A Potential Sword for Defendants in Product Liability Cases

By Kevin M. Reynolds and Jackson O'Brien

Misnamed Corporate Entities and the "Relation-Back" Rule

Several state court rules governing the relation back of amendments changing the party or changing the name of the defendant sued are distinctly different from the federal rule, which may determine case outcomes.

The doctrine of relation back may provide a case-dispositive defense when it is applied to a product liability case in which the plaintiff has sued the wrong defendant, or misnamed the correct defendant, and service has not been made on the correct party before the statute of limitations expires. Many states have a relation-back rule that favors defendants and is contrary to Federal Rule of Civil Procedure 15(c). In those jurisdictions, if a plaintiff sues the wrong party and fails to effect service of process on the correct defendant within the applicable statute of limitations, the case will be dismissed, and since the limitations period has run, the dismissal will be *with prejudice*. This issue should be of special concern to defense counsel since most, if not all, product liability cases are typically removed from state court to federal court, if removal jurisdiction exists. If a case is removed, the defendant could lose the defense of relation back provided by the state court rule.

For example, a corporate defendant took advantage of a state court, relation-back rule in *Richardson v. Walgreens*, 680 N.W.2d 379 (Iowa Ct. App. 2004) (table) (unpublished). In *Richardson*, a plaintiff misnamed the corporate defendant in a suit, the statute of limitations for personal injury actions expired, and later, the plaintiff sought to fix the error in the defendant's name and have the amendment relate back to the original filing date. In *Richardson*, the trial granted a summary judgment of dismissal, which was affirmed by the Iowa Court of Appeals, based on Iowa's relation-back rule, Iowa Rule of Civil Procedure 1.402(5).

Some defense practitioners may not be aware that several state court rules governing the relation back of amendments changing the party (or even changing the name of the defendant sued) are distinctly different from the federal rule. This difference may be case determinative, and for this reason, the operation of the relation-back rule and the current state of the law on this issue is the focus of this article.

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Rules Governing the Relation Back of Amendments Changing the Party to Be Sued

Iowa's relation-back rule, Rule 1.402(5), is a good example of a relation-back rule that differs from Federal Rule of Civil Procedure 15(c), and it is similar to many other states' rules. Iowa's rule provides as follows:

> An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party, the party to be brought in by amendment has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

This rule was based on and is identical to the *former* federal Rule15(c) on relation-back before the 1991 amendments.

Federal Rule of Civil Procedure 15(c) today is distinctly different and provides as follows:

> ***When an amendment relates back.*** An amendment to a pleading relates back to the date of the original pleading when
>
> (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

This rule was amended in 1991 to its current form to avoid what some thought was a harsh result in *Schiavone v. Fortune*, 477 U.S. 21 (1986).

Amended Rule 15(c) differs from many state court relation-back rules in one significant respect: the federal rule omits the terms "institution of the action" and replaces that language with a test defined by the time period allowed for service. This allows a plaintiff who has waited until the statute of limitations has nearly expired extra time to bring the correct party into the suit as long as service of process is effected within the time permitted by the service rules. In federal court under Rule 4(m), that time period is 90 days. This may or may not be the same as the time period permitted for service in state court actions. *See, e.g.,* Iowa R. Civ. P. 1.302(5) (permitting 90 days for service, although as with the federal rule, the court may grant a longer period of time based on a showing of good cause).

In *Schiavone*, the U.S. Supreme Court upheld the dismissal of an action with a misnamed defendant, based on the express language of the rule, when the defendant did not have knowledge of the pendency of the action within the applicable limitations period. The result in *Schiavone* was the same as the result in *Richardson* in Iowa.

Schiavone v. Fortune

Three plaintiffs in *Schiavone,* whose cases were consolidated on appeal, had filed libel suits in federal court in New Jersey and claimed that they had been defamed in a cover story entitled, "[T]he Charges Against Reagan's Labor Secretary," which appeared in the May 31, 1982, issue of Fortune magazine. The caption of each complaint named "Fortune," without any further identification, as the defendant. "Fortune," however, was only a trademark and the name of an internal division of Time, Incorporated, a New York corporation.

