Federal Rule of Civil Procedure 15(c): Relation Back of Amendments

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Note: Federal Rule of Civil Procedure 15(c): Relation Back of Amendments

I. INTRODUCTION

Federal Rule of Civil Procedure 15(c) provides standards to aid courts in determining whether a new matter asserted by amendment after the running of the statute of limitations is barred. Where the asserted new matter "changes" a party, and if it arose out of the same "conduct, transaction, or occurrence" as the pending action and meets certain other conditions, it will be deemed to have been included in the original complaint under the doctrine of "relation back of amendments." Treatment of the new matter as part of the original complaint thus avoids the bar of the statute of limitations. In this context, the issue is whether or not the standards of Rule 15(c), and the cases which have applied it, adequately take into account the policies of the statute of limitations which are intended primarily to protect certain rights of defendants.

Prior to 1966, courts reached differing conclusions on the issue of relation back in seemingly indistinguishable fact situations. This was caused largely by the imprecise standard for decision embodied in the "conduct, transaction, or occurrence" language of the original rule. The Advisory Committee on the Federal Rules suggested more definitive requirements based on standards developed by the better reasoned decisions. Thus, Rule 15(c) was amended in 1966 in an attempt to establish criteria which would lead to uniformity in the federal courts in the determination of whether an amendment that changes parties after the expiration of the statute of limitations would be allowed to relate back. Despite the specificity added by the amendment, peculiarities in interpretation since 1966 have led to inconsistencies and uncertainties in the case law. This Note seeks a correct and consistent application of Rule 15(c) as amended. Four major areas are considered: (1) the background and operation of 15(c) prior to 1966, (2) the 1966 amendment, (3) the applicability of 15(c) in diversity cases under the Erie doctrine and (4) the interreaction between 15(c) and the policies underlying the statute of limitations.
II. BACKGROUND AND OPERATION OF RULE 15 (c) 
PRIOR TO 1966

A. PURPOSES OF THE STATUTE OF LIMITATIONS

There is obviously a potential conflict between the statute of limitations and Rule 15 (c). In each instance that an amendment asserting new matter is allowed after the limitations period an arguable violation of both the technical and the policy aspects of the statute of limitations has occurred. Thus, a proper analysis of the ramifications of Rule 15 (c) necessarily requires a basic understanding of the policies on which the statute of limitations is premised. First, the primary purpose of the statute is to compel the exercise of a right of action within a reasonable time so that a defendant will have a fair opportunity to prepare an adequate defense. Otherwise, the belated institution of an action might prejudice defendant’s preparation of evidence. Such prejudice would commonly result, for example, where critical evidence is lost or where the facts have been obscured by the passage of time or faulty memories. The death or removal from the jurisdiction of witnesses is a further problem. Second, the statute relieves the defendant from the otherwise endless psychological fear of litigation based upon events in the distant past. Third, it frees the judicial system from stale claims which make resolution of fact issues both difficult and arbitrary. Fourth, the courts are relieved of the additional caseload which

1. However, Rule 15 (c) as amended is specifically designed to accommodate rather than violate the principles embodied in the statute of limitations. The extent to which such accommodation is achieved determines both the success of the 1966 amendment and the correctness of judicial interpretation of the rule. See Section IV infra.


would result if old causes of action were permitted, thus promoting efficient judicial administration. Finally, a limitations period avoids the disruptive effect of unsettled claims upon commercial intercourse. For example, creditors may more accurately determine a person's financial status if his former outstanding debts have been extinguished by the running of the statute of limitations.

B. THE CAUSE OF ACTION CONCEPT

The problem of relation back of amendments after the expiration of the statute of limitations confronted both federal and state courts even before the adoption of the Federal Rules of Civil Procedure in 1938. It was stated that whether or not such amendment related back depended upon the nature of the matter asserted by the amendment. If the amendment stated a "new cause of action" or one which was different and distinct from that originally pleaded, the new pleading was treated as asserting a new action. Accordingly, relation back would be precluded since the original action would not have tolled the statute and thus the new action would be barred if the limitations period had expired. On the other hand, if the amendment was found not to recite a new cause of action but merely to restate in a different form the cause of action originally pleaded, then the amendment to the plaintiff's complaint related back to the commencement of the action to avoid the statutory bar. The con-

8. See J. Harlan's concurring opinion in Hanna v. Plumer, 380 U.S. 460, 474 (1965). Necessarily the time period in a statute of limitations will be arbitrary, as it is determined by a state legislature and not by the judicial process. Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945). It could be argued that in a given situation the commencement of a suit a few days after the running of a limitations period does not run afoul of any policy of the statute of limitations. Nevertheless, the action will be barred without question by a court. Therefore, it would appear that legislatures and the courts are not willing to qualify the absolute cut-off dictated by the time period even though in a given situation the individual and public interests represented by the aforementioned policies are not jeopardized. Accordingly the legislature and the courts must feel that there is some further unarticulated purpose served by the certainty of an absolute cut-off. But it is clear that this absolute certainty is not supportive of any additional tangible interest of the defendant beyond those already discussed.
ceptual difficulty involved in the determination of whether a new cause of action was asserted posed substantial problems. 11

11. The Supreme Court has handled the concept of cause of action in the statute of limitations context in different ways depending upon the facts. In an early case, Union Pacific Ry. Co. v. Wyler, 158 U.S. 285 (1895), the Court adopted a restrictive notion of a cause of action in determining whether the statute of limitations had run. Plaintiff had originally based his suit on the legal theory of negligence caused by an incompetent fellow-servant. After the case had been removed to federal court and the statute of limitations had run, plaintiff amended his complaint seeking recovery upon a Kansas statute which held railroads liable for the negligence of their employees. Plaintiff's original pleading had stated facts necessary for recovery under the statute and thus only the legal theory had been revised. Id. at 295-96. The Court disallowed the amendment on the ground that there had been a change in legal theory, and hence a new cause of action. The Supreme Court later allowed an amended pleading to relate back in Missouri, Kansas & Texas Ry. Co. v. Wulf, 226 U.S. 570 (1913), where plaintiff originally sued in her individual capacity for her son's death under a Kansas statute. She sought to amend to sue as administratrix under the Federal Employers' Liability Act after the statute of limitations had expired in respect of the latter action. The Court reasoned that the change was in form rather than in substance, that it introduced no new or different cause of action, nor set up a different set of facts as the ground for recovery, and thus related back to the commencement of the suit. It is not difficult to see that, owing to the uncertainty caused by these inconsistent cases, the lower courts would adopt divergent tests to determine whether a new cause of action had been pleaded in the amendment.

A later Supreme Court case had discredited the Wyler decision as being too restrictive, holding that the cause of action concept must be dealt with pragmatically. United States v. Memphis Cotton Oil Co., 288 U.S. 62, 68 (1933). See also Maty v. Grasselli Chem. Works, 303 U.S. 197 (1938).

The typical tests employed by the courts in practically all jurisdictions were: (1) Whether a recovery upon the original petition would bar a recovery under the amended complaint, Salyers v. United States, 257 F. 255 (8th Cir. 1919); McDonald v. Nebraska, 101 F. 171 (8th Cir. 1900); Whalen v. Gordon, 95 F. 305 (8th Cir. 1899); (2) Whether the same evidence would support both pleadings, Kansas Gas & Elec. Co. v. Evans, 100 F.2d 549 (10th Cir.), cert. denied 306 U.S. 665 (1938); Bixler v. Pennsylvania R.R., 201 F. 553 (M.D. Pa. 1913); (3) Whether the measure of damages would be the same in each case, Salyers v. United States, 257 F. 255 (8th Cir. 1919); (4) Whether the allegations of each pleading would be subject to the same defenses, Hogle v. Reliance Mfg. Co., 113 Ind. App. 488, 48 N.E.2d 75 (1943); Cytron v. St. Louis Transit Co., 205 Mo. 692, 104 S.W. 109 (1907).

The test of whether the real parties and interests and the essential elements of the controversy would remain the same was also used. James v. Dr. P. Phillips Co., 115 Fla. 472, 155 So. 661 (1934). Another test occasionally employed made the general wrong suffered and the general conduct causing the wrong determinative factors. VanDoren v. Pennsylvania R.R., 93 F. 260 (3rd Cir. 1899); Jacobs v. Pennsylvania
C. THE RELATIONSHIP OF RULE 15(c) WITH 15(a)

A full understanding of the relation back doctrine of Rule 15(c) requires an examination of the entire rule because an amendment will relate back only if it is permissible under other subdivisions of the rule. The objective of Rule 15 generally is to facilitate the use of amendments to the pleadings to insure the proper presentation of a case and to promote the disposition of litigation on the merits. Rule 15(c) thus encourages the use of amendments to clarify the original complaint or to correct an error made in the original complaint without being barred by the statute of limitations. Although the thrust of Rule 15 as a whole is to allow the liberal use of amendments to implement the important federal policy of encouraging litigation on the merits, Rule 15(c) imposes necessary restrictions in deference to the equally important premises of the statute of limitations.

Rule 15(a) deals broadly with the standards for allowing amendments prior to trial, whether or not the amendment precedes the tolling of the statute of limitations. The section of Rule 15(a) applicable to 15(c) is: “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.” The test of “justice” employed by the courts is whether the proposed amendment would unduly prejudice the opposing party. Consequently, courts look to the adverse effects of such an amendment on the party opposing it, and then only those caused by the moving party's failure to assert the new matter in the original pleading. Generally, where the opposing party would not be prejudiced, where the movant has not been guilty of bad faith and where the trial itself would not be unduly delayed, courts will allow an amendment in order to assure a de-
cision on the merits.16 Rule 15(a) applies to all amendments before trial, and thus its standards will be at least indirectly considered by courts in determining whether a 15(c) amendment should relate back to the date of the original filing.17

D. OPERATION OF RULE 15 (c) BEFORE THE 1966 AMENDMENT

The adoption of Rule 15(c) in 1938 changed the test from


While Rule 15(a) applies only to amendments before trial, Rule 15(b) applies to amendments during trial. Issues not raised by the pleadings can be tried by express or implied consent of the parties and will be treated as if they had been raised in the pleadings. Rule 15(b) allows the amendment of the pleadings to conform to the evidence and the raising of these issues at any time. Should a party object to evidence on the ground that it is not within the issues contained in the pleadings, the court may allow amendments when the merits of the action will be reached and the opposing party fails to indicate how the admission of such evidence would prejudice him in maintaining his action upon the merits. The test of Rule 15(b) is the same as that of 15(a) except that the emphasis is on the prejudice to the opposing party and is not as concerned with diligence. Southern Coast Corp. v. Sinclair Ref. Co., 181 F.2d 960 (5th Cir. 1950); Robbins v. Jordan, 181 F.2d 793 (D.C. Cir. 1950); Fidelity & Deposit Co. v. Krout, 157 F.2d 912 (2d Cir. 1946). The relationship of 15(b) to 15(c) is relatively unimportant since Rule 15(a) encompasses the same tests as 15(b). FED. R. CIV. P. 15(b) provides:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.
that of the new cause of action standard to 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." Under this latter standard, courts were basically expected to examine the "aggregate of operative facts" rather than the conceptual cause of action standard or the legal theories of recovery. Rule 15(c) gave courts broad discretion in deciding whether a particular amendment should relate back. For example, where the statute of limitations had expired, the policies of the statute could be considered by courts in determining whether the amendments related back. Despite this seemingly large scale change in the law, some courts merely considered Rule 15(c) a concise restatement of the law already in existence. Thus, some courts continued to look to the cause of action concept rather than the factual situation or the operative facts.

