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Federal Rules of Civil Procedure; Statute of Limitations; State Policy; Relation Back; Marshall v. Mulrenin

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CONFLICT OF LAWS

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Marshall v. Mulrenin, 508 F.2d 39 (1st Cir. 1974)

IN SEPTEMBER OF 1967, Mrs. Marshall fell and injured herself on business premises in Massachusetts known as Craig Village by the Sea. In July of 1969, the Marshalls retained counsel, instituting a diversity action in the Massachusetts Federal District Court. The Marshalls named as defendants Mr. and Mrs. Kirk, the individuals whose names appeared on the certificate on file in the town hall in accordance with Massachusetts law[1] as the "real name of the person conducting the business."

The premises had in fact been conveyed by the Kirks to Mr. and Mrs. Mulrenin several years before the accident. The Kirks, however, in violation of the Massachusetts statute, had not filed a notice of discontinuance as required in order to update the certificate on file in the town hall. The Mulrenins continued to operate the business under the original name without filing a new certificate. The Marshalls did not discover, until after the Massachusetts statute of limitations for personal injury actions had run, that the named defendants, the Kirks, no longer owned the premises. The Marshalls therefore sought to amend by dismissing against the Kirks and naming the Mulrenins as defendants in the action.

The First Circuit Court of Appeals held that, in spite of federal rule 15(c),[2] the Marshalls had an absolute right under Massachusetts law[3] to bring in the Mulrenins. This ruling reversed the district court which had held that the amendment was impermissible under rule 15(c) and did not relate back.

A contra finding by the First Circuit Court of Appeals as to the permissibility of this amendment under rule 15(c) would have avoided a conflict between state law and the Federal Rules of Civil Procedure. The Marshalls contended that the notice given the Kirks, whom the Mulrenins permitted to appear as owners of record, should have been considered constructive notice to the Mulrenins within the meaning of rule 15(c). The First Circuit Court of Appeals stated that:

> This, however, is by no means an obvious conclusion. There was no evidence that the Mulrenins were aware of the statute, or that it had been violated by the prior owners' leaving their certificate on file. We do not pursue the matter, in the absence of authority, because we believe

[1] MASS. GEN. LAWS ANN. ch. 110, § 5 (1958).
[2] FED. R. CIV. P. 15(c).
[3] MASS. GEN. LAWS ANN. ch. 231, § 51 (1959).

that in spite of Rule 15(c), plaintiff had an absolute right under Massachusetts law to bring in the Mulrenins.[4]

Some federal courts have followed the rule that amendments to correct misnomer or misdescription of a defendant will relate back where the proper defendant is in court. An amendment which substitutes or adds a new party, however, creates a new cause of action, and under such circumstances, there is normally no relation back to original filing for purposes of limitations.[5] Since the 1966 amendment of rule 15(c), however, a number of courts have permitted amendments substituting defendants after the statute of limitations has run.[6]

The critical factor involved in rule 15(c) determinations is notice.[7] As Professor Moore has stated in his treatise on federal civil procedure: "rule 15(c) is based on the idea that a party who is notified of litigation concerning a given transaction or occurrence is entitled to no more protection from statutes of limitations than one who is informed of the precise legal description of the rights sought to be enforced."[8] The party that is sought to be substituted "must receive *notice of the action* 'within the period provided by law for commencing the action against him.' "[9]

In *Simmons v. Fenton,*[10] plaintiffs commenced an action for personal injuries on the last day of a two-year limitation period. After expiration of the statute of limitations, service was made on the named defendant, the 12-year-old daughter of the woman who was driving one of three cars involved in a collision. The Seventh Circuit Court of Appeals held that the plaintiffs were not entitled to have an amendment of the pleadings and service of process, substituting the mother as defendant and relating back to the original pleading under rule 15(c). The mother had not received the requisite notice within the limitation period and would have been prejudiced if the amendment had been allowed.

Mulrenin, like *Hanna v. Plumer,*[11] presents a case where there is a conflict

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[4] Marshall v. Mulrenin, 508 F.2d 39, 41 (1st Cir.1974).