The plaintiffs' counsel mailed the complaints to Time's registered agent for service of process. The complaints were received on May 23, 1983, but the agent refused service because Time was not named as a defendant. Later, on July 18, 1983, each plaintiff amended their complaints to name as the captioned defendant "Fortune, also known as Time, Incorporated," and the body of each amended complaint contained similar references to Time. The amended complaints were served on Time by certified mail on July 21, 1983.

Time moved to dismiss the complaints, and the district court granted those motions. Under New Jersey substantive law, a libel action must be commenced within one year of the alleged libel. Although Time admitted that the original filings were within the limitations period, it took the position that it could not be named as a party after the period had expired. Time contended that a party must be substituted within the limitations period for the amendment to relate back to the original filing date under to Rule 15(c). The district court reasoned that the amendments did not relate back to the original filing of the complaints because it had not been shown that Time received notice of the filing of the suits within the limitations period.

On appeal to the Third Circuit, the court affirmed the orders of the district court and ruled that the statute of limitation ran on May 19, 1983, at the latest, and regarded the language of Rule 15(c) to be "clear and unequivocal." 750 F.2d at 18. It also said, "While we are sympathetic to plaintiff's arguments, we agree with the defendant that it is not this court's role to amend procedural rules in accordance with our own policy preferences." *Id.* The petitioners then sought review in the U.S. Supreme Court, and "because of an apparent conflict among the Courts of Appeal," certiorari was granted. 477 U.S. at 22.

In a 6–3 decision authored by Justice Blackmun, the Supreme Court affirmed the dismissal of the cases, based on the express language of Rule 15(c). After discussing the factual chronology and relevant dates of filing and service, which were not in dispute, the Court noted:

> We do not have before us a choice between a "liberal" approach toward Rule 15(c), on the one hand, and a "technical" interpretation of the Rule, on the other hand. The choice, instead, is between recognizing or ignoring what the Rule provides in plain language. We accept the Rule as meaning what it says.

477 U.S. 21 at 30.

The Court then concluded, "The linchpin is notice, and notice within the limitations period. Of course, there is an element of arbitrariness here, but that is a characteristic of any limitations period. And it is an arbitrariness imposed by the legislature and not by the judicial process." 477 U.S. at 32.

The *Schiavone* Dissent: "Magic Words," "Trapdoors," and a "Return to the Sporting Theory of Justice"

Notwithstanding the seemingly clear language of Rule 15(c), a strident dissent in *Schiavone*, authored by Justice Stevens and joined by Chief Justice Rehnquist and Justice White, framed the issue as follows:

> Certain principles are undisputed. If petitioners had filed their suits alleging that Fortune magazine libeled them on precisely the same date; had added the magic words "also known as Time, Incorporated" to the word "Fortune;" and had done everything else exactly the same, petitioners would be entitled to proceed with their legal actions. Because petitioners committed the "fatal" error… of identifying the defendant by its name of publication rather than its name of incorporation, however, the Court finds that they fell through a trapdoor—despite the fact that the magazine's publisher's agent contemporaneously noted his understanding that the suits were directed against the magazine published (Time, Incorporated) fully as much as if petitioners had included the magic words.
>
> In my view, the Court's decision represents an aberrational—and, let us hope, isolated—return to the sporting theory of justice" condemned by Roscoe Pound 80 years ago. The Court's result is supported neither by the language nor purposes of the Federal Rules, or of Rule 15(c) in particular.

477 U.S. at 32–33.

It is clear that the so-called "harsh results" in both *Schiavone* and *Richardson* were self-imposed by plaintiffs' counsel: the dismissals would not have happened if the plaintiffs had diligently investigated to identify the proper corporate defendants before filing suit.