After 1938, an amendment which sought to change the capacity or identity of the parties caused many courts to scrutinize the facts to determine whether the defendant knew or was sufficiently apprised of the pendency of the action as to constitute notice. Relation back was generally allowed since the defend-

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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.
25. L.E. Whitham Constr. Co. v. Remer, 105 F.2d 371 (10th Cir. 1939); See also Commentary, supra note 21.
26. Goodrich v. England, 262 F.2d 298 (9th Cir. 1958) (initial bankruptcy proceeding alleged defendant was a partnership whereas defendant was at all times a sole proprietor); Owen v. Paramount Prods., Inc., 41 F. Supp. 557 (S.D. Cal. 1941); Echevarria v. Texas Co., 31 F. Supp. 596 (D. Del. 1940). Change in capacity cases usually arise where plaintiff originally sued in an individual capacity and the ap-
ant rarely could be found to be without adequate notice.\textsuperscript{27} In these cases, it was emphasized that no change in the parties before the court would result from the amendment and that all parties had notice within the limitations period of the facts out of which the claim arose. Although relation back was allowed in most of the change of capacity cases, the pre-Rule new cause of action concept still frequently influenced courts in considering these amendments.\textsuperscript{28}

A situation similar to the change of capacity cases was encountered when plaintiff sued a particular entity but later discovered after the expiration of the statute of limitations that he had misnamed it. These cases also allowed relation back under 15(c) because it was a correction of a mere "misnomer."\textsuperscript{29} The test was said to be whether it was clear that the person before the court was the person plaintiff intended to sue.\textsuperscript{30} Again, there was usually little problem with notice.

\begin{itemize}
\item \textsuperscript{29} Grooms v. Greyhound Corp., 287 F.2d 95 (6th Cir. 1961); Shapiro v. Paramount Film Distrib. Corp., 274 F.2d 743 (3rd Cir. 1960); Grandey v. Pacific Indem. Co., 217 F.2d 27 (5th Cir. 1954); County Theatre Co. v. Paramount Film Distrib. Corp., 166 F. Supp. 221 (E.D. Pa. 1958); Williams v. Pennsylvania R.R., 91 F. Supp. 652 (D. Del. 1950). These cases all involved the misnaming of a corporate defendant through the assertion of the wrong state of incorporation or the misstatement of some minor part of the name. But see Lomax v. United States, 155 F. Supp. 354 (E.D. Pa. 1957); Harris v. Stone, 115 F. Supp. 551 (D.D.C. 1953). The latter case reached an unfortunate decision since the original complaint named Mr. and Mrs. Augustus Stone as defendants and the amended complaint made the correction to J. Austin Stone and Margaret Stone, at the same address as that in the original complaint.
\item \textsuperscript{30} The court in Grandey v. Pacific Indem. Co., 217 F.2d 27, 29 (5th Cir. 1954) applied an objective test obtained from Professor Moore's treatise:
\begin{quote}
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
\end{quote}
\end{itemize}
However, courts generally refused to apply Rule 15(c) to an amendment which substituted or added a new party, whether plaintiff or defendant, to those included in the original complaint. The rationale was that bringing in new parties constituted a new "claim" which, if allowed to relate back, would deny a party the statute of limitations defense. However, several exceptions, generally based on equitable considerations and the proposed defendant's timely knowledge, were developed. First, the "identity-of-interest" doctrine stated that where the parties are closely related in their business activities the institution of an action against one is notice of the litigation to the other. Thus, when the new and old parties had sufficient identity-of-interest, relation back was found to be non-prejudicial.

whether plaintiff actually meant to serve and sue a different person.


33. United States ex rel. Statham Instruments v. Western Cas. & Sur. Co., 359 F.2d 521, 523 (6th Cir. 1966). If a new defendant was brought into an action after the running of the statute of limitations, the original complaint was a new cause of action as to him and thus he could use the statute of limitations as a defense. The new plaintiff situation was similar except that the defendant had not prepared his investigation or evidence against the new plaintiff's claim.

34. Link Aviation, Inc. v. Downs, 325 F.2d 613 (D.C. Cir. 1963); Fidelity and Deposit Co. of Maryland v. Fitzgerald, 272 F.2d 121, 129 (10th Cir. 1959), cert. denied, 362 U.S. 919 (1960); American Fidelity & Cas. Co. v. All American Bus Lines, Inc., 190 F.2d 234 (10th Cir.), cert. denied, 342 U.S. 851 (1951); United States ex rel. Way Panama,
maintained that the statute of limitations should not be so mechanically applied as to defeat the adjudication of a just claim where the correct parties were already on notice of the proceedings from an early stage or were even unofficially involved in the proceedings. Second, an estoppel-type approach was developed. Estoppel was applied where defendant had misled plaintiff into believing that he had sued the correct party in order to delay suit against the correct defendant before the expiration of the limitations period. In this situation, courts did not allow the newly sued defendant to raise the statute of limitations as a defense. However, since it was the originally named defendant that had engaged in the misleading acts, the newly named defendant arguably could not be estopped from asserting the defense. Courts usually resolved this conceptual problem by finding a close connection between the defendants so that the misleading conduct could be imputed to the correct defendant. Third, some courts allowed relation back on the theory that

S.A. v. Uhlhorn Int'l, S.A., 238 F. Supp. 887 (D.C.Z. 1965); Dalweld Co., Inc. v. Westinghouse Elec. Corp., 9 Fed. Rules Serv. 15a.32, Case 3 (S.D.N.Y. 1965); Lackowitz v. Lummus Co., 189 F. Supp. 762 (E.D. Pa. 1960) (court allowed amendment to relate back where originally named defendant corporation was a wholly owned subsidiary which was dissolved and its assets transferred to a division of the parent corporation); Mattson v. Cuyuna Ore Co., 24 F.R.D. 363 (D. Minn. 1959); Republic of Turkey v. Central Chem. Corp., 24 F.R.D. 132 (D. Md. 1959); Janis v. Cuyuna Elec. Power Co., 99 F. Supp. 88 (D. Kan. 1951). The last case is typical of many of the cases under the identity-of-interest exception in which an amendment is asserted which seeks to join insurers as parties plaintiff after the statute of limitations has run. The Janis court held that relation back would be allowed because the insurers were the real parties in interest and thus a new cause of action was not presented. The court's reference to real parties in interest would indicate that many of these insurance suits will now be covered by Rule 17(a) of the Federal Rules of Civil Procedure.

35. The court in De Franco v. United States, 18 F.R.D. 156, 160 (S.D. Cal. 1955), stated that:

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. (citation omitted)


37. 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1500, at 522-23 (1971 ed.). The estoppel-type approach is thus limited in application to those situations in which there is a close relationship or identity of interest between defendant and the proposed defendant.
plaintiff attorney's error in suing the wrong party was excusable.\textsuperscript{38}

The Advisory Committee in its Notes of 1966 stated that some courts had applied incorrect criteria "leading sporadically to doubtful results."\textsuperscript{39} For example, in Robbins \textit{v.} Esso Shipping Co.,\textsuperscript{40} plaintiff attempted to add a defendant which was interlocked with the defendant corporation already before the court in an action under the Jones Act for the death of a seaman. The court rejected plaintiff's motion to amend on the basis that Esso Standard Oil Company, the defendant attempted to be added, never took affirmative action to lull plaintiff into a false sense of security. Although the court thus dealt with the estoppel-type approach,\textsuperscript{41} it entirely overlooked the identity of interest between the two defendants. However, it is possible that plaintiff in Robbins only attempted to argue an estoppel theory on the basis that both defendants had the same attorneys. Nevertheless, where defendants are interlocked corporations it would seem that the court should have at least mentioned the identity-of-interest exception. Despite cases like Robbins, discrepancies usually arose not because courts completely ignored any usable legal doctrine but because the doctrines were often improperly applied to the facts.\textsuperscript{42} For example, one court refused to apply the identity-of-interest test where a parent corporation was originally sued and its wholly owned subsidiary was substituted by amendment.\textsuperscript{43} Instead, the court's test was simply whether the subsidiary had been before the court prior to the expiration of the limitations period.

\begin{itemize}
  \item 38. \textit{McDonald v. Chrysler Motors Corp.}, 27 F.R.D. 442 (W.D. Pa. 1961) (court allowed amendment to correct previous complaint where at time of answer by wrong defendant the plaintiff's attorney was in the hospital for a few weeks and was unaware of the original defendant's denial; however, the correct defendant had received notice of the accident in question before the expiration of the statute of limitations). Courts will weigh the absence of prejudice to the opposing party before employing this exception.
  \item 39. \textit{FED. R. Civ. P. 15(c), Advisory Committee's Note; 39 F.R.D. 82, 83 (1966).}
  \item 40. 190 F. Supp. 880, 885 (S.D.N.Y. 1960).
  \item 41. See text accompanying notes 36, 37 supra.
  \item 42. Many examples can be cited but a few cases stand out which reveal courts' application of law to facts. \textit{E.g.}, Jacobs \textit{v. McCloskey \& Co.}, 40 F.R.D. 486 (E.D. Pa. 1966) (no identity of interest between parent and wholly owned subsidiary); Kerner \textit{v. Rackmill}, 111 F. Supp. 150 (M.D. Pa. 1953) (proposed amendment did not relate back because defendant was a new party as a corporation rather than an individual doing business as originally sued, despite the fact that the individual was the corporation's agent for the receipt of service).
\end{itemize}
One of the reasons for the discrepancies in decisions prior to 1966 suggested by Professor Moore is that, although Rule 15(c) does not incorporate 15(a) directly, relation-back amendments must usually be considered under Rule 15(a), which grants the court discretion in refusing to allow an amended pleading.\textsuperscript{44} Professor Moore thus suggests that Rule 15(a) has caused courts to be unpredictable.\textsuperscript{45} Nevertheless, it would appear that the chief reason for inconsistency before 1966 was that 15(c) itself established no criteria except the "same conduct, transaction, or occurrence" test which gave courts a great deal of discretion in analyzing relation-back problems.

### III. THE 1966 AMENDMENT TO RULE 15(c)

#### A. INTRODUCTION

The second sentence of Rule 15(c) was added by the 1966 amendment, leaving the first sentence of 15(c) unchanged. Rule 15(c) as amended provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him. [Italicized language indicates 1966 amendment.]\textsuperscript{46}

\textsuperscript{44} See text accompanying note 17 \textit{supra}.

\textsuperscript{45} 3 J. Moore, \textit{Federal Practice}, \textit{supra} note 18, ¶ 15.15[4-1], at 1048.

\textsuperscript{46} Fed. R. Civ. P. 15(c). See generally Annot., 11 A.L.R. Fed. 269 (1972). References to the 1966 amendment will hereinafter concern only the emphasized portion of Rule 15(c) quoted in the text; the amendment further provided that:

> 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.

The Notes of the Advisory Committee indicate that the primary reason for the amendment of Rule 15(c) was to rectify the unjust results that were occurring when the incorrect governmental agency or department head was being sued and the amendment did not take place within the unusually short statutory time period. However, Rules 15(c) (1) and 15(c) (2) apply more broadly to include actions against non-
The stated purpose of Rule 15(c) is 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 of a defendant) shall 'relate back' to the date of the original pleading." 47 It has been questioned whether the amendment was intended to impose more restrictive requirements or whether Rule 15(c) is now to be regarded as more liberal than the old rule. However, it is likely that the Advisory Committee never thought in terms of strict or liberal allowance of amendments, but was more concerned with developing precise criteria to establish a sensible test for relation back. 48

In any case, the requirements set out in the second sentence of the amended rule are both a clarification of prior law and a compromise with the policies of the statute of limitations. The Advisory Committee amplified Rule 15(c) in the hope of at least rectifying the sporadic results reached by courts due to the appli-

48. A literal reading of amended Rule 15(c) might lead a court to believe that several requirements have been added to the more general "conduct, transaction, or occurrence" language of old 15(c) to make it more restrictive when party changes are sought. Yet the courts have granted relation back more freely since the amendment. Several courts have indicated that amended Rule 15(c) is to be read liberally. Woods Exploration & Producing Co. v. Aluminum Co. of Amer., 438 F.2d 1286, 1299 (5th Cir. 1971); Williams v. United States, 405 F.2d 234, 236 (5th Cir. 1968); Travelers Indem. Co. v. United States ex rel. Constr. Specialties Co., 382 F.2d 103 (10th Cir. 1967); Travelers Ins. Co. v. Brown, 338 F.2d 239, 234 (5th Cir. 1964); Washington v. T.G. & Y. Stores Co., 324 F. Supp. 849 (W.D. La. 1971); Wentz v. Alberto-Culver Co., 294 F. Supp. 1327 (D. Mont. 1969). No court has stated that the amended rule is to be applied restrictively. This does not mean that parts of amended Rule 15(c) have not been construed restrictively, but that, as a whole, Rule 15(c) is to be applied liberally. See, e.g., People of the Living God v. Star Towing Co., 289 F. Supp. 635 (E.D. La. 1968) (court held that facts constituted the addition of a new party so that the amendment could not relate back because Rule 15(c) only encompasses attempts to correct the name of a party already in the suit; this is a restrictive interpretation of "amendment changing the party"). An example of a court's reluctance to interpret the amended rule restrictively is Washington v. T.G. & Y. Stores Co., 324 F. Supp. 849 (W.D. La. 1971). The court stated that "The 1966 Amendments to Rule 15(c) were an attempt to liberalize and clarify its provisions. It certainly was not considered an attempt to restrict the liberality of amendments or their relation back." Id. at 856. While the 1966 amendments to 15(c) thus seem generally to liberalize the requirements, the necessity of deferring to the fundamental policies of the statute of limitations precludes any truly radical interpretation of the rule.
cation of incorrect criteria.\textsuperscript{49} 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. Despite the Advisory Committee's attempt at clarification, many residual problems of interpretation remain. One persistent problem that has confronted the courts is whether the case law under old Rule 15(c) carries over for consideration along with the new requirements of the amended rule. Another set of problems has arisen in interpreting the language in Rule 15(c) which survived the 1966 amendment. Interpretations have differed and thus inconsistent results are still a frequent occurrence.

