *See* 28 U.S.C. § 2072 (1982). The United States Supreme Court controls both the interpretation and the amendment of the Federal Rules of Civil Procedure. *Id.* The question thus arises: Will the inherent defect in rule 15(c) disappear after *Schiavone*, or will the Court be forced to resolve the double standard and the *Walker* issues in the future?

relation-back defendant. The new rule should focus on a two-step test: (1) the amended complaint must arise out of the same transaction or occurrence as the original pleading, and (2) the relation-back defendant should not be prejudiced in defending the action on the merits. The change to a general prejudice standard would allow courts to consider factors such as notice, knowledge of the mistake, and the applicable statute of limitations.[129] Furthermore, courts could weigh the prejudice to the relation-back defendant and consider what the result would have been if the plaintiff had properly named the defendant in the first instance. Preoccupied with elevating notice to a threshold requirement, the *Schiavone* Court completely ignored the prejudice element. In light of the problems still remaining after *Schiavone*, the Court should amend rule 15; to be effective, rule 15(c) should implement justice, not technicalities.

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129. Rule 15(c) should concentrate on avoiding prejudice. *See Schiavone*, 106 S. Ct. at 2389 (Stevens, J., dissenting); United States *ex rel.* Arrow Elecs. Inc. v. G.H. Coffey Co., 100 F.R.D. 413, 416 (D. Me. 1983). According to the rule's plain language, notice merely gauges prejudice. FED. R. CIV. P. 15(c) (the relation-back defendant receives "such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits"). Does the *Schiavone* Court presume that inadequate notice automatically equals prejudice? For a discussion of the Court's separation of the notice requirement from prejudice, see *supra* note 90.