The dissent urged several points. First, the then-federal rule governing time for service of process, Rule 4(j), was met, since at that time it allowed 120 days after filing for service of process. Second, the dissent noted that the suit papers were served on Time's registered agent, and they were forwarded to Time's legal counsel with the notation "Remarks: Discrepancy in corporate title noted. Letter from atty. indicates papers are for Time, Incorporated as publisher of Fortune. Service was made by mail pursuant to Rule 4(c) of the Federal Rules of Civil Procedure." 477 U.S. at 34. Further, the dissent noted that there was "no suggestion that [the amendment] did cause, or could have caused, Time, Incorporated any prejudice in maintaining its defense on the merits of the case." On this point, the dissent summarized: "The only question is whether Rule 15(c) should be construed to render petitioner's complaints untimely even though they were filed within the statute of limitations and even though Time, Incorporated, clearly had adequate notice of the timely filed complaints." 477 U.S. at 34. The dissent also argued that the amendments at issue did not "change the party against whom a claim is asserted" and thus, the express language of Rule 15(c) did not apply. Finally, the dissent posited that the rule could be interpreted to encompass the time permitted for service of process on a defendant in construing the terms "the period provided by law for commencing the action against him." 477 U.S. at 37.

In 1991, Rule 15(c) was amended to avoid the result in *Schiavone v. Fortune*. *See* Fed. R. Civ. P. advisory committee note to para. (c)(3) (1991 amendment) ("The paragraph has been revised to change the result in *Schiavone v. Fortune* with respect to the problem of a misnamed defendant. An intended defendant who is notified of an action within the period allowed by Rule 4(m) for service of a summons and complaint may not under the revised rule defeat the action on account of a defect in the pleading with respect to a defendant's name.").

Notwithstanding *Schiavone* and the federal rule amendments, the relation-back rule in several states is worded identically to the *former* federal Rule 15(c). *Schiavone*-like results will persist in those jurisdictions. At last count, 15 states plus Puerto Rico have relation-back rules that are the functional equivalent of the defendant friendly rule applied in *Schiavone* and *Richardson*. The chart on page 77 identifies the rule in each of these jurisdictions.

Strategic Defense Considerations Regarding Relation Back

It is clear that the so-called "harsh results" in both *Schiavone* and *Richardson* were self-imposed by plaintiffs' counsel: the dismissals would not have happened if the plaintiffs had diligently investigated to identify the proper corporate defendants before filing suit. Statutes of limitation provide ample time to do so. Another way to avoid this calamity would have been for plaintiffs' counsel *not* to wait until the statute of limitations had nearly expired before filing the cases. The ensuing problem was twofold: in both cases plaintiffs' counsel waited too long to sue, and in both cases, they then sued the wrong defendants or butchered the correct name of the defendant. In *Richardson*, if counsel had filed the case one or two months earlier, Walgreens would have been served with notice of suit before the limitations period had expired. Walgreens would have then had notice of the action, and any amendment to change or correct the name of the party defendant would have related back to the initial filing of the suit under Iowa's relation-back rule.

In jurisdictions that apply a rule akin to the old form of Rule 15(c), the notice of a *mere claim* held by a potential plaintiff, or discussions between a claimant or a claimant's attorney and a potential defendant or that defendant's liability insurance carrier, does not equate to "notice of the institution of the action" under the express terms of the rule. This is an important point. In many cases, a potential defendant, an insured, or an insurer will have knowledge of a claim, or of a potential claim, through pre-suit negotiations; yet, for relation back to apply in the Iowa state courts, a defendant must have knowledge "*of the institution of the action*": knowledge of the actual *filing* of a law-