The analysis of the 1966 amendment which follows will consider the requirements of Rule 15(c) in the following order: (1) whether the language "notice of the institution of the action" means notice of the filing of the suit or merely informal notice of the claim; (2) the interpretation of the language "commencing of the action within the period provided by law," including a suggested amendment to that language; (3) a discussion of the changing of the parties requirement, including an analysis of the scope and meaning of the word "changing"; (4) an examination of the application and meaning of prejudice within the context of Rule 15(c); and (5) the interpretation of the requirement that the proposed defendant knew or should have known the action would have been brought against him but for a mistake as to the identity of the proper party.

B. INCONSISTENCIES AND UNCERTAINTIES IN RULE 15 (C) AS AMENDED

1. "Notice of the Institution of the Action"

Courts appear to be in conflict as to how broadly the phrase "notice of the institution of the action" should be construed. At one extreme of the spectrum a very literal reading of notice might require service of process on the proposed defendant before the statute of limitations is tolled.\textsuperscript{50} Near the other extreme is a holding that the proposed defendant is put on notice of any litigation concerning a given transaction or occurrence; that is, as long as one party is suing from a particular factual sit-

\textsuperscript{49} Fed. R. Crv. P. 15(c), Advisory Committee's Note; 39 F.R.D. 82-83 (1966).

uation, then the proposed defendant will be on notice of any other claims arising from the same transaction or occurrence.51 "Incident notice," though even more extreme, is another possible interpretation of the requirement of "notice of the institution of the action," since arguably a proposed defendant would be sufficiently aware of any possible lawsuit based upon a potentially litigable incident.

The Advisory Committee Notes indicate that notice can be informal for purposes of this section of the amended rule.52 An example of informal notice is contained in Meredith v. United Airlines.53 The plaintiff in Meredith originally sued the United States, alleging liability for a mid-air collision between a commercial airliner and a military-type aircraft. After the running of the statute of limitations, plaintiff discovered that the military-type aircraft may have been operated by Lockheed on tests for the Air Force. Plaintiff then filed an amended complaint to add Lockheed. Lockheed previously had been called upon to defend its pilot's action before a Civil Aeronautics Board inquiry shortly after the accident, at which time it learned of the event and the possibility that commercial passengers were injured. The court held that Lockheed had sufficient notice for purposes of the amended rule in that it had notice of the possibility of a claim.

The Meredith interpretation of notice has been rejected by some courts, apparently even by the court of appeals of the same circuit.54 In Craig v. United States,55 a widow sued under the Death on the High Seas Act for the wrongful death of her

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   Thus notice is the test, and it is built-into the rule's requirement that the amended pleading arise out of the same "conduct, transaction, or occurrence." In other words, the inquiry in a determination of whether a claim should relate back will focus on the notice given by the general fact situation set forth in the original pleading.

pilot husband. Plaintiff's action was timely commenced against the United States, but she subsequently attempted to add Litton Systems, Inc. after the expiration of the limitations period. Litton had investigated the accident in connection with another civil action brought by a seaman injured in the same accident. The lower court held that although Litton had notice of the occurrence of the accident, it was not aware of the widow's lawsuit prior to the expiration of the limitations period. Thus, the court allowed Litton to use the statute of limitations as a defense to effectively bar the amendment. The decision was affirmed by the circuit court of appeals on the ground that notice must be of a lawsuit and not the incident which gives rise to the lawsuit. 58

Superficially, it would appear that Craig implicitly disapproves Meredith. However, the court never specifically overruled Meredith. One possible distinguishing feature of the two decisions, as suggested by one commentator, 57 is the differing fact situations of the two cases. The court in Craig reasoned that Litton's investigation of the seaman's injury would not necessarily have made it aware of the widow's potential claim. While it is certainly probable that Litton was aware of the husband's death, it conceivably could have assumed that the widow chose not to sue. By contrast, the CAB investigation in Meredith was conducted as a result of an injury to a passenger on a commercial airline and Lockheed knew this was the impetus behind the investigation. Thus, Lockheed prepared for the CAB administrative hearing aware of a possible civil claim arising from the injury to the passenger. However, this distinction is perhaps somewhat superficial in that Lockheed similarly could have considered that Meredith decided not to institute a lawsuit. Furthermore, there remains a doubt why Litton should not have investigated the pilot's death while it was investigating the seaman's injury. It does not seem unreasonable to expect a corporate defendant to gather all the possible facts necessary to defend any action arising out of a highly litigable situation such as that in Craig. A more substantial distinction may be that in Meredith Lockheed apparently knew within the limitations period that plaintiff was bringing a claim against it as a result of the CAB investigation; Litton, however, may not have known of

56. Nevertheless, it would appear that the court in Craig did not dismiss the possibility that notice could arise from an incident even though it looked for notice of a possible lawsuit. See note 119 infra.
57. 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROEDURE: CIVIL § 1498, at 510 (1971 ed.).
the widow's claim within the statutory period. Moreover, the 
*Meredith* court placed importance on the fact that Lockheed did 
not file an affidavit stating the point in time it had acquired 
knowledge of plaintiff's claim although it was required to do so.\textsuperscript{58} Thus, the court could easily have concluded that Lockheed ac-
tually did have knowledge of the passenger's specific claim with-
in the limitations period.

The distinction between *Meredith* and *Craig* might best be 
understood by placing the two decisions on a notice continuum. 
In *Craig*, Litton had notice of a highly litigable incident, one out 
of which litigation had already arisen. In *Meredith*, Lockheed 
had specific notice of the development of actions on the part of a 
plaintiff which led to a claim against Lockheed based on the same 
litigable incident. Thus, the *Craig* decision dealt with the ex-
treme of notice, that is, notice merely from a litigable incident. 
To accept such incident notice for purposes of Rule 15(c) would 
allow the addition or substitution of any party that was involved 
in a highly litigable incident, as, for example, in an accident 
where a person was injured or property was damaged and a pos-
sibility of fault on the part of the prospective defendant was evi-
dent. *Meredith* did not approach this extreme since there was 
knowledge of a specific claim arising from an incident in which 
Lockheed had been involved.

A literal reading of 15(c) would require that the notice be 
that of the filing of a particular lawsuit. A strict interpretation 
of notice would essentially require a plaintiff to make an amend-
ment by the time the statute of limitations period expires, be-
cause the proposed defendant would not have any "notice" of the 
filing of the suit until he was served. One exception to this re-
sult would be where the correct defendant was served but the 
wrong name was used.\textsuperscript{59} Another exception would be the identity-of-interest situation where the correct defendant realizes suit 
has been mistakenly filed against its counterpart.\textsuperscript{60} The diffi-
cult questions which have arisen under the amended rule occur 
in cases like *Meredith* and *Craig* where no identity of interest or 
misnaming exists. In these situations it is essential that the no-
tice requirement be liberally interpreted in order to allow rela-
tion back more freely than under the old rule.

However, any interpretation which deviates from literal no-
tice must satisfy the policies of the statute of limitations. The

\textsuperscript{58} Meredith v. United Air Lines, 41 F.R.D. 34, 38 (S.D. Cal. 1966).
\textsuperscript{59} See text accompanying note 29 supra.
\textsuperscript{60} See text accompanying note 34 supra. See also note 71 infra.
refusal to allow the statute of limitations defense absent literal notice is justified in at least one situation: where the proposed defendant knew, or should have known, sometime during the limitations period that a specific claim was likely to be filed. Thus, a proper interpretation would require notice of the assertion of a specific claim or the possibility of such an assertion against the proposed defendant arising out of the same transaction, occurrence, or factual situation as that of the original complaint.\footnote{Language to this effect can be found in Williams v. United States, 405 F.2d 234 (5th Cir. 1968). However, the facts indicate that the capacity of the plaintiff was changed rather than that of the defendants. Nevertheless, the Advisory Committee Notes state that the attitude in revised Rule 15(c) applies by analogy to amendments changing plaintiffs. 39 F.R.D. at 83-84. In Williams the court held that the government had fair notice of the mother's claim as a parent of an injured minor, although the mother originally sued only as next friend of the minor. The court stated that: Not only must the adversary have had notice about the operational facts, but it must have had fair notice that a legal claim existed in and was in effect being asserted by, the party belatedly brought in. This becomes of special importance in situations in which a common set of operational facts gives rise to distinct claims (or defenses) among distinct claimants (or defendants). \ldots \ldots 405 F.2d at 238.} Such an interpretation would both promote decisions on the merits and preserve the important objectives of the statute of limitations defense.

By contrast, an interpretation of notice as merely knowledge of an incident would effectively vitiate the statute of limitations since a party changed by amendment may not have prepared any evidence or may have felt secure by the passage of time in such a situation. In effect, the statute of limitations defense would be abrogated in any factual situation that could give rise to a legal claim.\footnote{A proposed defendant actually would only be deprived of his statute of limitations defense if another party had been sued in connection with the incident that gave rise to a legal claim, and an amendment sought to add or substitute the proposed defendant.} Therefore, notice can be interpreted as informal notice without violating the policies of the statute of limitations if its meaning is limited to knowledge of a specific claim or possibility of one within the limitations period.

2. The Limitations Period Problem—"the period provided by law for commencing the action"

The amended rule refers to the "conduct, transaction, or occurrence" requirements for relation back where the changing of
parties is attempted. It requires that, "within the period pro-
vided by law for commencing the action against [defendant]," the defendant "(1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his de-
fense 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." Although
the "period provided by law" language has resulted in some con-
fusion among courts, the correct interpretation of this phrase is
that requirements (1) and (2) must be fulfilled within the stat-
ute of limitations period. However, one court has interpreted
the phrase to mean that the amendment must be filed within
that period. This is certainly a misstatement of the rule be-
cause if the amendment had to be filed within the limitations pe-
riod, the relation back issue would never arise.

Several problems have arisen with this language in Rule
15(c). In *Martz v. Miller Brothers Co.*, plaintiff's motion to
amend was denied where he attempted to add the words "of
Newark" to "Miller Brothers Company" which appeared in the
original complaint. Two separate corporations existed, "Miller
Brothers Company" located in Wilmington and "Miller Brothers
Company of Newark," both of which were incorporated in Dela-
ware. It was clear that plaintiff had mistakenly tried to sue the
Wilmington enterprise since one of its agents was served. On
its face, the amendment appears to be the correction of a mere
misnomer which had been generally allowed to relate back under
the old rule despite the statute of limitations. The court noted
the difficulty of drawing the line between those amendments
that merely correct mistakes in the names of the parties and
those that are attempts to substitute new parties. But the court
concluded that the plaintiff was attempting to substitute a new

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63. *Fed. R. Civ. P. 15(c).*
64. *Id.*
(W.D. La. 1970); *Brennan v. Estate of Smith*, 301 F. Supp. 307
67. See 3 J. Moore, *FEDERAL PRACTICE* ¶ 15.15[4.2] n. 3
(Supp. 2d ed. 1968).
68. 244 F. Supp. 246 (D. Del. 1965). See generally 6 C. Wright &
A. Miller, *supra* note 57, § 1498, at 506, n. 84. The *Martz*
decision was analyzed under the proposed amendment to Rule 15(c)
but was decided under pre-1966 case law.
69. See text accompanying notes 29 and 30 supra.
Furthermore, the court rejected plaintiff's second contention that they were misled into naming the wrong defendant by the joint advertising of the Newark and Wilmington stores. The court found that the exception of estoppel only applies to defendant's misleading acts which occur after commencement of the suit and which have been motivated by the suit.\(^7\)

\(^7\) The court rejected plaintiff's contention that there was excusable neglect because of lack of sufficient time for his attorney to ascertain the correct defendant. The court felt that the question of the excusability of the attorney's negligence had no bearing where it could not find counsel negligent. Martz v. Miller Bros. Co., 244 F. Supp. 246, 252 (D. Del. 1965).

