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IV. Civil Procedure

places the risk of antitrust liability on physicians who enter the mainstream of commercial activity.[51]

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IV. CIVIL PROCEDURE

A. *Federal Rule 60(b)*

Rule 60(b) of the Federal Rules of Civil Procedure allows courts to vacate final judgments and requires the balancing of several competing interests.[1] Courts must weigh the rights of the party seeking to have the final judgment vacated against the rights of the non-moving party.[2] Courts must also balance the need for finality in litigation[3] against the

[51] *See* note 44 *supra*. Since the Fourth Circuit in *Virginia Academy* focused on the physicians controlling the Blue Shield plans, in the future, Blue Shield may be able to avoid antitrust scrutiny by eliminating unnecessary physician control. *See* Pertschuk, *supra* note 44.

[1] FED. R. CIV. P. 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

FED. R. CIV. P. 60(b).

[2] *See* text accompanying notes 21-23 *infra*.

[3] *See* Ackermann v. United States, 340 U.S. 193, 198 (1950) (litigation cannot continue indefinitely); Marquette Corp. v. Priester, 234 F. Supp. 799, 803 (E.D.S.C. 1964) (finality of judgments essential element of Anglo-American jurisprudence); Loucke v. United States, 21 F.R.D. 305, 308 (S.D.N.Y. 1957) (finality of judgments necessary to judicial administration and stability of law). The doctrine of judicial finality promotes the efficient and orderly administration of the judicial system. Moore & Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623, 623 (1946); *accord*, Comment, *Temporal Aspects of the Finality of Judgments—the Significance of Federal Rule 60(b)*, 17 U. CHI. L. REV. 664, 664 (1950). Finality also confirms and maintains public trust in the judicial system because parties would not bring their disputes before courts simply to win inconclusive judgments. Southern Pac. R. R. v. United States, 168 U.S. 1, 48 (1897); *accord*, Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299 (1917). Inconclusive judgments are undesirable because parties cannot rely upon them, since a court might alter or reverse such judgments at a future time.

desire to effect a just result between the parties.[4] In *Compton v. Alton Steamship Co.*,[5] the Fourth Circuit applied Rule 60(b) to vacate a clearly erroneous judgment and achieve an equitable balance between the conflicting interests involved.

In *Compton*, a merchant seaman brought suit against Alton Steamship Company for the recovery of wages earned while he was employed on an Alton vessel.[6] Alton's claims manager mistakenly believed that Bulk Food Carriers, the charterer of the vessel,[7] was solely liable for the claim and would defend against the claim in court.[8] Consequently, the claims manager forwarded notice of the claim to Bulk Food Carriers, but Alton neither answered Compton's complaint nor appeared in court.[9] The district court awarded Compton a default judgment on the liability issue, and set a hearing to determine damages.[10] Alton's claims manager forwarded notice of the hearing to Bulk Food Carriers, and Alton failed to answer or appear at the damages hearing.[11]

At the damages hearing, Compton supplemented his request for wages with a claim for penalty damages under Section 596 of the Merchant Seaman Act.[12] The statute imposes a substantial monetary penalty upon any shipowner who wrongfully witholds a seaman's due wages at the completion of a voyage.[13] Section 596 applies only to wages earned

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See Comment *Federal Rule of Civil Procedure 60(b): Standards for Relief from Judgments Due to Changes in Law*, 43 U. CHI. L. REV. 646, 648-49 (1976).

[4] Boughner v. Secretary of Health, Educ. & Welfare, 572 F.2d 976, 977 (3rd Cir. 1978); Banker's Mortgage Co. v. United States, 423 F.2d 73, 77 (5th Cir), *cert. denied*, 399 U.S. 927 (1970); In re Casco Chem. Co., 335 F.2d 645, 651 (5th Cir. 1964); *see* Kane, *Relief from Federal Judgments: A Morass Unrelieved by a Rule*, 30 HASTINGS L.J. 41, 68-70 (1978); Comment, *Rule 60(b): Survey and Proposal for General Reform*, 60 CALIF. L. REV. 531, 533 (1972). *See generally*, Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments*, 87 YALE L.J. 164, 182-92 (1977).

[5] 608 F.2d 96 (4th Cir. 1979).

[6] *Id.* at 98, 101.

[7] *Id.* at 98.

[8] *Id.* at 103.

[9] *Id.* at 99, 103.

[10] *Id.* at 99.

[11] *Id.* at 99, 103.

[12] *Id.* at 99; *see* 46 U.S.C. § 596 (1976).

[13] 46 U.S.C. § 596 (1976). The purpose of § 596 of the Merchant Seaman Act is to ensure that a master or shipowner does not set a seaman ashore without funds at the conclusion of a voyage. *See* Mavromatis v. United Greek Shipowners Corp., 179 F.2d 310, 315 (1st Cir. 1950); Underwood v. Isbrandtsen Co., 100 F. Supp. 863, 865 (S.D.N.Y. 1951). The statute reflects the paternalistic view traditionally taken by the courts toward a class of workers considered to be largely at the mercy of their employers. *See* 179 F.2d at 315.

Section 596 holds an employer liable to an unpaid seaman for double the seaman's normal wages for every day the wages remain unpaid. 46 U.S.C. § 596 (1976). Court rigorously apply the double wage provision in order to protect seamen from the harsh consequences of arbitrary and unscrupulous employer action. Collie v. Ferguson, 281 U.S. 52, 55-56 (1929). Where the shipowner offers a valid excuse for non-payment, however, the double wage provision is inapplicable. 281 U.S. at 56; *see* American S.S. Co. v. Matise, 423 U.S. 150, 160

during a voyage and is inapplicable to wages earned on port time.[14] Although Compton's claim was for wages earned during six days of port time, the district judge nevertheless awarded penalty damages under Section 596.[15] The penalty damages, totaling $58,340.80 greatly exceeded Compton's original claim of $312.54 for unpaid wages.[16] Less than ten days later, Alton moved for vacation of judgment under Rule 60(b).[17] The district judge denied the motion, and Alton promptly appealed.[18]

Courts will not allow a defendant to relitigate an action when the defendant lacks a valid defense.[19] Consequently, under Rule 60(b) analysis a party seeking to vacate a final judgment must show a meritorious defense to the claim upon which judgment has been rendered before a court will consider the motion.[20] Moreover, once the moving party establishes the existence of a meritorious defense, the moving party must persuade the court that vacation of the judgment will not seriously predjudice the non-moving party and thereby substitute one

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(1975), *rehearing denied*, 424 U.S. 979 (1975). In *Matise* a merchant seaman was discharged from his vessel for misconduct. 423 U.S. at 152-53. At the time of his discharge, the vessel was docked at a foreign port. *Id.* at 152. Because of difficulties in paying Matise immediately in United States currency, the master of the vessel bought Matise an airplane ticket to the United States and gave him a wage voucher for his remaining wages minus the cost of the ticket. *Id.* at 153-54. Matise later sued the shipowning company and claimed that the purchase of the airplane ticket, rather than immediate cash payment, violated § 596. *Id.* at 154. The Supreme Court held that despite the protective purpose of § 596, the employer's purchase of the airline ticket constituted a payment of wages and therefore did not violate the statute. *Id.* at 156-60.