[5] *E.g.,* Marlow v. Fisher Body, 489 F.2d 1057 (6th Cir. 1973); Longbottom v. Swabey, 397 F.2d 45 (5th Cir. 1968); United States v. Western Cas. & Surety Co., 359 F.2d 521 (6th Cir. 1966); Anderson v. Phoenix of Hartford Ins. Co., 320 F. Supp. 399 (W.D. La. 1970); Storey v. Garrett Corp., 43 F.R.D. 301 (C.D. Cal. 1967); King v. Udall, 266 F. Supp. 747 (D.D.C. 1967).

[6] *E.g.,* Meredith v. United Airlines, 41 F.R.D. 34 (S.D. Cal. 1966). *But cf.* Craig v. United States, 413 F.2d 854 (9th Cir. 1969). *See also* Trotter v. Cone Automatic Mach. Co., 48 F.R.D. 100 (E.D. Pa. 1969).

[7] Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971). *See also* Graves v. General Ins. Corp. 412 F.2d 583 (10th Cir. 1969); Baker v. Ferguson Research, Inc., 61 F.R.D. 637 (D. Mont. 1974).

[8] 3 J. MOORE, FEDERAL PRACTICE ¶ 15.15[2], at 1021 (2d ed. 1974).

[9] Simmons v. Fenton, 480 F.2d 133, 137 (7th Cir. 1973).

[10] *Id.*

[11] 380 U.S. 460 (1965).

between the Federal Rules of Civil Procedure and state law. Whether federal courts should apply the Federal Rules of Civil Procedure or contrary state law in diversity actions is a decision that continues to be plagued with uncertainty. *Hanna* held that rule 4(d)(1),[12] which controls service of process in diversity actions, neither exceeded the congressional mandate embodied in the Rules Enabling Act,[13] nor transgressed constitutional bounds and, therefore, took precedence over the conflicting Massachusetts rule.[14]

The holding of *Hanna* is based on the congressional mandate embodied in the Rules Enabling Act which delegated authority to the Supreme Court to establish the federal rules of procedure.[15] The Rules Enabling Act states emphatically that the federal rules are only to regulate procedure and "shall not abridge, enlarge, or modify any substantive rights."[16] The definition of what is substantive and what is procedural was of necessity left to the courts to determine under the Enabling Act within the bounds of its legislative intent and the Constitution. The Enabling Act was passed in 1934, approximately four years before *Erie R.R. Co. v. Tompkins*[17] was decided. There would seem to be no compulsion to look to *Erie* to resolve this definitional problem, except as *Erie* happened to address this question and define the constitutional bounds. The *Hanna* Court specifically pointed out[18] that the *Erie* rule[19] is not the appropriate test to use in determining the validity, and therefore the applicability of one of the Federal Rules of Civil Procedure.[20]

The *Hanna* Court indicated that the "outcome-determinative" test which was set forth in *Guaranty Trust Co. v. York*,[21] a descendant of *Erie*, is likewise

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[12] FED. R. CIV. P. 4(d)(1).
[13] Rules Enabling Act, 28 U.S.C. § 2072 (1958).
[14] MASS. GEN. LAWS ANN. ch. 197, § 9 (1958).
[15] 380 U.S. at 463-64, 470-71.
[16] Rules Enabling Act, 28 U.S.C. § 2072 (1958).
[17] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
[18] 380 U.S. at 469-70.
[19] Erie held that there is no federal general common law, that Congress has no power to declare substantive rules of common law applicable in a state, and that federal courts must apply state substantive law. This was based on the rationale that, when federal courts applied federal common law, there was an unconstitutional invasion of rights reserved to the states.
[20] The directive of Erie, as pointed out by the Hanna Court, is essentially the same as the Rules Enabling Act, viz., federal courts must apply federal procedural law and state substantive law. It would seem that only when a state rule is characterized as substantive instead of procedural should the *Erie* doctrine come into play to achieve the objectives of elimination of forum shopping and avoidance of inequitable administration of the law. Erie therefore, seemingly should provide no guidance on how to determine or define what is substantive and what is procedural under the circumstances of Hanna, or Mulrenin, except as these objectives are deemed relevant in determining whether or not the particular state law is substantive in construing the Enabling Act.
[21] *See* Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) wherein the "outcome determinative" test was announced: "And so the question is not whether a statute of