\(^7\) Id. at 252. Another issue centered on whether there was sufficient identity of interest between the two corporations such that service on the agent of "Miller Brothers Company" was in effect service on "Miller Brothers Company of Newark." Plaintiff argued that the officer of the Wilmington enterprise who was served was constructive "agent" of the Newark outfit, and thus service was made on proposed defendant. Id. at 253. Summons was served on de Polo who was secretary of the Wilmington store but not an officer or shareholder of the Newark store. However, the court did not regard the corporations as so closely linked that service on one was equal to service on the other despite the fact that both corporations had several common officers and shareholders. Id. at 255. The court noted that actual notice was not received by the correct defendant until three days after the running of the statute of limitations.

The identity-of-interest exception which developed under the pre-1966 Rule 15(c) is clearly continued by the language of the amended portion of Rule 15(c). Identity of interest means that the parties are so closely related in their business activities that the institution of an action against one is notice of the litigation to the other. See text accompanying note 34 supra. Stated another way, an identity of interest indicates that a party will have fair notice of the action and an opportunity to prepare its case, as well as reason to know of plaintiff's mistake in suing the wrong business. If the business activities are so closely related so as to assure such notice, it is almost certain that Rule 15(c)(1) is satisfied. Several courts have applied the identity-of-interest rationale to post-1966 decisions. See generally 6 C. WRIGHT & A. MILLER, supra note 57, at § 1499. Relation back has been allowed where no prejudice would result to a party sought to be added by the amendment. As one court has pointed out, the decisions have been unclear on the issue of what constitutes such an identity of interest between the new and former parties that permitting the new party to enter would not be prejudicial. Williams v. United States, 405 F.2d 234, 237-38 (5th Cir. 1969).

The relationship needed to satisfy the identity-of-interest test has been found to exist between a parent and a wholly owned subsidiary, Montalvo v. Tower Life Bldg., 426 F.2d 1135 (5th Cir. 1970); Travelers Indem. Co. v. United States ex rel. Constr. Specialties Co., 382 F.2d 103 (10th Cir. 1967); Wirtz v. Mercantile Stores, Inc., 274 F. Supp. 1000 (R.D. Okla. 1967), or between brother-sister corporations whose officers, directors or shareholders are substantially the same people and who may have similar names or even conduct their business from the same offices, Bernstein v. Uris Bldgs. Corp., 50 F.R.D. 121 (S.D.N.Y. 1970); Marino v. Gotham Chalkboard Mfg. Corp., 259 F. Supp. 953 (S.D.N.Y. 1966).
The most significant issue raised by the Martz case involved the problem of "commencing the action." Time limits are often geared in state statutes of limitations to the filing of a complaint. However, amended Rule 15(c) requires notice of the institution of the action within the time limit. This demonstrates a defect in the amended rule. Usually an action in these states against a defendant will be timely commenced by filing even though he does not have notice of the institution of the suit until after the limitation period has elapsed. However, Rule 15(c) requires that the proposed defendant receive notice within the limitations period, even though in any given case the defendant might not receive notice until after the expiration of the limitations period.


The extent to which the identity-of-interest rationale will be expanded is unclear. The phrase "identity-of-interests" referred to by the Angel court connotes more than having a closely connected business organization. The implication is that two individuals or organizations have a relationship of affinity through some sort of contractual arrangement, e.g., an insurance contract or a surety arrangement. However, another court has rejected the extension to a suretyship. United States ex rel. Statham Instruments, Inc. v. Western Cas. & Sur. Co., 359 F.2d 521 (6th Cir. 1966). The Statham court held that an amendment adding a surety as a party defendant would not relate back regardless of the alleged congruity between the principal and its surety. Judge Phillips, dissenting, thought that the decision clearly would be incorrect under the criteria of Rule 15(c) as amended in 1966. Id. at 525. The extension of the rationale will probably be slight since courts will ordinarily apply the criteria of amended Rule 15(c) in addition to using the identity-of-interest rationale. Prior to 1966, the rationale was not part of the language of Rule 15(c), but the amendment incorporates the standards used by courts which applied the exception before 1966.

Whether the 1966 amendment rectifies the harsh result found in the Martz decision is uncertain. The Martz court reasoned that since there was no proof that the common shareholders had the same proportion of ownership in each corporation or that the same Millers were involved in each corporation, the corporate entities did not have the requisite affinity. This reasoning probably would now be rejected by most courts if only the identity-of-interest test were applied. Nevertheless, an added problem in Martz was that the agent of the mistakenly sued corporation did not receive notice until after the statutory period even though the action had been timely commenced against that corporation.

72. See generally F. James, Civil Procedure § 1.16, at 46 n.5 (1965); 2 J. Moore, Federal Practice ¶ 3.03, at 707 n.2 (2d ed. 1970).
This defect is best illustrated by an example based on the Martz fact pattern. If the complaint against the named defendant is filed before the expiration of the limitations period, then the action against such defendant is valid. Assuming a common agent of the named defendant and the subsequently proposed defendant for the purposes of service of the complaint, then if filing is achieved within the limitations period but service is made only after the period has run, there would be no notice to the proposed defendant before the limitations period and the amendment would fail under 15(c) (1). This issue was never squarely reached in Martz because the court found no agency relationship between the two corporate defendants.

Such difficulties with the language “within the period provided by law for commencing the action against him” indicates a need either for a revised interpretation or for an amendment. It is doubtful whether the present language of Rule 15(c) is sufficiently broad or flexible to adequately remedy the defect exemplified in the Martz situation. “Notice of the institution of the action” would have to be expanded to mean constructive notice through the mere filing of an action against an entity that has an identity of interest with a proposed defendant. Such an interpretation of Rule 15(c) is questionable considering that the objective is notice, whether literal or informal, and that which is not prejudicial. The difference of a few days as in Martz arguably would not prejudice a proposed defendant, but an interpretation of constructive notice could be prejudicial in other situations. Even if the notice requirement is read to mean informal notice, there remains a situation where the standards of 15(c) are inadequate. This would be the case where defendant re-

73. The court in Martz v. Miller Bros. Co., 244 F. Supp. 246, 254 n.21 (D. Del. 1965), anticipated this situation as a possible oversight in amended Rule 15(c). “Query whether this inconsistency in the proposed Rule 15(c) would not frequently defeat the purposes which the change was intended to serve.”

74. See text following note 68 supra.

75. The court in Williams v. United States, 405 F.2d 234, 238 (5th Cir. 1969), emphasized the objective of fair notice under Rule 15(c):

In determining whether the adversary has had fair notice, the usual emphasis of “conduct, transaction or occurrence” is on the operational facts which give rise to a claim by the particular party based on any one or all of the theories conjured up, whether timely or belatedly. But when it comes to a late effort to introduce a new party, something else is added. Not only must the adversary have had notice about the operational facts, but it must have had fair notice that a legal claim existed in and was in effect being asserted by, the party belatedly brought in.
receives informal notice from service on the wrong defendant after
the expiration of the limitations period but where the action was
nevertheless timely commenced by filing against that wrong de-
fendant. Thus, notice would be timely for the wrong defendant
but not for the proposed defendant.

The Martz court noted the defect in Rule 15(c) and sug-
gested 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." This sugges-
tion would in effect extend the time within which the new de-
fendant could receive notice to permit plaintiff to amend, wheth-
er service on the wrong defendant occurred just before, or short-
ly after, the statute of limitations had run. Such a change would
correct the defect while avoiding the risk of prejudice.

This suggested amendment does not mean that service of
process is the only way in which a proposed defendant can re-
ceive "notice of the institution of the action" within the limita-
tions period. Rather, the amendment extends by a few days the
"period provided by law for commencing the action against him"
by establishing in effect a grace period from the filing of the
complaint to the date of its service. Conceivably then, a pro-
posed defendant could receive informal notice after the statute of
limitations had run but before the time the wrong defendant
was served with notice of the action and the amendment would
be allowed. 77

This proposed amendment to the rule does not vitiate the ne-
cessity of interpreting notice to include informal notice. If notice
of a lawsuit or receipt of service of process were required, a fact
pattern similar to that in Meredith would not be remedied by
the proposed amendment. Lockheed did not have literal notice
of a claim through the filing of the passenger's suit and service
on the government. Thus, an extended time period such as that
provided by the proposed amendment would not have been of
any help to the plaintiff in Meredith if literal notice were re-
quired. Therefore, even with the proposed amendment informal
notice should be allowed where the proposed defendant knew, or

1965).

77. Whether this time extension disregards the policies of the stat-
ute of limitations must be determined in connection with the "preju-
dice" requirement. See Section IV, B, infra. Notwithstanding a pos-
sible policies problem, the proposed amendment would rectify the de-
fect that could occur with facts similar to those of Martz.
should have known sometime during the extended period that a specific claim was likely to be filed.

3. "Changing the party"

The phrase "changing the party" can be read in four different ways: (1) substitution of a new defendant for the present defendant, (2) addition of a defendant, (3) changing the stated capacity of the defendant and (4) changing a misdescription or misnaming (misnomer) of the defendant.

a. Addition and Substitution: the "Changing Party"

The importance of the "changing party" phrase to a plaintiff seeking an amendment to add or substitute a new defendant is that the phrase operates as the threshold requirement of the amendment. Thus, the amended portion of Rule 15(c) applies only when the amendment actually changes the party "against whom a claim is asserted." Most courts have construed the meaning of changing liberally so as to include those amendments that add as well as those that substitute parties.\(^7\) As stated in Meredith v. United Air Lines,\(^7\) the "word 'changing' must be given a sensible and practical construction."\(^8\) However, some courts have refused to apply "changing" to amendments that seek to add new defendants.\(^8\)

One court raised yet another uncertainty with regard to the meaning of changing. It stated that "In this case, however, the libelant is attempting to add an additional party, to bring in a new party, rather than attempting to correct the name of a party already in the suit."\(^8\) Apparently the court interpreted chang-

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80. Id. at 39.


82. People of the Living God v. Star Towing Co., 289 F. Supp. 635,
ing to mean only the correction of a name, i.e., a misnomer.\footnote{83} Such a construction of the word “changing” would render the 1966 amendment operative only in misnomer cases.\footnote{84} If this interpretation were adopted, the courts in effect would be forced to rely on pre-1966 doctrines to decide cases involving the addition or substitution of a new defendant. This construction is hardly acceptable in light of the Advisory Committee Notes which indicate that the phrase “changing the party” includes those cases where a defendant’s description is changed.\footnote{85} Thus, the 1966 amendment clearly was intended to apply to cases other than mere misnomer changes.

A better approach to the interpretation of “changing” was that of the court in \textit{Craig v. United States},\footnote{86} which assumed, but did not decide, that the naming of a new defendant in addition to the original defendant constituted “changing” the party within the scope of Rule 15(c).\footnote{87} This approach is preferable to a more restrictive interpretation since the courts are not precluded from analyzing the facts in relation to the other criteria established by the 1966 amendment.\footnote{88} A restrictive interpretation would es-

\footnote{61}{(E.D. La. 1968). The court relied on Judge Holtzoff’s assertion in King v. Udall, 266 F. Supp. 747, 749 (D.D.C. 1967): “[Rule 15(c) as amended] is limited to amendments changing the party against whom a complaint was served. It does not apply to additional parties.”} 


\footnote{84}{The results of the cases in n.82 cannot be considered unjust considering the facts of each case. In both cases, the defendants sought to be added did not have notice of the claim and would have been prejudiced in maintaining their defenses if relation back had been allowed.} 

\footnote{85}{\textit{Fed. R. Civ. P. 15(c), Advisory Committee’s Note; 39 F.R.D. 82 (1966).}} 

\footnote{86}{413 F.2d 854 (9th Cir. 1969), cert. denied, 396 U.S. 987 (1969).} 

\footnote{87}{Id. at 857 n.3. The court stated that “[f]or present purposes we assume, but we do not decide, that the naming of a new defendant in addition to and not in lieu of another defendant misnamed in the original complaint, constitutes the ‘changing’ of the party within the meaning of Rule 15(c).”} 

\footnote{88}{An interesting question in relation to the meaning of “changing a party” is raised in 6 C. \textsc{Wright} & A. \textsc{Miller}, \textit{Federal Practice & Procedure: Civil} § 1498, at 512-13. Meredith v. United Air Lines, 41 F.R.D. 34. (S.D. Cal. 1966), raises the problem of asserting claims against a third-party defendant which arose out of the same subject matter as plaintiff’s claim against the third-party plaintiff or original defendant.}
sentially limit the courts to the standards embodied in the pre-1966 amendment with a concomitantly greater possibility of such inconsistent decisions as were seemingly endemic to that earlier period. Therefore, “changing the party” should be liberally interpreted to allow application of the criteria established by Rule 15(c) as amended.

b. The Misnomer Problem

An issue which has arisen in several decisions is whether the correction of a mere misnomer constitutes a changing of the parties. This issue is an important one in terms of the vitality of the amended rule. If the term “misnomer” is broadly construed and the correction thereof is not regarded as a “change in parties,” then it is possible that relation back would be granted in cases which would otherwise not qualify under the criteria of the amended rule. On the other hand, if correction of misnomers is considered to be a “change in parties,” whether or not misnomer is construed broadly, a few amendments that are mere corrections in name will be disallowed because the requirements of 15(c) as amended will not have been fulfilled. The Advisory Committee Notes indicate that misnomer amendments are to be included within the meaning of the phrase, but they failed to define the meaning of “changing.”