[14] 46 U.S.C. § 596 (1976); *see* Pacific Mail S.S. Co. v. Schmidt, 241 U.S. 245, 250 (1916); Eaton v. S.S. Export Challenger, 376 F.2d 725, 726 (1967). Port time refers to day-to-day employment aboard ship at a time when the vessel is between voyages. *See* 376 F.2d 725, 726 n.1; note 13 *supra*.

[15] 608 F.2d at 99-100.

[16] *Id.* Compton originally claimed port time benefits totaling $312.54. *Id.* at 99-100.

[17] *Id.* at 100.

[18] *Id.*

[19] United States v. $3,216.59 in United States Currency, 41 F.R.D. 433, 434 (D.S.C. 1967); Federal Deposit Ins. Corp. v. Alker, 30 F.R.D. 527, 532 (E.D. Pa. 1967); *see* Comment, *Equitable Power of a Federal Court to Vacate a Final Judgment for "Any Other Reason Justifying Relief"—Rule 60(b)(6)*, 33 MO. L. REV. 427, 433-34 (1968) [hereinafter cited as *Equitable Power*].

[20] *See* In re Stone, 588 F.2d 1316, 1319 (10th Cir. 1978); Rutland Transit Co. v. Chicago Tunnel Terminal Co., 233 F.2d 655, 656-57 (7th Cir. 1956); Tozer v. Charles A. Krause Milling Co., 189 F.2d 242, 244-45 (3rd Cir. 1951). The moving party must offer specific facts suggesting the existence of a meritorious defense to the claim. 588 F.2d at 1319-20; Consolidated Masonry & Fireproofing, Inc. v. Wagman Constr. Corp., 383 F.2d 249, 251-52 (4th Cir. 1967). The mere allegation of the existence of a meritorious defense is insufficient. *See* Gomes v Williams, 420 F.2d 1364, 1366 (10th Cir. 1970) (unsupported allegation not helpful in meritorious defense determination); Madsen v. Bumb, 419 F.2d 4, 6 (9th Cir. 1969) (general denial supported by unrelated counterclaim insufficient to establish meritorious defense); 383 F.2d at 151-52 (bare allegation of existence of alleged meritorious defense led court to conduct own factual inquiry).

inequity for another.[21] Such predjudice may arise when the non-moving party has relied upon the judgment, and vacation would effect the non-moving party adversely.[22] Similarly, vacation would predjudice the non-moving party when an alteration in circumstances precludes the non-moving party from effective relitigation upon remand.[23]

In *Compton*, the Fourth Circuit found initially that Alton had a meritorious defense to Compton's claim for statutory damages since section 596 of the Merchant Seaman Act does not apply to wages earned on port time.[24] Moreover, the Fourth Circuit determined that vacating the judgment would not predjudice compton because vacation would deprive Compton only of statutory damages to which he was not entitled.[25] The Fourth Circuit then proceeded to examine Alton's alleged grounds for relief under Federal Rule of Civil Procedure 60(b).

Rule 60(b)(1) allows courts to vacate a judgment that is the result of mistake, inadvertence, surprise, or excusable neglect.[26] Courts construe Rule 60(b)(1) liberally in order to allow full development of the merits of a particular case.[27] Consequently, trial courts enjoy a large measure of

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[21] *See* Tozer v. Charles A. Krause Milling Co., 189 F.2d 242, 246 (3rd Cir. 1951); *Equitable Power*, supra note 19, at 433.

[22] *See* Meadows v. Cohen, 409 F.2d 750, 753 (5th Cir. 1969); Erick Rios Bridoux v. Eastern Air Lines, Inc., 214 F.2d 207, 210 (D.C. Cir.), *cert. denied*, 348 U.S. 821 (1954); Vecchione v. Wohlgemuth, 426 F. Supp. 1297, 1311-12 (E.D. Pa. 1977). An alteration in a party's circumstances or lifestyle, in reliance upon the anticipated receipt of a financial award, may preclude a Rule 60(b) motion by the opposing party. *See* 409 F.2d at 753. Prejudice may even arise when a non-moving party reasonably believes itself entitled to a forthcoming award or rebate, particularly if the moving party had acted so as to create a reasonable expectation of payment. *See* 426 F. Supp. at 1311-12 (vacation prejudicial where moving party published terms of consent decree in newspaper and parties initiated implementation of decree).

[23] *See* Rinieri v. News Syndicate Co., 385 F.2d 818, 823 (2d Cir. 1967) (relitigation of "stale" defamation claim two-and-one-half years after judgment held prejudicial to non-moving party); McCawley v. Fleischmann Transp. Co., 10 F.R.D. 624, 625 (S.D.N.Y. 1950) (relitigation seven years after judgment held prejudicial to non-moving party where witnesses geographically dispersed).

[24] 608 F.2d at 103; *see* note 14 *supra*.

[25] 608 F.2d at 103.

[26] FED. R. CIV. P. 60(b)(1); *see* note 1 *supra*.