inappropriate. The Supreme Court pointed out in *Hanna* that *"every* procedural variation is 'outcome-determinative' "[22] in the sense that the outcome of the case depends on the particular ruling of the court at the point an encountered conflict between a state rule and a federal rule of procedure is resolved. Carried to extreme, the *York* test would virtually mandate the use of state rules of civil procedure and thereby frustrate the legislative intent of the Rules Enabling Act, *viz.*, the goal of uniformity in federal practice.[23]

While *Hanna* can be interpreted to be an assertion of the supremacy of the federal rules,[24] the validity of such an interpretation is uncertain since the Supreme Court distinguished rather than overruled its earlier decision in *Ragan v. Merchants Transfer & Warehouse Co.*[25] In *Ragan,* the complaint was filed before the statute of limitations had run; the defendant was not served, however, until after the statutory period. Under Kansas law, considered in *Ragan,* the service must have occurred within the statutory period, while filing alone was sufficient under the federal rule.[26] The *Ragan* Court characterized the state rule as substantive within the meaning of the *Erie* doctrine. The courts are divided on the question of whether *Ragan* is still authoritative after *Hanna.*[27]

The *Hanna* doctrine has been widely applied in the courts of appeals.[28]

limitations is deemed a matter of 'procedure' in some sense. The question is . . . does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?"

[22] 380 U.S. at 468-69.

[23] Various federal rules have been attacked as affecting substantive rights; however, the rules have been upheld. *See* Hanna v. Plumer, 380 U.S. 460 (1965) (rule 4[d][1]); Schlagenhauf v. Holder, 379 U.S. 104 (1964) (rule 35[a]); Cold Metal Process Co. v. United Engineering & Foundry Co., 351 U.S. 445 (1956) (amended rule 54[b]); Mississippi Publishing Co. v. Murphee, 326 U.S. 438 (1946) (rule 4[f]); Sibbach v. Wilson & Co., 312 U.S. 1 (1941) (rule 35); *cf.* Perry v. Allen, 239 F.2d 107 (5th Cir. 1956).

[24] *See* Meredith v. United Airlines, 41 F.R.D. 39 (S.D. Cal. 1966); C. WRIGHT, LAW OF FEDERAL COURTS, § 59, at 245 (2d ed. 1970).

[25] Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949).

[26] FED. R. CIV. P. 3.

[27] *Compare* Sylvestri v. Warner & Swasey Co., 398 F.2d 598, 604-06 (2d Cir. 1968); Grabowski v. United States, 294 F. Supp. 421 (D. Wyo. 1968); Elizabethtown Trust Co. v. Konschak, 267 F. Supp. 46 (E.D. Pa. 1967); *with* Groninger v. Davison, 364 F.2d 638 (8th Cir. 1966); Sylvester v. Messler, 351 F.2d 472 (6th Cir. 1965), *cert. denied,* 382 U.S. 1011 (1966); Tanner v. Presidents-First Lady Spa, Inc., 345 F. Supp. 950 (E.D. Mo. 1972); Hendricksen v. Roosevelt Hospital, 276 F. Supp. 731 (S.D.N.Y. 1967); O'Shea v. Binswanger, 42 F.R.D. 21 (D. Md. 1967).

[28] *E.g.,* Ransom v. Brennan, 437 F.2d 513 (5th Cir. 1971) (substitution of executor governed by federal rules); Sylvestri v. Warner & Swasey Co., 398 F.2d 598 (2d Cir. 1968); Crowder v. Gordons Transports, Inc., 387 F.2d 413 (8th Cir. 1967) (federal rules govern relation back of amended complaint); Har-Pen Truck Lines, Inc. v. Mills, 378 F.2d 705 (5th Cir. 1967); Szantay v. Beech Aircraft Corp., 349 F.2d 60 (4th Cir. 1965).