The misnomer problem is further compounded by fact patterns similar to that of Martz. In that case, the words “of Newark” were attempted to be added by amendment to the name “Miller Brothers.” The court clearly found two separate corporate entities although on its face the correction appears to be one of the corporate name only. The court had to make a difficult determination as to plaintiff’s intent since it was not clear whether plaintiff intended to sue the proper defendant but was misled into attaching the wrong name,

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Rule 14(a) permits plaintiff to assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of plaintiff’s claim against the third-party plaintiff. Most courts have sustained the third-party defendant’s statute of limitations defense on the premise that plaintiff’s claim is a new cause of action. The better approach as suggested by the Meredith decision would be to judge the asserted amendment to plaintiff’s complaint in terms of the Rule 15(c) notice requirements. This approach is possible if the third-party defendant is considered a party brought in by amendment, thus constituting a “changing of a party” which would trigger the application of Rule 15(c).

89. FED. R. Civ. P. 15(c), Advisory Committee’s Note; 39 F.R.D. 82 (1966).

90. See text accompanying note 68 supra.
or whether he intended the wrong defendant and thus named him properly according to his intent at that time. This is potentially a problem in every misnomer case.

Several cases illustrate the multi-faceted nature of the misnomer problem. In *Wynne v. United States ex rel. Mid-States Waterproofing Co.*, plaintiff's original complaint described defendant as a corporation. After the expiration of the statute of limitations period, plaintiff sought leave to amend the complaint to properly describe defendant as a sole proprietorship. The court allowed the amendment to relate back since all the conditions of the rule as amended had been satisfied. Although the amendment was only one which sought to correct a misnomer, the court considered the amendment to be one which changed the parties, thus triggering the requirements of the amended rule. In *Fricks v. Louisville & Nashville R.R. Co.*, plaintiff originally sued the "Louisville and Nashville Railroad Co." and sought to correct this after the running of the limitations period with the name "Western & Atlantic Railroad." By a Georgia statute the named defendant had adopted the name "Western & Atlantic Railroad" as an assumed name when it leased tracks from the state of Georgia. Defendant contended that the statute required that the railroad be sued in this name for any negligence on the leased tracks. In direct contrast to *Wynne*, the district court held that the correction was one of a misnomer rather than a change in parties. Obviously the court considered the fairness of the result in allowing the amendment to relate back. However, the court did not apply the criteria of the amended rule because there was thought to be no change of parties.

The results in the *Wynne* and *Fricks* decisions were consistent as a matter of policy but the difference in application of the meaning of "changing" could lead to diverse results in the future. This possibility is illustrated in *Washington v. T.G. & Y. Stores Co.* Plaintiff in that case moved to amend the complaint to correct the original defendant's name. Defendants contended that the amendment could not relate back because notice of the institution of the suit was not given within the statutory time period as required by the new portion of the rule. The court concluded that only a misnomer and not a change of parties was involved and that the case should thus be analyzed in terms of

91. 382 F.2d 699 (10th Cir. 1967).
the first sentence of Rule 15(c). The basis for the decision was that the amendment to Rule 15(c) was intended to make the rule more liberal rather than restrictive and thus the court restrictively interpreted the meaning of "changing the party" while liberally applying the amended rule in general. To reach a desirable result, the court disregarded the committee's prescription that "changing parties" includes misdescriptions.

Similarly, in *Wentz v. Alberto-Culver Co.* the court was faced with the dilemma of either applying the criteria of the amended Rule 15(c) and thereby disallowing the amendment, or construing the amended complaint as a mere misnomer with no change in the parties, making the amended portion of the rule inapplicable. The originally named defendant was an Illinois corporation which, unknown to plaintiff, had been dissolved a few years before the suit. However, a Delaware corporation with the same name had acquired the assets and continued the business. Clearly the plaintiff intended to sue the Illinois corporation since the complaint charged the Illinois corporation and the proper defendant, a Delaware corporation, answered in the name of the Illinois corporation. The Delaware corporation had been advised that plaintiff was claiming damages arising out of the use of hair spray in 1964, but did not know of the institution of the action until February 15, 1966. The court decided that January 31, 1966, the date upon which the complaint had been filed in state court, was the cut-off date for the statute of limitations. Thus, the problem was that the Delaware corpora-

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94. *Id.* at 856.
95. Much the same result occurred in *Wentz v. Alberto-Culver Co.*, 294 F. Supp. 1327 (D. Mont. 1969), which is commented on in 6 C. *WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1499, at 522 (1971 ed.): Of course, the Wentz court was faced with a dilemma and the actual result it reached was desirable. But since Rule 15(c) is based on a notice policy, the court probably should have relied upon the inherent flexibility of the rule.
96. *See text accompanying note 85 supra.*
98. *Id.* at 1328.
99. The situation presented to the *Wentz* court was somewhat similar to that in *Martz* to the extent that the complaint was filed against the wrong defendant the day before the expiration of the limitations period, and the corporation did not have notice of the filing of the action until after the expiration of the period. The *Wentz* facts also demonstrate the necessity of an interpretation of notice as informal notice, since the action was not timely filed against the Delaware corporation, although it was timely against the dissolved corporation; yet the corporation knew since 1964 of the customer's claim concerning the hair spray.
tion did not have notice of the institution of the action until after the limitations period. The court clearly realized that if it applied the new portion of Rule 15(c), the amended complaint would fail to relate back because the requirements of 15(c)(1) had not been satisfied. Although the facts would indicate that an entirely different legal entity was substituted for the defunct corporation, the court regarded the amendment as the correction of a mere misnomer and thus not a change in parties. The court then concluded that only the first sentence of Rule 15(c), which constituted the rule before 1966, applied in order to allow the amendment.

Thus, the Wentz court allowed the relation back consistent with the many decisions prior to 1966 under the first sentence which allowed them as a correction in form rather than substance. Unfortunately, as in the Washington case, the court disregarded the language of the Advisory Committee Notes which included the cases of correcting a misnomer or misdescription within the scope of “changing the parties.” The Wentz court, however, went even further than the Washington court to reach what it considered to be a desirable result. More important than the court’s interpretation of “changing” is the consequence of interpreting the meaning of misnomer broadly. By construing an amendment that adds a defendant or substitutes a different defendant for the one originally sued as a misnomer, relation back is granted in complete defiance of the new require-

100. See text accompanying note 29 supra.
101. See text accompanying note 93 supra.
102. Fed. R. Civ. P. 15(c), Advisory Committee’s Note; 39 F.R.D. 83 (1966): “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.”
103. See Washington v. T.G. & Y. Stores Co., 324 F. Supp. 849 (W.D. La. 1971), discussed in text following note 93. The Washington case can be regarded as a true misnomer correction since the first complaint used the name of “T.G. & Y. Family Center” while the amendment was “T.G. & Y. Stores Co.” Furthermore, in this case two separate legal entities were not sued in that the original named defendant was merely a trade name which was corrected by the amendment to its correct corporation name. Nevertheless, the Washington court rejected the argument that a correction of a misnomer is a change in parties. The reason given was the same as in Wentz, where actual notice by service was not effected until after the limitations period and the court wished to avoid an unjust result. See also Jackson v. Duke, 259 F.2d 3 (5th Cir. 1958) (plaintiff allowed to correct a misnomer although notice of the institution of the suit was not given within the statutory time period).
ments of Rule 15(c). The approach developed by the Wentz court thus points to a possible defect in the rule if courts can look to the first sentence of the rule to avoid meeting the requirements added by the 1966 amendment. The amended portion of Rule 15(c) is flexible enough to deal with the problem raised in Wentz. As suggested by one commentator, the Wentz court could have proceeded in a different fashion by finding that the second sentence of 15(c) applied and then finding “notice” by reason of facts in the case which showed defendant’s peculiarly acute knowledge of plaintiff’s claim arising out of the use of the hair spray in 1964.104 In this way, the flexibility of the rule is employed by finding notice of the institution of the action by informal notice of a specific claim.

There would still be some question under such an approach as to the status of a genuine misnomer case: one specifically involving the correction of the name of a defendant already before the court. Relation back was denied in very few pre-1966 cases where a simple misnomer was sought to be corrected.105 Under the amended rule, if misnomers are treated as a “change in the parties,” certain problems would remain if the criteria were applied literally, e.g., if notice of the institution of the action would mean notice of the filing of the suit. Generally, this problem will not arise because in most cases involving misnomers, even under a restrictive interpretation, the requirements of the amended rule will have been satisfied.106 There should be even fewer situations in which the requirements of Rule 15(c) cannot be met where a misnomer is sought to be corrected and a liberal

104. 6 C. Wright & A. Miller, supra note 95, § 1499 at 522. The facts of the Wentz decision indicate that the new defendant had sent an experienced investigator to discuss plaintiff’s claim and had proposed a settlement even before commencement of the original suit. The correspondence addressed to the defunct corporation also reached the Delaware corporation, which, through its agents, responded in the name Alberto-Culver Co. Furthermore, there was clearly an identity of interest between the defunct Illinois corporation and the Delaware corporation so that commencement of the action against one and eventual service on the other could have been considered the proper “notice of the institution of the action.”


106. Brittian v. Belk Gallant Co., 301 F. Supp. 478 (N.D. Ga. 1969) (fact that the word “suburban” was omitted from defendant’s name would not require striking of amendment to complaint, since complaint was served upon the proper party, which had notice of, and had been involved in the suit from its very beginning). See also Wynne v. United States ex rel. Mid-States Waterproofing Co., 382 F.2d 699 (10th Cir. 1967).
interpretation of notice is employed. In these cases, the defendant whose name was corrected would almost always have had notice of the institution of the action and knowledge of the mistake.

The other alternative in the misnomer area would be to interpret misnomer as outside the scope of "change in the parties." Under this alternative, the first sentence of the rule would be applied without consideration of the criteria added by the 1966 amendment. However, this approach may overlook the fact that the case law developed under the first sentence of the rule did not automatically allow relation back where amendments correcting the name of a defendant were sought.\textsuperscript{107} If only the first sentence were used, there would be a greater risk of inconsistent results due to the lack of definite standards that precipitated the 1966 amendment.\textsuperscript{108} Furthermore, this approach disregards the language of the Advisory Committee Notes that misnomers are to be included within the scope of changing the parties.

Discussion of the flexibility of the second sentence of Rule 15(c) necessarily brings in the \textit{Martz} problem and the suggested amendment discussed previously. The \textit{Martz} fact pattern\textsuperscript{109} presents a situation analogous to that in \textit{Wentz}\textsuperscript{110} in that the court would be forced to deny relation back if it literally applied the 1966 amendment. However, \textit{Martz} presents a situation where even a broad interpretation of 15(c) which includes misnomers within the scope of changing the parties would not allow relation back because of the previously noted defect in the 1966 amendment. The adoption of the proposed amendment to correct this defect in conjunction with the previously suggested interpretation of notice\textsuperscript{111} would avoid the necessity for courts faced with the \textit{Martz} or \textit{Wentz} fact pattern to determine whether the case involved a misnomer or substitution, assuming that misnomers are definitely subject to the requirements of the 1966 amendment.

At least two suggestions concerning interpretation may be made in connection with the misnomer problem. First, in order to follow the intentions of the Advisory Committee and to promote consistency, misnomers should be subject to the requirements of the amended portion of Rule 15(c) in order to force ap-

\textsuperscript{107} \textit{Id.}
\textsuperscript{108} See text accompanying notes 39 to 45 \textit{supra.}
\textsuperscript{109} See text accompanying note 68 \textit{supra.}
\textsuperscript{110} See text accompanying note 97 \textit{supra.}
\textsuperscript{111} See text accompanying note 61 \textit{supra.}
propriate consideration of the policies of the statute of limitations. Second, the amended portion of the rule should be applied flexibly through a liberal interpretation of notice. The problem that remains is to determine how flexibly the rule can be construed without unjustly depriving a defendant of his statute of limitations defense.