[27] *See* Roberts v. Rehoboth Pharmacy, Inc., 574 F.2d 846, 847-48 (5th Cir. 1978); Greater Baton Rouge Golf Ass'n. v. Recreation & Park Comm., 507 F.2d 227, 228-29 (5th Cir. 1975). A party's failure to appear at trial due to a sudden violent illness may constitute excusable neglect and inadvertence. *See* Ten v. Svenska Orient Linen, 573 F.2d 772, 774-75 (2d Cir.), *cert. denied*, 439 U.S. 834 (1978). In addition, relief may be appropriate under the excusable neglect clause of Rule 60(b)(1) when a party fails to have substitute counsel file notice of appearance within ten days. *See* Roberts v. Rehoboth Pharmacy, Inc., 574 F.2d 846, 847-48 (5th Cir. 1978). An attorney's lack of familiarity with local or federal rules of civil procedure may also constitute excusable neglect. *See* A.F. Dormeyer Co. v. M.J. Sales & Distrib. Co., 461 F.2d 40, 42-43 (7th Cir. 1972). An unauthorized stipulation of fact by a party's attorney may lead to vacation under Rule 60(b). *See* Freeman v. MacCarthy, 153 F.2d 1001, 1004-06 (3rd Cir. 1946). A defaulting party's inadvertent late arrival in court may be a proper ground for vacation under Rule 60(b)(1) even though the party's conduct demonstrates a "failure of good judgment" and is "an affront to the court." Peterson v. Term Taxi, Inc., 429 F.2d 888, 891-92 (2d Cir. 1970).

discretion in all Rule 60(b)(1) issues.[28] Following the rule of liberal interpretation, the Fourth Circuit acknowledged that Alton's neglect may have been excusable.[29] The Fourth Circuit, however, held itself bound by the district court's ruling that Alton's neglect was inexcusable.[30] Since the district court's ruling was not an abuse of discretion, the Fourth Circuit denied Alton's request for relief under the excusable neglect clause of Rule 60(b)(1).[31]

The Fourth Circuit next considered whether the term "mistake" in Rule 60(b)(1) encompasses a clear mistake of law by the court.[32] Alton contended that the district court's misapplication of section 596 constituted mistake under Rule 60(b)(1) and therefore merited vacation.[33] As originally drafted, Rule 60(b)(1) restricted mistake to "his mistake", meaning the mistake of the moving party.[34] The 1946 revision of the Rule deleted the qualifying pronoun "his", in order to include errors made by persons other than the moving party.[35] The rationale for the revision is that mistakes committed by third parties can be equally as costly to a party as his own mistakes.[36] The Fourth Circuit neither accepted nor rejected Alton's mistake argument. Rather, the Fourth Circuit declined to apply the mistake argument since other, more simple approaches governed the case.[37]

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[28] Bank of America Nat'l Trust & Sav. Ass'n. v. Mamakos, 509 F.2d 1217, 1219 (9th Cir. 1975); Beshear v. Weinzapfel, 474 F.2d 127, 130-34 (7th Cir. 1972); *see* 7 MOORE'S FEDERAL PRACTICE ¶ 60.19 (2d ed. 1979) [hereinafter cited as 7 MOORE]; 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2857 (1973) [hereinafter cited as 11 WRIGHT & MILLER]. Under Rule 60(b) broad trial court discretion is proper because the trial judge, who directly sees and hears evidence and witnesses, is in a better position than an appellate court to determine matters of credibility. *See* Farmer's Co-op. Elevator Ass'n. Non-Stock v. Strand, 382 F.2d 224, 231-32 (8th Cir.), *cert. denied*, 389 U.S. 1014 (1967); International Nikoh Corp. v. H.K. Porter Co., 374 F.2d 82, 84 (7th Cir. 1967). A trial court abuses its discretion in determining a question under Rule 60(b) only if no reasonable man could agree with the trial court's decision. *See* Smith v. Widman Trucking & Excavating, 627 F.2d 792, 795-96 (7th Cir. 1980); *see also* Ruiz v. Hamburg-American Line, 478 F.2d 29, 31 (9th Cir. 1973).

[29] 608 F.2d at 103.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 103-04.

[33] *Id.*

[34] *See* 7 MOORE, *supra* note 28, ¶ 60.22[3] at 258-59.

[35] *Id.*

[36] *Id.* at ¶ 60.22[1] n.9.

[37] 608 F.2d at 104. Acceptance of the mistake argument would have required analysis of the inter-relationships between the various time limits governing the Federal Rules of Civil Procedure. Alton's interpretation of mistake allows courts the power of self-correction under Rule 60(b)(1), which would aid judicial efficiency by obviating the necessity for an appeal. *See* 7 MOORE, *supra* note 28, ¶ 60.22[3] at 259-60; *accord*, Gila River Ranch, Inc. v. United States, 368 F.2d 354, 357 (9th Cir. 1966); McDowell v. Celebreezze, 310 F.2d 43, 44 (5th Cir. 1962). The time limit governing Rule 60(b)(1) is a "reasonable" period of time which may not exceed one year. FED. R. CIV. P. 60(b); note 1 *supra*. Courts do not allow the full one year period of time under all circumstances. *See* Schildhaus v. Moe, 335 F.2d 529, 531 (2d

After declining to grant relief under the excusable neglect and mistake provisions of Rule 60(b)(1), the Fourth Circuit vacated the judgment under Rule 60(b)(4).[38] Rule 60(b)(4) authorizes the vacation of a void judgment.[39] Federal Rule of Civil Procedure 54(c) provides that a judgment is void if it differs from or exceeds in amount the relief requested in the complaint.[40] Compton had won a default judgment that exceeded the relief prayed for in his complaint by over $50,000.[41] The Fourth Cir-

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Cir. 1964) (8 month delay unreasonable). *But see* Rocky Mtn. Tool & Mach. Co. v. Tecon Corp., 371 F.2d 589, 597 (10th Cir. 1966) (91 day delay reasonable). Courts uniformly deny "mistake" motions brought more than one year after the date of judgment. *See* Tobriner v. Chefer, 335 F.2d 281, 282-83 (D.C. Cir. 1964); Morgan v. Southern Farm Bureau Cas. Ins. Co., 52 F.R.D. 25, 26-27 (W.D. La. 1967). The filing of a motion for appeal does not extend the one year limitation governing the filing of a Rule 60(b)(1) motion. *See* Bershad v. McDonough, 469 F.2d 1333, 1336 (7th Cir. 1972); Transit Cas. Co. v. Security Trust Co., 441 F.2d 788, 791 (5th Cir.), *cert. denied*, 404 U.S. 883 (1971). Rules 59(d) and 59(e) of the Federal Rules of Civil Procedure, however, specifically grant the power of self-correction to the federal courts, while imposing a ten day time limit upon the exercise of this power. FED. R. CIV. P. 59(d)(e). Since bringing a Rule 60(b)(1) motion rather than a Rule 59(d) or 59(e) motion circumvents the ten day time limit governing motions to amend judgment, the mistake argument is proper only when brought within a ten-day time limit. *See* Silk v. Sandoval, 435 F.2d 1266, 1267-68 (1st Cir.), *cert. denied*, 402 U.S. 1012 (1971); Meadows v. Cohen, 409 F.2d 750, 752 n.4 (5th Cir. 1969); *see* 7 MOORE, *supra* note 28, ¶ 60.22[3] at 259, 266, & 268; Note, *Federal Rule 60(b): Finality of Civil Judgments v. Self-Correction by District Court of Judicial Error of Law*, 43 NOTRE DAME LAW. 98, 100-104 (1967). Since Alton brought its Rule 60(b)(1) motion within a ten day time period, accepting the mistake argument would not have nullified the time provisions of Rules 59(d) and 59(e).