Survey of States Regarding the Relation-Back Rule

State	Does relation back occur if service is made after the statute of limitations runs?
Alabama	Yes. The correct party or name of defendant must be named and served within the statute of limitations or within 120 days of commencement of the action, whichever comes later. In emergency cases where the identity and name of the defendant are unknown, a party may sue under a fictitious name and later amend the pleading once information surfaces. Ala. R. Civ. P. 9(h), 15(c)(3).
Alaska	Yes. The correct party defendant must merely be served within the time allowed for service. Alaska R. Civ. P. 15(c).
Arizona	Yes. The correct party defendant must merely be sued and served within the time allowed for service. Ariz. R. Civ. P. 15(c)(2)(B).
Arkansas	Yes. The correct party or name of defendant must be sued within the time allowed for service. Ark. R. Civ. P. 15(c)(2).
California	Yes. The correct party defendant may be named and served after the statute of limitations has run, as long as the nature of the action is not substantially changed as determined by the court as justice so requires. Cal. Code Civ. Proc. §473(a)(1); *Hawkins v. Pac. Coast Bldg. Prods.*, Inc., 124 Cal. App. 4th 1497, 1504 (Cal. Ct. App. 2004).
Colorado	Yes. The correct party defendant must be named and served within the time allowed for service. Colo. R. Civ. P. 15(c).
Connecticut	Yes. The correct party defendant may be named and served within the first 30 days after the return day, or after, at the discretion of the court. Conn. Gen. Stat. §§52-128, 52-123 (2017); *Pack v. Burns*, 562 A.2d 24, 27 (Conn. 1989).
Delaware	Yes. The correct party or defendant must be named and served within the time allowed for service. Del. Super. Ct. Civ. R. 15(c)(3).
District of Columbia	Yes. The correct party defendant must be named and served within the time allowed for service. D.C. Sup. Ct. R. Civ. 15(c)(1)(C).
Florida	No. The correct party defendant must be sued and served within the statute of limitations or receive proper notice within that time. Fla. R. Civ. P. 1.190(c); *Kozich v. Shahady*, 702 So. 2d 1289, 1291 (Fla. Ct. App. 1997).
Georgia	No. The correct party defendant must be sued and served within the statute of limitations or receive proper notice within that time. Ga. Code Ann. §9-11-15(c) (2017).
Guam	Yes. The correct party defendant must be named and served within the time allowed for service. Guam R. Civ. P. 15(c)(3).
Hawaii	Yes. The correct party defendant may be named and served after the statute of limitations has run, as long as the action still arises out of the same conduct, transaction, or occurrence; the party has received such notice of the action that it will not be prejudiced; and the party had reason to know that it should have been named as a defendant but for a mistake. Haw. R. Civ. P. 15(c)(3).
Idaho	Yes. The correct party defendant must be named and served within the time allowed for service. Idaho R. Civ. P. 15(c)(1)(C).
Illinois	Yes. The correct party defendant may be named and served after the statute of limitations has run, as long as the action was commenced within the statute of limitations; the party received notice within the time for service; the party had reason to know that it should have been named as a defendant but for a mistake; and the action still arises out of the same transaction or occurrence as initially submitted. 735 Ill. Comp. Stat. 5/2-616(d) (2017).
Indiana	Yes. The correct party defendant may be named and served after the statute of limitations has run, as long as within 120 days of the commencement of the action, the party received notice of the litigation, and had reason to know that it should have been named as a defendant but for a mistake. Ind. R. Trial P. 15(C).
Iowa	No. The correct party defendant must be sued and served within the statute of limitations or receive proper notice within that time. Iowa R. Civ. P. 1.402(5).
Kansas	Yes. The correct party defendant must be named and served within the time allowed for service. Kan. Stat. Ann. §60-215(c)(3) (2017).
Kentucky	No. The correct party defendant must be sued and served within the statute of limitations or receive proper notice within that time. Ky. R. Civ. P. 15.03(2).
Louisiana	Yes. The correct party defendant may be named and served after the statute of limitations has run, as long as the party received such notice of the action that it will not be prejudiced and had reason to know that it should have been named as a defendant but for a mistake, the action still arises out of the same transaction or occurrence, and the party is not wholly new or unrelated to the action. La. C.C.P. art. 1153; *Gioir v. S. La. Med. Ctr., Div. of Hosps.*, 475 So. 2d 1040, 1044 (La. 1985).
Maine	Yes. The correct party defendant must merely be named and served within the time allowed for service. Me. R. Civ. P. 15(c)(3).
Maryland	Yes. The correct party defendant may be named and served after the statute of limitations has run as long as the correct defendant was the party originally intended to be sued and had such timely notice that it would not be unfairly prejudiced. Md. Rule 3-341; *Williams v. Hofmann Balancing Techniques, Ltd.*, 776 A.2d 4, 20 (Md. Ct. Spec. App. 2001).
Massachusetts	Yes. The correct party defendant may be named and served after the statute of limitations has run as long as the amendment arises out of the same conduct, transaction, or occurrence as set forth in the initial pleading. Mass. R. Civ. P. 15(c).
Michigan	No. The relation-back doctrine does not apply to the addition of new parties. Mich. Ct. R. 2.118(D); *Miller v. Chapman Contr.*, 730 N.W.2d 462, 463–64 (Mich. 2007).
Minnesota	No. The correct party defendant must be sued and served within the statute of limitations or receive proper notice within that time. Minn. R. Civ. P. 15.03.
Mississippi	Yes. The correct party defendant must be named and served within the time allowed for service. Miss. R. Civ. P. 15(c).
Missouri	Yes. The correct party defendant must be sued and served within the time allowed for service. Mo. Sup. Ct. R. 55.33(c).
Montana	Yes. The correct party defendant must be named and served within the time allowed for service. Mont. Code Ann. §20-3-15 (2017).