4. The "Prejudice" Requirement

Not only must the proposed defendant have "notice of the institution of the action" within the limitations period but he also must not be "prejudiced in maintaining his defense on the merits." This wording has not been the subject of such close analytical scrutiny as the "changing parties" and "notice" requirements. The Advisory Committee Notes do not deal with the meaning of prejudice. What constitutes prejudice often depends on the factual situation before the court. However, some courts have been reluctant to precisely analyze the application and significance of the prejudice requirement and generally have made legal conclusions that newly added parties will be prejudiced without consideration of the particular factual situation.

For example, in *Phillip v. Sam Finley, Inc.*, plaintiff originally sued several construction companies and unidentified parties ("John Does") for injuries arising out of an automobile accident allegedly caused by inadequate barricades and signs on a highway. After the expiration of the limitations period, plaintiff sought to substitute several employees of the Virginia State Highway Department for the "John Does" in the original complaint. The *Phillip* court determined that to allow the amend-


116. The substitution of new defendants for fictional persons has been stated by most courts not to relate back because it is analogous to adding completely new parties. Craig v. United States, 413 F.2d 854 (9th Cir. 1969), aff'd 284 F. Supp. 697 (S.D. Cal. 1967), cert. denied, 396 U.S. 987 (1969); Bufalino v. Michigan Bell Tel. Co., 404 F.2d 1023 (6th Cir. 1968), cert. denied, 394 U.S. 987 (1969); Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959).
ment would in effect prejudice the employees by precluding the assertion of the statute of limitations defense. Such an assertion is misleading. In all cases of relation back of amendments, proposed defendants would be "deprived" of the statute of limitations defense in the sense that they will be unable to assert it if the conditions of Rule 15(c) are met. "Prejudice in maintaining his defense on the merits" must clearly mean something more than that the defendant simply will be deprived of his statute of limitations defense. Consistent with the policy objectives of the statute of limitations, the phrase properly should be construed to mean that the proposed defendant will be deprived of the fair opportunity to obtain evidence before it becomes stale. It seems likely that prejudice is connected with the ability to obtain evidence, since a defendant's surprise or psychological insecurity as a result of a suit has little bearing on the preparation of a defense on the merits. Moreover, the requirement of notice within the statutory period encompasses the limitations policies relating to surprise and psychological insecurity and thus insures that a defendant will not be forced to seek out witnesses long after memories have faded and evidence has disappeared. Actually, the Phillip case was probably correctly decided on its facts. However, the court should have explicitly recognized that on the facts the employees would not have been able to prepare any evidence within the limitation period absent notice that they were to be defendants in a lawsuit.

The approach of most courts to the prejudice requirement has been to state rather bare conclusions without factual analysis. Perhaps the reason is that the prejudice requirement is not regarded as an independent criterion but one that merely reiterates the other requirements. Thus, courts have analyzed the facts, determined that one of the other requirements has not been met and, without further factual analysis, found that the newly proposed defendant would be prejudiced on the merits. Another possible reason for the absence of guidelines on the prejudice issue is that many decisions allowing an added defendant have been based on the identity-of-interest exception. If the proposed defendant has the close relationship with the named defendant required by this exception, then presumably

117. An illustration of the preservation of evidence situation is Meredith v. United Air Lines, 41 F.R.D. 34 (S.D. Cal. 1966), where the court doubted that defendant could be prejudiced after he had conducted a full-fledged investigation of the facts.
118. See note 114 supra.
no prejudice would result. However, this may not be true in all cases, and courts should avoid reaching conclusions without considering possible prejudice. A rare and desirable exception is the Craig\textsuperscript{119} court, which wisely perceived the requirements of Rule 15(c) as discrete elements. It determined that the proposed defendant would be prejudiced because his investigative research before the expiration of the limitations period did not focus on plaintiff’s claim, thus precluding a fair defense on the merits.\textsuperscript{120} The treatment of the prejudice requirement in this manner tempers any possible broad construction of the notice requirement: if notice were construed to include informal notice, the prejudice requirement would still have to be satisfied. Furthermore, the fact that the prejudice requirement acts as a

\begin{flushleft}
\textsuperscript{119} See text accompanying note 55 supra. The Craig court stated:
\end{flushleft}

\begin{quote}
Moreover, even if the rule means notice of the incident rather than notice of the institution of the action, there was failure to fulfill the further requirement of the second condition that the notice be such that the new defendant “will not be prejudiced in maintaining his defense on the merits.”
\end{quote}

\begin{flushleft}
While Litton had, prior to the running of the statute, investigated the factual issues relevant to seaman Sevis’ suit, it was not shown to have investigated additional factual issues relating primarily to the suit now before us.
\end{flushleft}

413 F.2d at 858.

Opposite results are reached not only when the notice test is used but when the other part of the first requirement, the prejudice standard, is applied. In Meredith the court determined that Lockheed would not be prejudiced in its defense on the merits, since it presumably had collected the proper evidence during its own investigation. However, in Craig the court realized that Litton would be prejudiced in its defense on the merits since it had not investigated the facts of the particular suit. Such a recommendation for the construction of the prejudice requirements of Rule 15(c) has been advanced in 6 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1498, at 510-11 (1971 ed.):

\begin{quote}
[T]he court should not give special treatment to the careless or myopic defendant whose alleged prejudice results from his own superficial investigatory practices or his poor preparation of a defense. But at least when the facts relevant to one possible claimant do require a substantially different and more burdensome investigatory effort or when the initial action is not sufficiently serious to warrant a full-fledged investigation, a party should be able to rely on the statute of limitations when that claimant does not interpose his claim in time.
\end{quote}

It should be noted that the Craig court would never have considered the defendant’s possible prejudice in maintaining its defense on the merits if it had been satisfied that notice of the institution of the action was unequivocally lacking. Thus it would appear that the court in Craig did not dismiss the possibility that notice could arise from an incident even though it looked for notice of a possible lawsuit.

\begin{flushleft}
\textsuperscript{120} In the identity-of-interest situation it should not be necessary that the proposed defendant actually conduct a factual investigation since there is no element of surprise as there may be in the case of an unrelated added defendant.
\end{flushleft}
backstop to notice allows a court to broadly interpret notice without fear that the policies of the statute of limitations will be violated.

Whether a jurisdiction uses strict or liberal notice will determine how often the prejudice issue is reached. If literal notice is required, the courts would seldom reach the prejudice requirement. This is so because where the proposed defendant was not served within the limitations period, the court would either conclude that there was prejudice or ignore the requirement altogether since the notice prerequisite was not fulfilled. The alternative situation is where the proposed defendant does have notice by service within the limitation period. In this situation, there would be no cases where a proposed defendant could be prejudiced in his defense on the merits. Where defendant had notice within the limitations period, prejudice would not result since the opportunity existed to prepare evidence at that point. Prejudice should have to be carefully considered by a court only when the amendment seeks to add or substitute a defendant and the statute of limitations period has already lapsed for some time. This situation would seldom arise in a jurisdiction requiring literal notice but would arise where only informal notice is required. Therefore, the prejudice requirement will only be a truly essential part of Rule 15(c) if notice is interpreted to be informal notice.

5. 15(c)(2)—the "Knowledge" Requirement

The 1966 amendment also requires that the party to be brought in "knew or should have known that, but for the mistake concerning the identity of the proper party, the action would have been brought against him." As with prejudice, courts have not carefully scrutinized this requirement. In certain situations it is similar to the estoppel test which prevailed before the amendment. For example, a newly named defendant could hardly deny the fact that he knew he was the one intended to be sued where plaintiff served him with process but

121. See text preceding note 59 supra.
merely misdescribed him. Similarly, where plaintiff names the wrong party but serves the person attempted to be sued, the defendant normally will be considered to have notice of plaintiff's mistake and the amendment will accordingly relate back. In those situations where the proposed defendant did not receive notice through service of process, and it cannot be clearly shown that he knew the action would have been brought against him, the facts must be more closely scrutinized to determine whether the new party "should have known."

One decision has indicated that the 15(c)(2) requirement will not be so broadly construed as to demand that defendant have an unreasonable degree of foresight. In Storey v. Garrett Corp., plaintiff originally did not sue decedent's employer because it was thought that the employer was immune from suit under the Defense Base Act. After the limitations period had expired, a Supreme Court decision cast doubt on that statutory immunity and plaintiff attempted to amend its original complaint. The court denied the amendment, holding that the proposed defendant could not reasonably have known of the mistake any more than plaintiff, or even the courts, could have known of it. The court noted that Rule 15(c)(2) required more than a mistake in identity alone. The party to be brought in must have known, or have been reasonably expected to have known, of the mistake.

The facts of the Storey decision indicate a mistake of law as opposed to a mistake of fact. The Storey court never decided whether 15(c)(2) encompassed a mistake of fact as well as a mistake of law since it found that the defendant did not know, and could not have been expected to know, of the mistake. At first reading, the language of 15(c)(2)—"mistake concerning the identity of the proper party"—would appear to merely connote a


125. 43 F.R.D. 301 (C.D. Cal. 1967).
mistake of fact, such as in Martz where the wrong defendant was named. However, to read Rule 15(c)(2) as excluding other kinds of mistakes would imply that the amended portion of the rule is inapplicable to situations where there has been a mistake as to defendant's legal identity. In light of the broad purpose behind the 1966 amendment and the intent of the Advisory Committee, such a reading is tenuous. On the other hand, where a mistake of law is not one of identity, as in Storey, the matter is more doubtful. But it would seem unreasonable to distinguish between the Storey-type mistake and a mistake of identity, whether factual or legal. If the proposed defendant has received notice, knows of a mistake and will not be prejudiced, the amendment should be allowed to relate back.

The language of the should-have-known provision in Rule 15(c)(2) does not appear to require that the proposed defendant know of the mistake as well as that he was the party intended to be sued. Nevertheless, courts have so construed it. One possible reason for this interpretation is that requiring knowledge of "the action would have been brought against him" without necessarily knowing of any mistake, is similar to a broad construction of "notice of the institution of the action" under part (c)(1) of the rule. If knowledge of the mistake is not also imputed, the "should have known" clause could be interpreted so broadly that Rule 15(c)(2) would be meaningless through its exclusion only of situations already excluded by 15(c)(1). For example, if the literal reading were strictly adhered to and the "should have known" clause were broadly con-

126. See text accompanying note 68 supra.
127. See Callahan v. American Sugar Ref. Co., 47 F.R.D. 359 (E.D. N.Y. 1969). The court emphasized that the Delaware corporation to be brought into the case must have realized that it would have been named as a defendant in the original action if plaintiff had been aware of the merger. However, the court did not require that the proposed defendant be aware of plaintiff's mistake, although this could be implied. See also Montalvo v. Tower Life Bldg., 426 F.2d 1135 (5th Cir. 1970).
128. Meredith v. United Air Lines, 41 F.R.D. 34, 38 (S.D. Cal. 1966). The court stated: Lockheed should have known at an early moment that there was a strong possibility of a mistake of identity on the part of Plaintiff and her counsel. It seems obvious that if Plaintiff had known that the Government had no planes operating in the vicinity and that Lockheed had a plane or planes so operating with Government insignia thereon, Plaintiff would have originally named Lockheed at least as a co-defendant with the Government.
strued, the requirement would be satisfied any time a defendant was involved in an accident or incident threatening possible legal liability. It would be ridiculous to have two redundant requirements. On the other hand, Rule 15(c)(2) should not be equated with the estoppel test which was applied before the 1966 change. The estoppel test was previously applied as an exception to the general rule that amendments adding or substituting defendants do not relate back. However, it was only applied where defendant had engaged in some sort of misleading activity. To make 15(c)(2) an estoppel test would vitiate the significance of the words “should have known” since estoppel was only applied where defendant actually misled the plaintiff.129

IV. RULE 15(c) IN DIVERSITY CASES

It is germane to discuss two other issues arising in conjunction with the 1966 amendment to Rule 15(c): (1) whether or not the Erie doctrine makes 15(c) applicable in diversity cases; and (2) the extent to which 15(c), if applicable in such cases, might potentially vitiate the policy objectives on which state statutes of limitations are premised. Discussion of the Erie problem130 will be limited to the effect of Hanna v. Plumer,131

129. See text accompanying note 36 supra.

130. For an excellent discussion of Rule 15(c) in relation to the Erie problem prior to 1960 see Note, Federal Rule 15(c) and the Doctrine of Substantive Conformity, 59 COLUM. L. REV. 648 (1959).