[38] 608 F.2d at 104.

[39] FED. R. CIV. P. 60(b)(4); note 1 *supra*. Since a void judgment is a legal nullity, a court must vacate under Rule 60(b)(4) if the moving party establishes that the judgment is void. Jordan v. Gilligan, 500 F.2d 701, 704 (6th Cir.), *cert. denied*, 421 U.S. 991 (1974); Austin v. Smith, 312 F.2d 337, 343 (D.C. Cir. 1962); Hicklin v. Edwards, 226 F.2d 410, 413 (8th Cir. 1955); *see* 11 WRIGHT & MILLER, *supra* note 28, § 2862.

[40] FED. R. CIV. P. 54(c); *see* SEC v. Wenke, 577 F.2d 619, 623 (9th Cir.), *cert. denied*, 439 U.S. 964 (1978). In *Wencke*, the trial court granted an injunction and receivership order requested by the SEC, but extended its order to several companies not named in the SEC's complaint. 577 F.2d at 623. The judgment was entered by default. *Id.* at 621. The Ninth Circuit reversed on the grounds that the judgment violated Rule 54(c) since the relief granted differed from the relief prayed for. *Id.* at 623. *See generally* 10 C. WRIGHT & A. MILLER. *Federal Practice and Procedure*, ¶ 2663 at 100 (1973) [hereinafter cited as 10 WRIGHT & MILLER].

A judgment may also be void if the court that awarded it lacked jurisdiction over the subject matter or the parties or entered a decree which was not within the court's powers. In re Four Seasons Securities Laws Litigation, 502 F.2d 834, 842 (10th Cir.), *cert. denied*, 419 U.S. 1034 (1974); Marshall v. Board of Ed., 575 F.2d 417, 422 (3rd. Cir. 1978); 11 WRIGHT & MILLER, *supra* note 27, § 2862. A judgment is not void merely because it is erroneous or based upon precedent which is later found incorrect or unconstitutional. In re Four Seasons Securities Laws Litigation, 502 F.2d at 842; Marshall v. Board of Ed., 575 F.2d at 422. Judicial error so gross as to violate due process of law, however, may render a judgment void. *See* V.T.A., Inc. v. Arico, Inc., 597 F.2d 220, 224-25 (10th Cir. 1979); 502 F.2d at 842. *See also* Crosby v. Bradstreet Co., 312 F.2d 483, 485 (2d Cir.), *cert. denied*, 373 U.S. 911 (1963) (decision violative of first amendment held void).

[41] 608 F.2d at 99-100; *see* text accompanying note 16 *supra*.

cuit, therefore, reversed the district court's decision and vacated the penalty damages award.[42]

Rather than rely solely on Rule 60(b)(4), the Fourth Circuit examined the applicability of Rule 60(b)(6) to the facts in *Compton*.[43] Rule 60(b)(6) provides that a court may relieve a party from an improperly awarded judgment for "any other reason justifying relief."[44] This catch-all clause allows a court to promote complete fairness in unusual cases where vacation is proper, but the specific provisions of Rules 60(b)(1)-(5) are inapplicable.[45] Rule 60(b)(6) is not an unlimited endorsement for vacation of judgments, however, and courts limit the use of Rule 60(b)(6) to cases involving extreme hardship.[46] Rule 60(b)(6) offers the courts maximum flexibility to vacate unfair judgments, while preserving the finality of judgments.[47] Accordingly, the Fourth Circuit allowed Alton's claim for relief under Rule 60(b)(6).[48]

The Fourth Circuit's treatment of Alton's claim of excusable neglect demonstrates strict adherence to the rule of allowing broad trial court discretion in Rule 60(b) issues.[49] A close question arose whether Alton's neglect was inexcusable.[50] Alton's conduct, however, indicated the

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[42] 608 F.2d at 104-06.

[43] *Id.* at 106-07.

[44] FED. R. CIV. P. 60(b)(6); note 1 *supra*.

[45] FED. R. CIV. P. 60(b)(6); note 1 *supra*. The plain meaning of "any other reason" in Rule 60(b)(6) is "any reason not encompassed in the provisions of Rule 60(b)(1-5)." 7 MOORE, *supra* note 28, ¶ 60.27[1] at 340-41. The Supreme Court has adopted this interpretation of Rule 60(b)(6). *See* Ackermann v. United States, 340 U.S. 193, 197 (1950); Klapprott v. United States, 335 U.S. 601, 613-14, *modified*, 336 U.S. 942 (1949). *See generally* 11 WRIGHT & MILLER, *supra* note 28, § 2864 at 216-17; *Equitable Power*, *supra* note 19, at 434-441.

[46] *See, e.g.*, Ackermann v. United States, 340 U.S. 193, 200 (1950) (Rule 60(b)(6) reserved for extraordinary circumstances); Gray v. Estelle, 574 F.2d 209, 215 (5th Cir. 1978) (vacating judgment because of moving party's attorney's conflict of interests); In re Cremidas' Estate, 14 F.R.D. 15, 17-18 (D. Alaska 1953) (vacating judgment when minor's attorney so incapacitated at trial as to preclude effective representation).

[47] *See, e.g.*, Ackermann v. United States, 340 U.S. 193, 197-202 (1950); Klapprott v. United States, 335 U.S. 601, 613-16 (1949). Both cases involved petitions to reopen default judgments of denaturalization. 340 U.S. at 194; 335 U.S. at 602-03. The Supreme Court in *Ackermann* denied Rule 60(b) relief to petitioner, who claimed that he had not appealed his default judgment because of financial inability to do so. 340 U.S. at 202. The Court held that Ackermann's actions demonstrated a conscious choice not to appeal, rather than an extraordinary excuse for not appealing. *Id.* at 197-98. In contrast, the Klapprott Court granted Rule 60(b)(6) relief. 335 U.S. at 615-16. Klapprott was in prison on an unrelated charge at the time he suffered his default judgment, and despite due diligence he failed to answer the complaint or appear in court. *Id.* at 604-08. The Court held that the "extraordinary" circumstances of the Klapprott case warranted relief under Rule 60(b)(6). *Id.* at 613.