While the cases are divided, a number of courts have determined, subsequent to *Hanna,*[29] that state law need not be followed in cases involving relation back of amendments as to defendants[30] after the statute of limitations has run.[31]

In *Swartzwalder v. Hamilton,*[32] the plaintiff, injured in an auto accident, brought an action against a party whom he thought was the driver and owner of the vehicle. The named defendant, however, was neither the driver nor the owner. After the statute of limitations had run, plaintiff sought to substitute the driver and her husband as defendants. The District Court for the Middle District of Pennsylvania held that current federal practice under rule 15, not state law, controls the question of whether an amendment substituting a party defendant can be made after expiration of the statute of limitations. The *Swartzwalder* court permitted substitution, even though the statute had run, since the parties sought to be substituted as defendants had notice of the action. The defendants were in the auto at the time of the collision and could not complain that they did not know of the suit within the period of the statute of limitations.

In *Meredith v. United Airlines,*[33] the District Court for the Southern District of California held that, in view of *Hanna,* the doctrine of *Erie* does not require the application of state law rather than federal law as to relation back. The *Meredith* court, citing *Chase Securities Corp. v. Donaldson,*[34] further pointed out that no party has any vested or substantive right in the protection of a statute of limitations.

In *Martz v. Miller Brothers Co.,*[35] the Federal District Court for the District of Delaware determined that, in spite of a contrary result under Delaware law, the question of whether an amended pleading relates back is

[29] Even before the Hanna decision, courts have held that federal rule 15(c) should control relation back in the face of the Erie doctrine. *See, e.g.,* Aarhus Oliefabrik, A/S v. A. O. Smith Corp., 22 F.R.D. 33 (E.D. Wis. 1958); *cf.* Gifford v. Wichita Falls & So. Ry. Co., 224 F.2d 374 (5th Cir. 1955), *cert. denied,* 350 U.S. 895 (1955).

[30] Welch v. Louisiana Power & Light Co., 466 F.2d 1344, 1345 (5th Cir. 1972); Loudenslager v. Teeple, 466 F.2d 249, 250 (3d Cir. 1972); Williams v. Avis Transport of Canada, Ltd., 57 F.R.D. 53, 56 (D. Nev. 1972); Swartzwelder v. Hamilton, 56 F.R.D. 606, 608 (M.D. Pa. 1972); Meredith v. United Airlines, 41 F.R.D. 34, 39 (S.D. Cal. 1966); Cone v. Shunka, 40 F.R.D. 12, 14 (W.D. Wisc. 1966); Martz v. Miller Bros. Co., 244 F. Supp. 246, 250 (D. Del. 1965).

[31] A number of courts, applying federal law rather than state law, have allowed amendments as to plaintiffs after the statute of limitations has run. *See, e.g.,* Longbottom v. Swabey, 397 F.2d 45 (5th Cir. 1968); Crowder v. Gordons Transports, Inc., 387 F.2d 413 (8th Cir. 1967); Holmes v. Pennsylvania New York Cent. Transp. Co., 48 F.R.D. 449 (N.D. Ind. 1969); Newman v. Freeman, 262 F. Supp. 106 (E.D. Pa. 1966) (Applied 15[c] rather than state law which would have disallowed the amendment).

[32] Swartzwelder v. Hamilton, 56 F.R.D. 606 (M.D. Pa. 1972).

[33] Meredith v. United Airlines, 41 F.R.D. 34, 39 (S.D. Cal. 1966).

[34] Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945).