Survey of States Regarding the Relation-Back Rule

State	Does relation back occur if service is made after the statute of limitations runs?
Nebraska	No. The correct party defendant must be named and served within the statute of limitations or receive proper notice within that time. Neb. Rev. Stat. §25-201.02(2).
Nevada	Yes. The correct party defendant may be named and served after the statute of limitations has run, as long as the party has received actual notice of the action, had reason to know that it was a proper party, and has not been prejudiced. Nev. R. Civ. P. 15(c); *Badger v. Eighth Judicial Dist. Ct.*, 373 P.3d 89, 94 (Nev. 2016).
New Hampshire	No. The correct party defendant must be sued and served within the statute of limitations or receive proper notice within that time. N.H. Rev. Stat. Ann. §514:9 (2017); *Dupuis v. Smith Props.*, 325 A.2d 781, 783 (N.H. 1974).
New Jersey	No. The correct party defendant must be sued and served within the statute of limitations or receive proper notice within that time. N. J. Ct. R. 4:9-3.
New Mexico	No. The correct party defendant must be sued and served within the statute of limitations or receive proper notice within that time. N.M. R. Civ. P. 1-015(C).
New York	Yes. The correct party defendant may be named and served after the statute of limitations has run, as long as the party had reason to know that the party was intended to be summoned and would not be prejudiced. N.Y. C.P.L.R. Law §3025(c) (Consol. 2017); *Simpson v. Kenston Warehousing Corp.*, 154 A.D.2d 526, 527 (N.Y. App. Div. 1989).
North Carolina	Yes. The correct party defendant may be named and served after the statute of limitations has run, as long as there is evidence that the intended defendant has in fact been properly served and would not be prejudiced. N.C. Gen. Stat. §1A-1-15 (2017); *Liss v. Seamark Foods*, 555 S.E.2d 365, 369 (N.C. Ct. App. 2001).
North Dakota	No. The correct party defendant must be named and served within the statute of limitations or receive proper notice within that time. N.D. R. Civ. P. 15(c).
Northern Mariana Islands	Yes. The correct party defendant must be named and served within the time allowed for service. N. Mar. I. R. Civ. P. 15(c)(3).
Ohio	No. The correct party defendant must be sued and served within the statute of limitations or receive proper notice within that time. Ohio Civ. R. 15(C).
Oklahoma	Yes. The correct party defendant must be named and served within the time allowed for service. Okla. Stat. 12 §2015(C)(3) (2017).
Oregon	No. The correct party defendant must be sued and served within the statute of limitations or receive proper notice within that time. Or. R. Civ. P. 23(C).
Pennsylvania	Yes. The correct party defendant may be named and served after the statute of limitations has run, as long as the party received notice of the action within 90 days of the expiration of the statute of limitations such that the party will not be prejudiced and had reason to know to know that the party should have been named as a defendant but for a mistake. Pa. R. C. P. 1033(b).
Puerto Rico	No. The correct party defendant must be sued and served within the statute of limitations or receive proper notice within that time. P.R. R. Civ. P. 13.3; *Hernandez Moreno v. Serrano Marrero*, 719 F. Supp. 70, 72 (D.P.R. 1989).
Rhode Island	Yes. The correct party defendant must be named and served within the time allowed for service. R.I. Super. Ct. R. Civ. P. 15(c).
South Carolina	No. The correct party defendant must be sued and served within the statute of limitations or receive proper notice within that time. S.C. R. Civ. P. 15(c).
South Dakota	No. The correct party defendant must be sued and served within the statute of limitations or receive proper notice within that time. S.D. Codified Laws §15-6-15(c) (2017).
Tennessee	Yes. The correct party defendant must be named and served within the statute of limitations or within 120 days after commencement of the action. Tenn. R. Civ. Proc. 15.03.
Texas	Yes. The correct party defendant is treated as having been properly sued under a misnomer, as long as it is clear that no one was misled or placed at a disadvantage by the error. The serving party need only correct the misnomer before entry of judgment. *Tex. R. Civ. P. 62; Sheldon v. Emergency Med. Consultants*, 43 S.W.3d 701, 702–03 (Tex. App. 2001).
Utah	Yes. The correct party defendant must be named and served within the time allowed for service. Utah R. Civ. P. 15(c)(3).
Vermont	Yes. The correct party defendant must be named and served within the time allowed for service. Vt. R. Civ. P. 15(c)(3).
Virgin Islands	Yes. The correct party defendant must be named and served within the time allowed for service. V.I. R. Civ. P. 15(c)(1)(C).
Virginia	No. The correct party defendant must be named and served within the statute of limitations or receive proper notice within that time. Va. Code Ann. §8.01-6 (2017).
Washington	No. The correct party defendant must be sued and served within the statute of limitations or receive proper notice within that time. Wash. Super. Ct. Civ. R. 15(c).
West Virginia	Yes. The correct party defendant must be named and served within the time allowed for service. W. Va. R. Civ. P. 15(c)(3).
Wisconsin	No. The correct party defendant must be sued and served within the statute of limitations or receive proper notice within that time. Wis. Stat. Ann. §802.09(3) (2017).
Wyoming	Yes. The correct party defendant must be named and served within the time allowed for service. Wyo. R. Civ. Pro. 15(c)(1)(C).