[48] 608 F.2d at 106. The Fourth Circuit vacated the award of damages, but upheld the default judgment as to $312.54, the amount of Compton's original claim. *Id.*

[49] *See* text accompanying note 28 *supra*.

[50] Courts have allowed relief in circumstances similar to the facts of *Compton*. *See, e.g.*, Tozer v. Charles A. Krause Milling Co., 189 F.2d 242, 243-46 (3rd Cir. 1951) (moving party's careless internal procedures for receipt of service of process); Standard Grate Bar Co.

possibility that its failure to answer Compton's complaint or appear in court was due to a conscious decision to suffer a default judgment rather than pay the cost of defending an apparently minor claim.[51] The trial court acted within its discretion in determining that Alton's default was due either to carelessness or to a conscious choice not to litigate the claim. In holding itself bound by the district court's determination that Alton's neglect was inexcusable, the Fourth Circuit reaffirmed the rule of broad trial court discretion in Rule 60(b) issues.

The *Compton* court's Rule 60(b)(4) analysis is consistent with Rule 54(c)'s fundamental fairness requirement for default judgments. Fundamental fairness requires that a party have notice of the existence and exact nature of a claim brought against him.[52] Receiving notice allows the party to make a fully informed decision whether to contest the claim or suffer a default judgment.[53] By granting Compton's request for damages which exceeded the relief prayed for in his complaint, the district court denied Alton the right to make a fully informed decision concerning the disposition of the claim. By using Rule 60(b)(4) to vacate the district court's judgment, the Fourth Circuit reinstated Alton's right to receive notice of the claim and to decide whether to defend or default.[54]

The Fourth Circuit bolstered its treatment of the voidness issue by granting relief under Rule 60(b)(6). Both case law and the language of Rule 60(b)(6) restrict the use of the catch-all provision to those occasions where the specific provisions of Rules 60(b)(1)-(5) are inapplicable.[55] Thus, where relief is possible under either one of the specific provisions of Rules 60(b)(1)-(5) or under the catch-all clause, courts apply the specific

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v. Defense Plant Corp., 3 F.R.D. 371, 371-72 (M.D. Pa. 1944) (party erroneously believed codefendant would defend suit for both parties). Courts do not, however, accord relief for simple carelessness, and the district court could have decided that Alton's conduct was mere carelessness. *See, e.g.*, Greenspun v. Bogan, 492 F.2d 375, 382-83 (1st Cir. 1974) (corporate party's failure to direct notice to proper officer carelessness rather than excusable neglect); Design & Dev., Inc. v. Vibromatic Mfg., Inc., 58 F.R.D. 71, 73 (E.D. Pa. 1973) (reliance on representation by co-defendant's attorney that party "had nothing to worry about" mere carelessness).

[51] 608 F.2d at 103. Courts do not grant relief where a party has made a conscious choice to settle, compromise, or accept a default judgment. *See, e.g.*, United States v. Erdoss, 440 F.2d 1221, 1223 (2d Cir.), *cert. denied*, 404 U.S. 849 (1971) (default judgment in bankruptcy proceeding binding even though unanticipated recoverable assets existed); Allinsmith v. Funke, 421 F.2d 1350, 1351 (6th Cir. 1970) (consent decree accepted by corporation's board of trustees not subject to vacation when three board members changed their minds).

[52] *See* 10 WRIGHT & MILLER, *supra* note 40, § 2663 at 99.

[53] *Id.*

[54] *See* 608 F.2d at 106. Previous cases applying Rule 60(b)(4) have involved judgments that were void for lack of personal or subject matter jurisdiction. *See* note 40 *supra*; *see generally*, 7 MOORE, *supra* note 28, ¶ 60.25[1]-[2].

[55] *See* note 45 *supra*.

provision.[56] Under the unusual circumstances of the *Compton* case, however, the Fourth Circuit acted properly by granting relief in the alternative. The time limitations for bringing Rule 60(b)(4) and Rule 60(b)(6) motions are identical, so granting alternative relief under the two provisions raises no timing conflict.[57] Since Alton's motion for vacation satisfied both relevant time provisions, strict categorization and separation of the two grounds for relief was not necessary.[58]

The Fourth Circuit's decision in *Compton* reflects an understanding of the need to balance fairness, finality, and the rights of the parties when resolving issues arising under Rule 60(b). By exploring four separate grounds for vacation and by granting relief in the alternative under two of those grounds, the Fourth Circuit demonstrated full use of the flexibility that Rule 60(b) allows the courts, while reducing the chance of reaching an incorrect decision. Moreover, the Fourth Circuit's analysis gives proper weight to the need for finality by respecting the discretionary power of the trial court under the provisions of Rule 60(b). Thus, the Fourth Circuit, in *Compton v. Alton Steamship Co.*, effectively utilized the broad powers granted by Rule 60(b) while underscoring the obvious fairness of vacating a previous judgment when merited under particular circumstances.

BROOKS D. KUBIK

B. Application of Erie: *Conflict Between State Substantive Law and Federal Rule 15*

The Supreme Court determined in *Erie R. R. v. Tompkins*[1] that federal courts sitting in diversity must apply state substantive law and

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[56] *Id.*; *see, e.g.*, De Filippis v. United States, 567 F.2d 341, 343 (7th Cir. 1977) (party invoking Rule 60(b)(5) cannot also claim relief under Rule 60(b)(6)); Carr v. District of Columbia, 543 F.2d 917, 926 n.76 (D.C. Cir. 1976) (Rule 60(b)(6) inapplicable if relief was earlier available under Rules 60(b)(1)-(5)); Stradley v. Cortez, 518 F.2d 488, 493-94 (3rd Cir. 1975) (Rule 60(b)(6) inapplicable merely to extend time limitation governing Rule 60(b)(1)); Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 701-02 (2d Cir.), *cert. denied*, 409 U.S. 883 (1972) (rule 60(b)(6) inapplicable merely to extend time limitation governing Rules 60(b)(2)-(3)); Gulf Coast Bldg. & Supply Co. v. International Bhd. of Elec. Wkrs. Local No. 380, 460 F.2d 105, 108 (5th Cir. 1972) (Rules 60(b)(4)-(6) inapplicable to extend time limitation governing Rule 60(b)(1)).