[35] Martz v. Miller Bros. Co., 244 F. Supp. 246 (D. Del. 1965).

procedural; and, therefore, the federal court is not required to follow state law. The *Martz* court pointed out that the courts which have permitted relation back of amendments adding defendants after the statute of limitations had run, have utilized one or more of three theories:

> (1) that neglect of the plaintiff or his attorney in suing the wrong party was excusable, (2) that defendant had misled plaintiff or "lulled" him into the feeling that he had sued the right defendant when he had not, or (3) that the party actually sued and the party whom plaintiff meant to sue had sufficient "identity of interest."[36] (footnotes omitted.)

The court indicated that cases[37] in the second category at times proceeded on an estoppel theory.

In spite of *Hanna v. Plumer,* some federal courts have applied state law instead of rule 15(c) in diversity actions involving relation back of amendments.[38] In *Burns v. Turner Construction Co.,*[39] an action to recover for injuries sustained in falling off a platform, the plaintiff filed an amended complaint to add several new defendants after the statute of limitations had run. The Federal District Court of Massachusetts held that under the *Erie* doctrine, a federal court in a diversity action should apply the law of the forum state regarding amendments as to parties. The court indicated, however, that relation back would not have been allowed under rule 15(c) due to lack of notice and probable prejudice to new defendants. In *Nave v. Ryan,*[40] a diversity action for wrongful death, the plaintiff sought to amend the complaint, which alleged malpractice, to join an anesthesiologist as an additional party defendant. The amendment was filed after the Connecticut one-year statute of limitations had run. Citing *York* and *Ragan,* the Federal District Court of Connecticut held that the Connecticut rule controlled and must be applied because the court "may not keep alive a right which has lapsed under state law."[41]

Courts that have applied state law instead of the federal rules have chosen to disregard the *Hanna* Court's view that Enabling Act rationale, rather than that of *Erie,* should be the test in these cases.[42] The *Hanna* court, in fact, distinguished the line of cases that have attacked the rules as invading

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[36] *Id.* at 250-51.

[37] *E.g.,* Williams v. Pennsylvania R.R. Co., 91 F. Supp. 652 (D. Del. 1950).

[38] Burns v. Turner Constr. Co., 265 F. Supp. 768 (D. Mass. 1967); Nave v. Ryan, 266 F. Supp. 405 (D. Conn. 1967); *cf.* Anderson v. Pappillion, 445 F.2d 841 (5th Cir. 1971).

[39] Burns v. Turner Constr. Co., 265 F. Supp. 768 (D. Mass. 1967).

[40] Nave v. Ryan, 266 F. Supp. 405 (D. Conn. 1967).

[41] *Id.* at 407.

[42] 380 U.S. at 470. *See* Johnson Chemical Co. v. Condado Center, Inc., 453 F.2d 1044, 1046 (1st Cir. 1972).

substantive rights and exceeding the grant of power in the Enabling Act[43] from the line of cases which are the progeny of *Erie*.[44]

In spite of the *Hanna* Court's view that the *Erie* rule is not the appropriate test to use in determining the validity and applicability of a federal rule of civil procedure, the *Mulrenin* court chose to base its decision on *Erie* rationale. The First Circuit Court of Appeals pointed out that: "Although Rule 15, on its face, conflicts with section 51, to apply the rule would mean that the choice of forum 'would wholly bar recovery.' "[45] The *Mulrenin* court considered *Hanna's* holding to be contained in its disclaimer of an intent to effect substantive results. The court said, in *Erie*-styled prose:

> Such a construction does not, of course, render Federal Rules inoperative in their procedural aspects. It merely means that a rule is not to be applied to the extent, if any, that it would defeat rights arising from state substantive law as distinguished from state procedure. This line may not always be easy to draw.[46]

The First Circuit Court of Appeals dedicated a sizeable portion of its opinion in *Marshall v. Mulrenin* to its views on the Supreme Court's decision in *Hanna*.[47] The First Circuit concluded that, in *Hanna,* the Supreme Court misconstrued the Massachusetts statute that it struck down, "but that this misreading is not to be taken as part of the *ratio decidendi* so far as the treatment of other state statutes in other circumstances is concerned."[48] One may interpret this position to mean that the rationale of the *Hanna* Court is appropriate as to state statutes where a strong underlying public policy is not present. The *Mulrenin* court places much emphasis[49] on the "strong public policy" behind the state statute[50] that was in conflict with rule 4(d)(1) in *Hanna*. The court also implied that a strong state policy is behind the statute[51] involved in *Mulrenin*. The First Circuit indicated, apparently based in large part on these considerations,[52] that *Hanna* was therefore only "superficially