suit. *See, e.g., Alvarez v. Meadow Lane Mall L.P.*, 560 N.W.2d 588 (Iowa 1997); *Jacobson v. Union Story Tr. & Sav. Bank*, 338 N.W.2d 161, 164 (Iowa 1983) (notice of intention to bring suit is in no way tantamount to notice of its filing). Also notice of a claim or of a potential claim to an insurer is not notice to its insured under Iowa law. *Id.*

Relation Back May Bear on the Decision to Remove to Federal Court

The relation-back rule of the respective state court jurisdiction should be considered in those cases in which federal court jurisdiction is available to a defendant. In defending a product liability case, federal court is typically preferred. When subject matter jurisdiction exists based on diversity of citizenship, 28 U.S.C. §1332, it is very likely that many defense counsel would opt to remove the action to federal court. This must be done quickly and within 30 days. *See* 28 U.S.C. §1446(b).

Product liability defense counsel often prefer a federal court venue for various reasons: they apply *Daubert* and stricter standards governing the admissibility of expert witness testimony; federal courts may be more amenable to granting summary judgment motions; and in some venues, the federal court venire may be somewhat more conservative, with potential jurors drawn from outlying rural areas in the federal district, instead of only from urban areas, such as those that make up the entirety of some Iowa counties. Also, jury verdicts in federal court must be unanimous. *See* Fed. R. Civ. P. 48(b). This is not the case in some state court jurisdictions. In Iowa, for example, eight-person juries are selected, and if there is no verdict after six hours of deliberation, a verdict by seven of the eight jurors stands as the jury's decision. *See* Iowa R. Civ. P. 1.931(1). In any event, if federal court is an option, the law of relation back in the particular state should be considered, if the case is filed late in the limitations period, and the plaintiff has misnamed the product defendant or sued the wrong party. This is because relation back may be case dispositive as it was in both *Schiavone* and *Richardson*.

Consider what the result may have been in *Richardson* had defense counsel removed the case to federal court, as is typically done in a product liability case, rather than keeping it in the Iowa state court system. Once removal was effected, any effort to get the case dismissed based on misnaming the corporate defendant would have been met by the hurdle presented by Rule 15(c). Under Rule 15(c) the plaintiff in *Richardson* would have then had 120 days under the service of process rule, Rule 4(m), within which to serve the proper defendant, and even more time than that if good cause for an extension of time for service could be shown. In *Richardson*, the correct defendant was served within two weeks of the filing of the suit. This would have been well within the timeframe contemplated by Rule 4(m). If *Richardson* had been removed to federal court, or if the plaintiff had filed the case in federal court at the inception, the case would have survived. But since it was filed in Iowa state court and the defendant elected to keep it there, the state court rule on relation back, Iowa R. Civ. P. 1.402(5), was applied to dismiss the case. Of course, the whole problem for the plaintiff in *Richardson* could have been avoided by not waiting until the second to the last day of the statute of limitations period to file the action, or by properly researching the owner and operator of the store. The same is true, of course, for *Schiavone*.