[57] FED. R. CIV. P. 60(b)(4), (6); *see* note 1 *supra*.

[58] *See* 7 MOORE, *supra* note 28, ¶ 60.27[1] at 346-47. *See also* In re Four Seasons Sec. Laws Litigation, 502 F.2d 834, 841 (10th Cir.), *cert. denied*, 419 U.S. 1034 (1974).

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[1] 304 U.S. 64 (1938).

federal procedural law.[2] The *Erie* Court created the substance—procedure distinction to discourage forum shopping and to avoid inequitable administration of the laws.[3] Although the aims of the *Erie* doctrine were clear, courts had difficulty applying the substance versus procedure distinction.[4] In repeated efforts to clarify *Erie*, the Supreme Court has moved from an interpretation that is highly protective of state rights[5] to

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[2] *Id.* at 78-80. Federal district courts have diversity jurisdiction over controversies between citizens of different states and between a state or its citizens and foreign states or their citizens. 28 U.S.C. § 1332 (1976).

The Rules of Decision Act (Act), 28 U.S.C. § 1652 (1976), requires federal district courts to apply state law except where the Constitution or an act of Congress requires otherwise. The Supreme Court originally interpreted the Act to apply to state statutory law and not to state common law. Swift v. Tyson, 41 U.S. 166, 16 Pet. 1 (1842). Federal courts therefore could apply their own interpretation of the general common law in disregard of state judicial decisions. 41 U.S. at 170-71.

The Supreme Court in *Erie* discarded the common law—statutory law distinction by overruling *Swift*. 304 U.S. at 77-78. In *Erie*, a door-like appendage of a train struck Tompkins as he was walking near railroad tracks. *Id.* at 69. Tompkins brought a negligence claim against the railroad in a federal district court alleging that the court had jurisdiction on the basis of diversity of citizenship. *Id.* Tompkins prevailed in district court and on appeal the Second Circuit affirmed. *Id.* at 70. The Supreme Court granted certiorari on the issue whether to apply state or federal law to Tompkin's claim. *Id.* at 71. Under state law, the Court would have regarded Tompkins as a trespasser and absolved the railroad of liability. Under federal law, the Court would have regarded him as a licensee and imposed liability on the railroad. *Id.* at 70. The *Erie* Court held that state law, not federal common law, determined the substantive question whether Tompkins was a licensee or a trespasser. *Id.* at 79-80. The original *Erie* rule requires federal courts to respect state created rights by applying state substantive law, whether statutory or judicial. *Id.*; *see* 50 N.Y.U. L. REV. 952, 954 (1975).

The *Erie* doctrine pervades the jurisprudence of the federal court system. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267, 269 (1946). Judge Learned Hand once remarked that counsel could no longer argue a civil appeal without quoting large portions of *Erie*. *Id.*

[3] 304 U.S. at 73. *Erie's* twin aims of avoidance of forum shopping and inequitable administration of the laws were based on the theories that to apply federal substantive law would invade the state's sovereignty and to apply state procedural law would destroy uniformity in the federal system. *Id.* at 74-78. Commentators have noted, however, that *Erie's* "twin aims" may be a singular aim. Forum shopping itself may be desirable as a means of avoiding inequitable administration of the law in a state court by allowing a plaintiff to litigate in an unbiased federal forum. *See* Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 512-13 (1954); McCoid, Hanna v. Plumer: *The* Erie *Doctrine Changes Shape*, 51 VA. L. REV. 884, 889 (1965) [hereinafter cited as McCoid].

[4] *See* notes 5 & 6 *infra*. *See also* C. WRIGHT, LAW OF THE FEDERAL COURTS, § 55 at 255, 258 (3d ed. 1976) [hereinafter cited as WRIGHT].

[5] In Guaranty Trust Co. v. York, 326 U.S. 99 (1945), the Supreme Court held that federal courts siting in diversity must apply state law if application of federal law would yield a substantially different result. *Id.* at 109. The Court interpreted *Erie* to mean that the accident of having to bring suit in a federal court rather than a state court should not lead to a different outcome. *Id. Guaranty Trust*, therefore, required that the outcome of a trial in a federal court, insofar as legal rules are determinative, should be substantially the same as a trial in a state court. *Id.* Commentators view *Guaranty Trust* as extremely, and perhaps excessively, protective of state rights. Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 696 n.26 [hereinafter cited as Ely].

an interpretation that favors the application of federal laws.[6] In *Davis v. Piper Aircraft Corp.*,[7] the Fourth Circuit applied *Hanna v. Plumer*,[8] the Supreme Court's most recent clarification of *Erie*. The court addressed a conflict between a state law regarding capacity to bring wrongful death actions and rule 15 of the Federal Rules of Civil Procedure concerning amendments.[9]

The Court qualified *Guaranty Trust's* outcome determinative test in Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958). The *Byrd* Court interpreted *Erie* to require a balance between the state's interest in having state laws applied and the federal interest in preserving the independence of the judge-jury relationship in the federal courts. *Id.* at 537-38. *Byrd* indicated that courts should consider countervailing federal interests in applying the outcome determinative test. *Id.* at 539-40; *see* 37 WASH. & LEE L. REV. 430, 431 (1980).

[6] *See* Hanna v. Plumer, 380 U.S. 460, 474 (1965). In *Hanna*, the Supreme Court addressed the issue whether service of process on an executor at his usual place of abode, as authorized by FED. R. CIV. P. 4(d)(1), will suffice where state law requires in-hand service on an executor. *Id.* at 461-62. The Court held that the Federal Rules should be applied. *Id.* at 474.

Hanna distinguished between federal judge-made rules and federal statutory rules and required that a court measure a federal judge-made rule by *Erie* and her progeny. *Id.* at 470. To measure the validity of such a rule, the *Hanna* Court indicated that courts should apply *Guaranty Trust's* outcome determinative test with due consideration of *Erie's* twin aims. *Id.* at 468; *see* note 5 *supra*. Notably, the outcome determinative test effectuates *Erie's* aims only if a court applies the test prospectively because a litigant will forum shop precisely to bring about substantially different results. *See* Note, Erie-York *Doctrine Does Not Govern Federal Rules of Civil Procedure*, 27 OHIO S. L. J. 345, 351 (1966) [hereinafter cited as Erie-York *Doctrine*].