Since Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949), the federal courts have applied the state statute of limitations without question. Anderson v. Papillion, 445 F.2d 841 (5th Cir. 1971); Cummings v. Greif Bros. Cooperage Co., 202 F.2d 824 (8th Cir. 1953); Anderson v. Phoenix of Hartford Ins. Co., 320 F. Supp. 399 (W.D. La. 1970); Meredith v. United Air Lines, 41 F.R.D. 34 (S.D. Cal. 1966); Callan v. Lillybelle, Ltd., 234 F. Supp. 773 (D.N.J. 1964); Wm. T. Burton, Inc. v. Reed Roller Bit Co., 214 F. Supp. 84 (W.D. La. 1963). However, the extent to which the federal courts must apply state practice is doubtful. Generally, the federal courts have allowed state practice to dictate when the cause of action commenced and how many years the statute is allowed to run. Id. The difficult question as to whether state practice must be followed arises when an issue in which the statute is less centrally concerned is raised, e.g., the relation back of an amendment when the limitations period has expired.

After Erie R.R. v. Tompkins, 304 U.S. 64 (1938), it was important to decide whether the state statutes of limitations were procedural or substantive laws. See Comment, 34 N.W.L. REV. [ILL. L. REV.] 765 (1940). The first important decision following Erie was Guaranty Trust Company v. York, 326 U.S. 99 (1945), which announced the proposition that state law must govern in diversity cases on all matters likely to affect the outcome of the case. Thus it could be argued from Guaranty Trust that if an amendment would relate back with the pos-
while discussion of the latter issue will attempt to determine whether a congruency exists between Rule 15(c) and the statute of limitations.

A. *Erie Revisited*

Courts have been divided on the question of whether Rule 15(c) or the state practice of relation back applies when an amendment changes the parties. The majority opinion of *Hanna* has often been recognized as holding that whenever there is a direct clash between a federal rule of procedure and a state rule, the presumption is that the federal rule applies as long as it neither transgresses constitutional bounds nor exceeds the delegation of rule-making authority granted in the Rules Enabling Act. The Court emphasized the twin aims of the *Erie* rule, that is, the discouragement of forum shopping and the avoidance of inequitable administration of the laws.

Since 1966, most courts faced with the *Erie* issue in applying Rule 15(c) have held that *Hanna* controls and Rule 15(c) applies despite a conflicting state practice. Such courts note...
that Hanna gives primacy to the Federal Rules of Civil Proce-


Although the question of whether or not to permit the com-
plaint to be amended would be considered procedural for Erie
purposes . . . it clearly has substantive overtones. Under such
circumstances, we ought to follow state practice if we can do so
without doing violence to federal policy.

Id. at 361. The quotation indicates a return to the concern with pro-
cedure versus substance begun in Erie. Whether this court relies on
Hanna is not clear but it is possible that weight was given to Justice
Harlan's concurring opinion in Hanna. Justice Harlan's test in deciding
whether the application of a federal rule is substantive or procedural
is that it is substantive if the purpose of the state law is to regulate a
primary activity of human conduct. In these terms, the doctrine of
relation back probably does not involve primary activity of human
conduct but only a minor adjustment to a statute of limitations.

Where there is no conflict with state practice so that the outcome is
the same, the federal rules clearly should apply. In those states having
a more restrictive doctrine of relation back, it is possible that a plain-
tiff in federal court could amend his complaint to change parties when
it might otherwise be barred in a state court. Although since Hanna,
most courts apply Rule 15(c) rather than the more restrictive state
doctrine, several courts still insist on applying the state practice.
The following decisions apply Federal Rule 15(c) rather than state prac-
tice: Longbottom v. Swaby, 397 F.2d 45 (5th Cir. 1968); Crowder v.
Gordon Transp., Inc., 387 F.2d 413 (8th Cir. 1967); Wentz v. Alberto-
Beech Aircraft Corp., 47 F.R.D. 148 (D. Del. 1969); Fricks v. Louisville
Tobacco Co., 44 F.R.D. 440 (D. Conn. 1967); Newman v. Freeman, 262
F. Supp. 106 (E.D. Pa. 1966); Meredith v. United Air Lines, 41 F.R.D. 34
(S.D. Cal. 1966); Cone v. Shunka, 40 F.R.D. 12 (W.D. Wis. 1966); Martz
v. Miller Bros. Co., 244 F. Supp. 246 (D. Del. 1965); but see Anderson v.
Papillon, 445 F.2d 841 (6th Cir. 1971); Nave v. Ryan, 260 F. Supp. 405
(D. Conn. 1967); Burns v. Turner Constr. Co., 265 F. Supp. 769 (D.
Mo. 1966) (decisions which apply state practice). In the latter group of
cases, no rationale for following the state law is developed and the
precedents relied on are pre-Hanna decisions.

In Anderson v. Papillon, plaintiff sought to amend his complaint
after the running of the statute of limitations to add more defendants.
The court used general language to the effect that Ragan was still good
law in the area of those rules which affect the statute of limitations.
The court at one point stated that "[w]e think Ragan, then, controls
this case. Conceding as we do, that it has its critics, it remains viable." 445 F.2d at 842. The language in the lower court opinion is no more
revealing and indicates that the criteria of 15(c) would apply. And-
Thus the Fifth Circuit appears to directly contradict the lower court's
Erie application.

The Fifth Circuit in another recent decision followed state law
where it did not conflict with Rule 15(c). Shepard v. Chrysler Corp.,
430 F.2d 161, 164 (5th Cir. 1970) (however, it is not clear whether the
dure whenever there is a direct clash with a state rule. However, very few of the courts have analyzed Hanna beyond the general test espoused in that decision. One court concluded that, since no attack was made on either the constitutional or statutory powers given to the Supreme Court to adopt rules of procedure, the question of relation back was covered by the federal rule.

1. Newman v. Freeman and the Twin Aims of Hanna

Although Newman v. Freeman, in dealing with a relation-back problem, failed to critically analyze the holding of Hanna, it did discuss the twin aims espoused in that opinion. First, with regard to forum shopping, the court found that Rule 15(c) provides no advantage to a plaintiff using the federal courts since such a plaintiff, prior to commencing the suit, will not have envisioned neglecting a claim with the thought of adding it by amendment after the running of the statute of limitations. Second, no privilege is accorded to the out-of-state litigant by relation back because the case will already be pending in federal court resolved the Erie question). On the other hand, the Fifth Circuit in 1968 held that the federal rules apply in cases of relation back, although it was not a case involving a change in parties. Longbottom v. Swaby, 397 F.2d 45 (5th Cir. 1968). See also Louderslager v. Teeple, 16 Fed. Rules Serv. 2d 397 (3d Cir. 1972). After Longbottom, a district court in the Fifth Circuit applied Rule 15(c) on the basis that it is a procedural right and not a substantive right. Fricks v. Louisville & Nashville R.R., 46 F.R.D. 31 (N.D. Ga. 1968). However, in this decision the court also noted that Georgia practice would be the same in regards to the factual situation before the court.

The Anderson decision also leaves in doubt the issue of whether the state law actually conflicted with Rule 15(c) on the given facts. The reason for this doubt is that the Fifth Circuit affirmed the lower court's refusal to allow relation back based on Rule 15(c). Where such doubt exists, absent any compelling reason for following the state practice, the better reasoned decisions apply Rule 15(c).


140. See also 6 C. WRIGHT & A. MILLER, PRACTICE & PROCEDURE: CIVIL § 1503, at 535 (1971 ed): "Moreover, the need to have a pleading amendment relate back is rarely perceived before the action is instituted so that a more liberal federal rule on the subject is unlikely to affect plaintiff's choice of forum."
court within the statutory period and the amended complaint will be closely related to the first complaint if the requirements of Rule 15(c) are satisfied.141

2. Meredith v. United Airlines and the Rules Enabling Act

Meredith v. United Airlines142 is one of the few cases to deal analytically with the real test of Hanna. It discussed the limits of the delegation of rule making authority expressed in the Rules Enabling Act. It could be argued that Rule 15(c) exceeds the scope of the Rules Enabling Act which provides that the rules shall “not abridge, enlarge, or modify any substantive right.”143 Such an argument would assert that the statute of limitations is a substantive right of the defendant which is modified or abridged by allowing an amendment to relate back under Rule 15(c). However, the Meredith court rejected this argument:

Lockheed could not argue that sec. 2072 prohibits applying amended Rule 15(c) to achieve a relation back of the Amended Complaint. The Supreme Court has held that no party has any vested or substantive right in the protection of a statute of limitations. Chase Securities Corp. v. Donaldson, 325 U.S. 304, 65 S. Ct. 1137, 89 L. Ed. 1628 (1945). Moreover, as demonstrated above, under the facts here, Lockheed has no benefit or right under the California statute of limitations of which it is conceivably being deprived.144

The court's reliance on Chase Securities Corp. for the proposition that no party has a substantive right in the protection of a statute of limitations is somewhat misleading. Although the Su-

141. Hanna’s concern with the avoidance of inequitable administration of the laws was not the equal protection problem between residents of the same state who happened to choose different courts, but the equal protection problem between the non-citizen and citizen because of the former's ability to choose the more advantageous federal court. The Newman court was correct in determining that no equal protection problem of any substantial sort would be presented by the out-of-state litigant’s choice of the federal court rather than the state court for the same reason that no forum shopping problem is created: a plaintiff would hardly foresee an incorrect complaint in the first place.

As a practical matter, it is doubtful that a court would ever be faced with a situation where plaintiff would actually choose a federal court over the state court solely on account of Rule 15(c). If plaintiff were at all conscious of the problem of unknown or mistaken defendants, he presumably would take the time to check and rectify the complaint rather than make such a choice. On the other hand, it is possible that plaintiff might choose the federal court in recognition of the potential necessity of changing parties.


The Supreme Court in *Chase Securities Corp.* decided that no fundamental right of the individual existed in the limitations time period itself, since it is subject to legislative grace and control.\(^{145}\) It also noted that an individual is entitled to the protections the statute affords while the time period is in existence.\(^{146}\)

The distinction between procedure and substance in the Rules Enabling Act context is often difficult to make.\(^{147}\) The Supreme Court has previously held that state practice as to statutes of limitations is a matter of substance and thus must be applied rather than a federal rule of procedure.\(^{148}\) Whether a state rule on relation back would be considered one of substance is an open question. A relation-back rule could be considered one of substance because of its connection with the statute of limitations.

Even if the proposition can be accepted that a relation-back rule involves a substantive right,\(^{149}\) the substantive aspect of that right is to have some form of knowledge of litigation which is sufficient to prepare evidence for a defense at trial. An individual defendant has no substantive right in the public policies of the statute of limitations.\(^{150}\) Rule 15(c) (1) and (2), in conditioning relation back on some kind of notice of the action, clearly requires that the proposed defendant have sufficient knowledge of the likelihood of litigation. Therefore, Rule 15(c) would appear to preserve any substantive right which would ordinarily be protected by notice in the typical non-amendment situation.

3. *Ragan and Hanna*

*Hanna's* primary test is that a valid federal rule will be applied over a directly conflicting state rule. In *Hanna*, the court applied the federal rule of service of process which expressly allowed service at abode rather than the state practice which required service in hand.\(^{151}\) In *Ragan v. Merchants Transfer &

\(^{145}\) 325 U.S. at 314.

\(^{146}\) Id.


\(^{149}\) A federal court in the context of Rule 15(c) has held that the statute of limitations provides a substantive right. *Barthel v. Stamm*, 145 F.2d 487, 491 (5th Cir. 1944).

\(^{150}\) See text accompanying notes 6 & 7 *supra*, for the public policies of the statute of limitations.

\(^{151}\) 380 U.S. 460 (1965).
Warehouse Co., the plaintiff tried to establish that Federal Rule 3 controlled since it could be impliedly read to state that filing tolls the statute. However, the Court followed the state law since the action could not commence until service was made on the defendant. Service was not within the limitations period and the action was barred because not timely commenced.