The Case for Retaining the Former Relation-Back Rule

Some argue that those states that follow the old relation-back rule should be liberalized and their rules amended to conform with Rule 15(c) in its current iteration. This change would allow relation back even after the statute of limitations had expired, as long as the proper defendant learns of the suit within the time permitted for service of process. *See, e.g.,* Travis Armbrust, *Relation Back—To the Future: Conforming Iowa Rule of Civil Procedure 1.402(5) to Federal Rule of Civil Procedure 15(C)*, 60 Drake L. Rev. 263 (2011). In federal court, the time permitted for service of process is 90 days, absent a court-ordered extension based on a showing of good cause. *See* Fed. R. Civ. P. 4(m). Some state courts provide the same. *See, e.g.,* Iowa R. Civ. P. 1.302(5).

Although it is unlikely that Rule 15(c) would by amendment ever revert to its previous formulation, a principled argument can be made that the old rule that many state courts currently follow, which is consistent with *Schiavone* and *Richardson*, should be retained. In the authors' view, common sense supports a rule that requires a claimant to give actual notice of a claim to be afforded relation back if the correct defendant has not been sued within the limitations period. Ordinarily, if a defendant has not been sued within the limitations period, the claimant is completely barred from any recovery. The relation-back doctrine is an *exception* to that rule. To be entitled to the *exception*, it is not too much to require a claimant to notify the correct party defendant before the limitations period has expired.

In addition, part of the reason for a limitations period for personal injury or product liability actions, whatever that time period is in the appropriate jurisdiction, is to afford a claimant and counsel adequate time to do a proper investigation and learn whether a cause of action against a potential defendant exists. The only claimants who would be saved by a more liberalized relation-back rule similar to Rule 15(c) would be those who drag their feet and wait until the very last minute to file suit, and who do so before doing their homework to determine who the proper defendant is. The rules of civil procedure should not reward dilatory and sloppy conduct. As the majority in *Schiavone* noted:

> We cannot understand why, in litigation of this asserted magnitude, Time was not named specifically as the defendant in the caption and in the body of each complaint. This was not a situation where the ascertainment of the defendant's identity was difficult for the plaintiffs. An examination of the magazine's masthead clearly would have revealed the corporate entity responsible for the publication.

477 U.S. at 28.

If the limitations period is two years, there is nothing that says that a plaintiff has to wait one year and 364 days before filing a case. Delay in filing suit is often purposeful to gain a strategic advantage by allowing the fact trail on the claim to run ice cold for the defendant, while plaintiffs' counsel is preparing their case, retaining experts, and so forth. The rules plainly require the proper party to be sued within the applicable limitations period. Many times the parties are engaged in pre-suit

settlement negotiations and there is no doubt which party is the proper defendant. If the proper party is unknown, pre-suit discovery can be conducted to uncover the right one. *See, e.g.,* Iowa R. Civ. P. 1.722. Finally, the rules should require a claimant to notify the proper defendant sooner rather than later. In some cases, the discovery rule serves to further extend the limitations period. An important public policy that undergirds statutes of limitation is to give the putative defendant sufficient and timely notice of the action so the defendant can locate witnesses and gather documents, including electronically stored information, which may be transient in nature, and do this while memories are fresh and not stale.

Conclusion

Product liability defense counsel should be sensitive to situations involving a suit that has been filed on the eve of the expiration of the statute of limitations and the wrong party has been sued or the wrong name has been identified as corporate party defendant. The law of "relation back" in the particular state court venue could affect the decision to remove such a case to federal court. In some situations, well-illustrated by the U.S. Supreme Court decision in *Schiavone* and Iowa holding in *Richardson*, a case-dispositive motion may be in order.