The issue in *Hanna*, however, was the validity of a Federal Rule of Civil Procedure. The *Hanna* Court held that the validity of a Federal Rule should be tested under the Constitution and the Rules Enabling Act. In the constitutional analysis, the *Hanna* Court fleetingly mentioned the Necessary and Proper Clause of Article I of the Constitution, the provision for a federal court system in Article III, and "some other section of the Constitution." *Id.* at 471-72. Commentators have criticized *Hanna's* sparse constitutional analysis. *See* Note, 44 N.C. L. REV. 180, 185 (1965); WRIGHT, *supra* note 4, § 56 at 260. Extensive constitutional analysis may not be necessary in Federal Rule choice of law cases, however, because the Federal Rules of Civil Procedure are presumptively procedural and therefore within the authority of Article III. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941). In *Sibbach*, the Supreme Court defined procedure as the judicial process for enforcing rights and duties recognized by substantive law, and the process for justly administering remedy and redress for disregard or infraction of substantive rights. *Id.*

The *Hanna* Court based the second portion of the analysis on the Rules Enabling Act, 28 U.S.C. § 2072 (1976). 380 U.S. at 471. The Rules Enabling Act provides in pertinent part that "[t]he Supreme Court shall have the power to prescribe, by general rules . . . the practice and procedure of the district courts of the United States in civil actions . . . . Such rules shall not abridge, enlarge, or modify any substantive right . . . ." *Id.* The *Hanna* Court noted that both *Erie* and the Rules Enabling Act require courts to apply state substantive law and federal procedural law, but that the former controls federal judge-made rules and the latter controls the Federal Rules of Civil Procedure. *See* 380 U.S. at 470-71. *See generally* 9 AKRON L. REV. 199 (1975) [hereinafter cited as AKRON].

[7] 615 F.2d 606 (4th Cir. 1980).

[8] *Id.* at 611; Hanna v. Plumer, 380 U.S. 460 (1965); *see* note 6 *supra*.

[9] *See* text accompanying notes 14-15 *infra*.

Plaintiff Davis, the executor of an Alabama decedent's estate, brought a wrongful death action in the District Court for the Western District of North Carolina.[10] Defendant Piper Aircraft moved for dismissal of the action, on the ground that the plaintiff lacked legal capacity to bring suit because he had not qualified in North Carolina as an ancillary administrator.[11] After the statute of limitations had expired,[12] the plaintiff qualified as an ancillary administrator and moved under the Federal Rules to amend his complaint to indicate this capacity.[13] Although state law prohibits amendments reflecting capacity once the statute of limitations has expired,[14] the Federal Rules of Civil Procedure permit such amendments to overcome the statute of limitations bar provided no prejudice results.[15] The district court held that

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[10] 615 F.2d at 608. The wrongful death action in *Davis* arose from a crash of a Piper Aircraft in North Carolina. The pilot and his two passengers died in the crash. Personal representatives of the two passengers brought wrongful death actions against the pilot and Piper Aircraft in Alabama state courts. In one case, the plaintiffs obtained a judgment against both of the defendants. In the other case, the parties reached a settlement. Jimmy P. Davis, the plaintiff in *Davis*, received his appointment as executor of the pilot's estate from an Alabama probate court. *Id.* at 609.

[11] *Id.* Wrongful death actions in North Carolina may be brought only by a personal representative of the decedent in his representative capacity. N.C. GEN. STAT. §§ 28A-18-2, 28A-18-3 (1976). A foreign personal representative lacks such capacity unless she has first qualified in North Carolina as an ancillary administrator. *Id.* § 28A-26-3. A personal representative must satisfy bond requirements and file certified copies of letters of appointment with the clerk of the superior court who will grant the ancillary letters. *Id.*; *see id.* § 28A-26-4.

[12] The North Carolina statute of limitations for wrongful death actions is two years. N.C. GEN. STAT. § 1-53(4) (1976). Plaintiff's appointment took place nine months after the state's statute of limitations had run. 615 F.2d at 609.

[13] 615 F.2d at 609. Plaintiff moved to amend his complaint under FED. R. CIV. P. 15(a). Rule 15(a) states that once a responsive pleading such as defendant's answer has been served, leave to amend a pleading is subject to the consent of the adverse party or of the court. In *Davis*, there is no indication that the adverse party consented to plaintiff's proferred amendments. Leave to amend, therefore, was in the court's discretion. 615 F.2d at 609; *see* text accompanying notes 27-37 *infra*.

[14] The majority of North Carolina cases are consistent with code authorities on pleading, under which an amendment to a complaint to show capacity as an administrator represents an entirely new cause of action. *See, e.g.*, Sims v. Rea Construction Co., 25 N.C. App. 472, 473, 213 S.E.2d 398, 399 (1975); Johnson v. Wachovia Bank & Trust Co., 22 N.C. App. 8, 10, 205 S.E.2d 353, 355 (1974). Plaintiffs are barred from bringing any such new cause of action after the expiration of the statute of limitations. 22 N.C. App. at 10, 205 S.E.2d at 355. Nevertheless, at least two cases applying North Carolina law have held that the code did not control and have allowed the amended complaint reflecting capacity to be considered as part of the original cause of action. McNamara v. Kerr-McGee Chemical Corp., 328 F. Supp. 1058, 1061 (E.D.N.C. 1971); Graves v. Welborn, 260 N.C. 688, 696-97, 133 S.E.2d 761, 767 (1963). Under this minority rule, plaintiffs may amend their complaint at any time prior to trial, and the amendment will relate back to the timely but defective complaint and validate the proceedings regardless of the statute of limitations. 328 F. Supp. at 1061. Nevertheless, the Fourth Circuit regarded the North Carolina decisions denying relation back as the recent and authoritative statement of the state's law. 615 F.2d at 610 n.4.