It has been stated that Ragan was overruled by Hanna. However, some authorities have contended that Ragan and Hanna are distinguishable, and, that since Hanna cited Ragan as authority, Ragan survives. If Ragan is in fact still good law, the distinction could only be that Rule 3 did not directly cover the point in dispute, i.e., the time the action was tolled. Thus, for Ragan to be a danger to the application of Rule 15(c) it must be shown that an explicit state practice incorporated within the statute of limitations allows relation back under more demanding standards than those of Rule 15(c) and that Rule 15(c) does not directly cover the relation back of amendments changing parties. Even if an explicit state practice can be established, it would still have to be demonstrated that Rule 15(c) does not cover the change of defendants or that it does not cover the statute of limitations problem. It is doubtful that one could convincingly argue that Rule 15(c) does not directly cover a relation-back problem where the wrong defendant was originally sued. The Rule as amended in 1966 specifically provides that "[a]n amendment changing the party against whom a claim is asserted relates back . . . ." Furthermore, the obvious implication of the language of the 1966 amendment is that relation back can occur as long as notice and knowledge took place within the limitations period. Therefore, even if Ragan survives Hanna, it would appear to be less difficult since 1966 to find that Rule 15(c) applies in the face of an explicit state practice. Even if such a direct conflict cannot be established, it must be recognized that Hanna continues the important balancing of federal and state interests begun in Byrd v. Blue Ridge Rural Electric Cooperative, Inc. Strong federal interests exist in encouraging the application of Rule 15(c), even at the expense of ab-

152. 337 U.S. 530 (1949).
153. Id. FED. R. CIV. P. 3 states: "A civil action is commenced by filing a complaint with the court."
156. FED. R. CIV. P. 15(c).
rogating the state rule of relation back. The use of Rule 15(c) maintains the uniformity of practice in the federal courts and, more important, promotes the federal goal of deciding cases on the merits rather than on technical pleading rules. Reliance on state law would hinder such liberal policies of the federal rules.

B. RULE 15(c) AND THE POLICIES OF THE STATUTE OF LIMITATIONS

Although the cases which have developed from Erie thus indicate that Rule 15(c) should apply in conflict situations, this does not mean that the policies of a state's statute of limitations can or should be disregarded. As the Advisory Committee points out, the wording of the amended portion of the rule was framed to carefully defer to the policies underlying such statutes. One issue here is whether the federal courts have been construing Rule 15(c) so broadly as to transgress certain protections of the statute of limitations, particularly in cases involving added defendants. The issue presented by judicial interpretations

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The above list is only a superficial coverage of those courts not allowing the addition of defendants since some of the above decisions applied the criteria of Rule 15(c). Those decisions listed above which state as a general rule that added parties do not relate back by amendment are: United States ex rel. Statham Instruments v. Western Cas. & Sur. Co.; Lewis v. Lewis; Anderson v. Phoenix of Hartford Ins. Co.; People of the Living God v. Star Towing Co.; and Storey v. Garrett Corp.

On the other hand, the following courts allowed the addition of parties by amended complaint after the running of the statute of limi-
of Rule 15(c) in added defendant cases is whether the addition of a new defendant by application of amended Rule 15(c) effectively abrogates the primary policy of the statute of limitations in protecting defendants from stale claims.

Rule 15(c) (1) is designed to protect the added defendant in that he must have "notice of the institution of the action [such] that he will not be prejudiced in maintaining his defense on the merits . . . ." The interpretations of notice and prejudice are critical. In line with the Advisory Committee Notes and the interpretation suggested in this Note, several courts have allowed notice of the institution of the action to be informal. This interpretation of notice could arguably undermine the policies of the statute of limitations in that it may not be appropriate to expect a defendant to prepare evidence merely because he has notice of a possible claim against him. This would occur

See text accompanying notes 2 to 4 supra.

The courts have been in conflict as to whether the term "changing" even encompasses the added defendant situation to trigger the application of the amended portion of Rule 15(c); the suggested interpretation is that it does. See text accompanying note 88 supra.

See text accompanying note 61 supra.

See text accompanying note 52 supra.
where a proposed defendant merely has notice of plaintiff's mistaken claim against another defendant and is not certain that the claim will be brought against him. In this situation, a court should consider the prejudice criterion to decide whether defendant would be subjected to, or be forced to collect, stale evidence. No prejudice would result where a proposed defendant has already conducted a factual investigation similar to an investigation that he would have conducted if sued. However, the court must also be careful to determine whether the defendant in the exercise of reasonable caution should have prepared a factual investigation because of such notice as he had already received.

If plaintiff originally sued the wrong defendant within the limitations period but the correct defendant had both "knowledge" and "notice" as defined, then the court must determine whether plaintiff delayed for an inexcusable length of time before filing an amendment regardless of any prejudice to defendant. Even if the plaintiff did not inexcusably delay, the court must still consider the prejudice that could occur to a defendant in his preparation of a defense before granting the amendment. What constitutes prejudice must be viewed in light of the policy objectives of the statute of limitations, which include elements of surprise, factual investigation, availability of witnesses and other similar considerations. The balancing of notice and prejudice is best illustrated by the Meredith and Craig decisions. The Meredith court determined that the proposed defendant had duly received informal notice of a specific claim which sufficiently assured an adequate defense on the merits because a factual investigation had already been conducted. The same issue was resolved the other way in Craig because the defendant had not conducted an adequate factual investigation with regard to plaintiff's claim.

Although Rule 15(c) is based in large measure on fair notice to defendant, the Meredith-Craig example illustrates that the notice requirement alone is insufficient in terms of protection of the policies of the statute of limitations. The court must determine whether the proposed defendant "knew or should have known, that, but for a mistake [in] identity," he would have been the defendant. Furthermore, if the amendment suggested in this Note is in operation, this requirement must have occurred

166. See text following 53 supra.
167. See text following 55 supra.
"within the period provided by law for commencing the action . . . and serving . . . notice of the action."\textsuperscript{169} In addition, the court has discretion in weighing the facts pursuant to Rule 15(a) to reject the amendment.\textsuperscript{170} Thus, if plaintiff did not delay through his own fault but rather through inability to discover the real facts, the court may be reluctant, either through its discretion or on the grounds of prejudice, to allow an amendment adding a defendant if, for example, a year or more has elapsed since the running of the statute of limitations.\textsuperscript{171} Obviously, the requirements of the second sentence of Rule 15(c), particularly the prejudice criterion, protect the stale evidence policy of the statute of limitations by acting as a backdrop to any broad interpretation of the notice requirement.

The second policy of the statute of limitations is more concerned with defendant's psychological security in being free from the fear of litigation after a certain point in time.\textsuperscript{172} The notice requirement becomes significant since to the extent that a proposed defendant has adequate notice of an existing claim, there is no good reason for him to feel psychologically secure in not being sued. Psychological security arguably could result in a typical non-amendment situation if the time period expires on an existing claim. However, in the relation-back context, the proposed defendant also knows that he is the one intended to be sued, and has not been sued to this point only because of plaintiff's mistake. The only possible psychological security which might be served by a strict limitations application is that, once the time limit has expired, the plaintiff who has not discovered his mistake will be barred despite defendant's knowledge. But this policy of the statute of limitations is not directed to reliance on plaintiff's errors. Rather, the statute of limitations gives repose to a defendant's reasonable expectation that the slate has been wiped clean of past obligations.\textsuperscript{173} In the Rule 15(c) context, a defendant cannot reasonably expect a \textit{tabula rasa} be-

\textsuperscript{169} See text accompanying note 76 supra.

\textsuperscript{170} See Butler v. Poffinberger, 49 F.R.D. 8, 10 (N.D. W. Va. 1970), where the court stated in dictum that Rule 15(c) amendments are subject to Rule 15(a).

\textsuperscript{171} For such an example, see Burns v. Turner Constr. Co., 265 F. Supp. 768 (D. Mass. 1967).

\textsuperscript{172} See text accompanying note 5 supra.

\textsuperscript{173} \textit{Developments in the Law—Statutes of Limitations}, 63 HAW. L. REV. 1177, 1185 (1950). See Section II.A supra. If the defendant can rely on an arbitrary time period then Rule 15(c) does not protect this policy. However, it was previously noted that the arbitrary time periods are subject to change by state legislation.
cause of an error by plaintiff in suing the wrong defendant. The policy of the statute of limitations here is concerned with fairness to the defendant. It is certainly fair to bring in a defendant who has had both some sort of "notice" and "knowledge" that the claim would have been brought against him but for a mistake. The fairness to a defendant will be further measured by the courts in their assessment of prejudice to the defendant.

The final policy upon which the statute of limitations is premised is the promotion of efficient judicial administration by eliminating unnecessarily stale claims and manufactured facts from the courtroom. 174 Previous discussion 175 reveals that the "prejudice" requirement would eliminate stale claims. It should be noted that Rule 15(c) promotes efficient judicial administration in another way: elimination of technical pleading rules with concomitant encouragement of decisions on the merits. Although Rule 15(c) requires a motion to amend, the primary objective of Rule 15(c) is to allow plaintiffs to present claims on the merits without fear of being denied their day in court because of a technical defect in their complaints. The third policy of the statute of limitations is not to discourage the trial of cases on the merits, but, rather, to discourage cluttering courtrooms with cases that are so stale as to be difficult or impossible to correctly decide. Therefore, Rule 15(c) and the statute of limitations in many respects are aimed at the same goals.

An issue previously raised is whether the time extension up to the point of service of process under the amendment suggested in this Note 176 would undermine the statute of limitations. It arguably does because the incidence of "notice" and "knowledge" is allowed beyond the statute of limitations period. However, this argument overlooks the fact that even in a situation where no relation-back amendment is involved, a proposed defendant may not have notice or knowledge until he was served with process, and yet the action would be timely commenced by filing before the expiration of the limitations period. Thus, if the action were filed the day before the period expired, a defendant in a typical non-amendment situation would not receive service of process until several days later. However, this analysis may not hold up in view of the Ragan decision. 177 In a state which requires service of process to commence an action, the defendant

174. See text accompanying note 6 supra.
175. See text accompanying notes 119-20 supra.
176. See text accompanying note 76 supra.
177. See text accompanying note 153 supra.
in a non-amendment situation would have to receive service of process before the end of the limitations period, unlike the previous example. The proposed amendment, then, would extend the period a few days beyond even the typical situation. However, this argument is based on the assumption that the proposed amendment extends the time period in all cases. The applicable portion of Rule 15(c) with the proposed amendment would provide: "within the period provided by law for commencing the action against him and serving him with notice of the action." The latter portion of the quoted language only extends the time period if the action commences upon the filing of the suit rather than with service of process. In the Ragan situation, the service of notice of the action would necessarily take place during the limitations period provided by law and thus the time period is not extended in those states where the action commences only upon service.

The objectives of state statutes of limitations are protected by the notice requirement of Rule 15(c), as well as by the "knowledge" and "prejudice" requirements. Thus state interests are not significantly reduced by application of Rule 15(c), and the federal rule should prevail in diversity cases. One possible state interest not protected is a state's view of the use of relation-back amendments. The state interest in an arbitrary time period for commercial intercourse and as a cut-off date for litigation also may not be protected by Rule 15(c). However, the state interest in an arbitrary time period is minimal compared to the federal interest in the use of its procedural rules. Furthermore, operation of Rule 15(c) does not upset credit checks significantly nor does it flood the courts with litigation. Since

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179. Until a court adds a completely unrelated defendant or stranger by use of Rule 15(c) defendants will not have a viable argument that they are being deprived of the statute of limitations defense without judicial due process. Not even the Meredith court reached this result; thus, a defendant would hardly have a constitutional argument as long as the criteria of Rule 15(c) are applied with a modicum of caution. Rule 15(c) has been construed both narrowly and broadly by the courts since 1966, but it appears that no court has yet been in danger of upsetting the policies of the statute of limitations or depriving a defendant of his statute of limitations defense without procedural due process. Given the suggested interpretations and amendments of this Note, courts should be able to apply Rule 15(c) uniformly without undermining the policies of the statute of limitations. Certainly the suggested interpretations and amendments would not permit the addition or substitution of a completely unrelated stranger.

180. See text accompanying note 7 supra.
Rule 15(c) adequately reflects the most substantial aspects of the key policies of the statute of limitations defense, it is unreasonable to argue that the various important federal interests to be served by its application should be subservient to a state's procedural concept.

V. CONCLUSION

Since the 1966 Amendments to the Rules of Civil Procedure, Rule 15(c) has not been uniformly applied by the courts. One defect has been noted within the language of the amendment, and misleading interpretations of its provisions have been discussed. In order to rectify these inconsistencies and defects, several suggestions have been made which seek to satisfy the policy goals of both the federal rules and the statute of limitations: (1) notice should be interpreted to mean informal notice by knowledge of a specific claim arising from a litigable incident in which the defendant was involved; (2) the rule should be amended to add the words “and serving him with notice” to “within the period provided by law for commencing the action against him”; (3) “changing party” should include the addition, substitution, change of capacity and misnomer cases; (4) prejudice should refer primarily to the collection of evidence necessary for an adequate defense; and (5) Rule 15(c)(2) should require knowledge (whether constructive or actual) of a mistake of identity as well as knowledge that the action would have been brought against the proposed defendant except for the mistake. If these suggestions are adopted, Rule 15(c) will be uniformly applied in the federal courts without undermining the policies of the statute of limitations.