[43] *E.g.*, Schlagenhauf v. Holder, 379 U.S. 104 (1964) (rule 35[a]); Cold Metal Process Co. v. United Engineering & Foundry Co., 351 U.S. 445 (1956) (amended rule 54[b]); Mississippi Publishing Co. v. Murphee, 326 U.S. 438 (1946) (rule 4[f]); Sibbach v. Wilson & Co., 312 U.S. 1 (1941) (rule 35).

[44] *E.g.*, Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949); Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

[45] 508 F.2d at 44.

[46] *Id.*

[47] *See* 508 F.2d at 41, n.2, where the court notes that it is conscious of the fact that it was the court which the Supreme Court unanimously reversed in Hanna.

[48] *Id.* at 41.

[49] *Id.* at 42-43.

[50] MASS. GEN. LAWS ANN. ch. 197, § 9 (1958).

[51] MASS. GEN. LAWS ANN. ch. 231, § 51 (1959).

[52] *See generally* Johnson Chemical Co. v. Condado Center, Inc., 453 F.2d 1044, 1046 (1st Cir. 1972) (the court interprets Byrd v. Blue Ridge Rural Electric Coop. Inc., 356 U.S. 525 [1958], as having added a new criterion to *Erie*-type problems, viz., that a

apposite" to the decision of whether to look to state law or federal law under the facts of *Mulrenin*.[53] The *Hanna* Court, however, appeared to be fully cognizant of this underlying public policy argument since the opinion took note of the fact that the court of appeals seemed to frame the inquiry in terms of how "important" section 9 was to the state of Massachusetts and that section 9 was designed to make sure that the executors receive actual notice.[54]

Mr. Justice Harlan, in his concurring opinion in *Hanna,* concluded that last and usual service under rule 4 affords substantially as good a notice as the Massachusetts statute. He did not see the application of rule 4(d)(1), instead of the Massachusetts service rule, as having a substantial effect on the speed with which estates are distributed. Such a practice would simply mean that an executor would have to check at his own house or the federal courthouse, as well as the registry of probate, before he could distribute the estate without fear of being held personally liable for further liabilities that may be outstanding. Mr. Justice Harlan then concluded that the variation between rule 4(d)(1) and the Massachusetts law was not substantial[55] and did "not seem enough to give rise to any impingement on the vitality of the state policy which the Massachusetts rule is intended to serve."[56]

The *Hanna* Court did not appear to be compelled to classify a right as substantive merely because a strong state policy or clear legislative intent was present. Instead, the Court relied on Enabling Act rationale, referring to federal rules of civil procedure as "housekeeping" rules for the courts, even though some of them will inevitably differ from comparable state rules.[57]

Continued application of the rationale of *Erie* and its progeny to resolve conflicts between the Federal Rules of Civil Procedure and state law will only preserve the confusion now inherent in this area of the law. The approach taken by the *Hanna* Court to resolve these conflicts appears to be much preferred over an analysis of whether a particular state policy is strong enough to classify the right as substantive. Uniform application of Enabling Act rationale would lend a great deal more certainty to this area of the law and would honor, rather than frustrate, the legislative intent of the Rules Enabling Act, *viz.*, the goal of uniformity in federal practices.[58]

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balancing of the policies behind the federal and state laws in conflict was added to the determination of which law to apply).

[53] 508 F.2d at 41.
[54] 380 U.S. at 468, n.9.
[55] *Id.* at 469, n. 11.
[56] *Id.* at 478.
[57] *Id.* at 473.
[58] *See* C. WRIGHT, LAW OF FEDERAL COURTS § 66, at 276 (2d ed. 1970).