[15] FED. R. CIV. P. 15(a),(c). Court should freely grant leave to amend when justice so re-

subsections (a) and (c) of Federal Rule of Civil Procedure 15 controlled the motion to amend rather than the state laws governing plaintiff's capacity.[16] The court determined, however, that the amendment should not overcome the statute of limitations bar.[17] Accordingly, the district court denied plaintiff's motion to amend and granted defendant's motion to dismiss.[18]

On appeal, the Fourth Circuit agreed that the Federal Rules of Civil Procedure controlled the decision whether to allow the amendment, but held that the district court had abused its discretion by denying leave to amend.[19] In the first step of the analysis, the Fourth Circuit in *Davis* relied on *Hanna* to determine whether to apply Federal Rule of Civil Procedure 15 or the state laws.[20] Under *Hanna*, courts must apply a federal rule despite a conflicting state rule if the federal rule is applicable and valid under the Constitution and the Rules Enabling Act.[21]

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quires. FED. R. CIV. P. 15(a). Amendments brought after the expiration of the statute of limitations may be treated as part of the timely but defective complaint, thereby defeating the statute of limitations time bar. FED. R. CIV. P. 15(c). Courts will not allow the amendment to relate back to the original complaint, however, if prejudice will result to the opponent's case. FED. R. CIV. P. 15(c); *see* WRIGHT, *supra* note 4, § 66 at 311.

[16] 615 F.2d at 610-12; *see* notes 14 & 15 *supra*.

[17] 615 F.2d at 612. The district court noted four factors in refusing to permit the amendment to defeat the statute of limitations. First, the plaintiff had failed to assert his claim in prior actions. Second, the plaintiff delayed four months before correcting the defect in his complaint. Third, in state court, plaintiff's motion would be denied and the case dismissed. Finally, the Alabama state court had found plaintiff's decedent negligent and plaintiff's decedent had admitted his negligence in prior proceedings. *Id.* at 612.

[18] *Id.* at 609.

[19] *Id.*

[20] *Id.* at 611. The Fourth Circuit noted in *Davis* that *Hanna* should be applied when state rules and Federal Rules of Civil Procedure conflict directly. *Id.* The Fourth Circuit did not rely on Ragan v. Merchants Transfer Warehouse Co., 337 U.S. 530 (1949). 615 F.2d at 611. In *Ragan*, the Supreme Court held a state law that determined the method of tolling the statute of limitations would prevail over a federal law requiring a different tolling method. 337 U.S. at 534. The *Davis* court followed *Hanna* in distinguishing *Ragan*. *See* 615 F.2d at 611 n.8. In *Hanna*, the applicable federal rule was at least as broad in scope as the conflicting state rule, while in *Ragan* the federal rule was not so broad. *See* 380 U.S. at 469-70. Similarly, in *Davis* the federal rule is at least broad as the state rule because application of the federal rule specifically cures the deficiency of the plaintiff's complaint. 615 F.2d at 611 n.8.

The dissenting opinion in *Davis*, however, contended that *Ragan* was controlling. *Id.* at 615 (Hall, J., dissenting). Judge Hall framed the issue in terms of which events can toll the statute of limitations rather than whether an amendment can cure a lack of capacity. *Id.* at 614. If the issue did involve a direct statute of limitations question, *Ragan* would require the court to apply North Carolina law that would preclude plaintiff from litigating his claim. *Id.* at 615. The dissent erred, however, in construing the state wrongful death statutes as tolling statues. Time is not an integral part of a wrongful death right of action, and therefore the tolling of the statute of limitations is not a condition precedent to maintaining a wrongful death action. *See* Kinlaw v. Norfolk So. Ry., 269 N.C. 110, 119, 152 S.E.2d 329, 336 (1967).

[21] 380 U.S. at 473-74; *see* text accompanying notes 23 & 40 *infra*.

All of the Federal Rules of Civil Procedure are constitutionally valid because they are authorized by Congress' Article III power over federal court proceedings.[22] Courts, however, must engage in a more detailed analysis under the Rules Enabling Act (REA), which requires that the Federal Rule of Civil Procedure in question must not abridge, enlarge, or modify any substantive right.[23] The Fourth Circuit determined that the Federal Rule of Civil Procedure was applicable to the conflict precisely because use of the federal rule cured plaintiff's incapacity by allowing the amendment.[24] The *Davis* court reasoned that the federal rule was valid under the Constitution,[25] and under the Rules Enabling Act because the federal rule did not impinge upon a substantive state right.[26]

After determining that the federal rules did apply, the Fourth Circuit addressed the second issue, whether under the federal rules, the district court should have granted leave to amend.[27] The Fourth Circuit relied on Supreme Court precedent that trial courts should freely grant leave to amend unless the amendment would prejudice the opposing

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[22] U.S. CONST. art. 3, § 2; *see* Westen and Lehman, *Is There Life For* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311 (1980) [hereinafter cited as Westen]. Professor Westen expressly noted that Rule 15(c) was constitutional. *Id.* at 363. The rule's purpose and effect are entirely procedural, and therefore constitutionally valid. *Id.*

[23] *See* note 6 *supra*. A substantive right is a fundamental, non-procedural rule which is designed to regulate conduct and personal relationships outside the courtroom. *See* Ely, *supra* note 5, at 725-27. Professor Ely defines substance as including everything which is not strictly procedural. *Id.*

Federal Rule of Civil Procedure 15 impinges a substantive right by denying potential defendants the right to rely on the expiration of the statute of limitations as a bar to further action by the plaintiff. In practice, however, the substantive rights of both parties are adequately protected because of the rule's notice requirement. *See* text accompanying notes 45-50 *infra*. *See also* Westen, *supra* note 22, at 363.

Under the Rules Enabling Act, the rule in question must be entirely procedural. *See* note 6 *supra*. Professor Ely defines a procedural rule as one designed to make litigation fair and efficient, notwithstanding the substantive effects of application of the rule. *See* Ely, *supra* note 5, at 724 & n.170; text accompanying note 22 *supra*.

[24] 615 F.2d at 611 n.8. The court noted that even if the Federal Rule was not directly applicable under *Hanna* because it was not as broad in scope as the state rule, the Federal Rule would still apply under the *Erie* doctrine. *Id.* at 612.

The court did not indicate which portions of the state rule may have been unaddressed by Federal Rule 15. *Id.* Nonetheless, the court reasoned that application of the Federal Rule would best meet *Erie's* twin aims of discouragement of forum shopping and avoidance of inequitable administration of the laws. *Id.*

The Fourth Circuit noted that Hanna requires courts to use *Guaranty Trust's* outcome determination test, *see* note 5 *supra*, in conformity with *Erie's* twin aims when no Federal Rule of Civil Procedure is directly applicable. 615 F.2d at 612. Forum shopping will not result from application of the federal rule because the need for a rule allowing the amendment will not arise until after a forum has been selected. Application of the federal rule fosters equitable administration of the laws because state substantive interests will be adequately protected as will federal procedural uniformity. *Id.*

[25] 615 F.2d at 612; *see* text accompanying notes 41 & 42 *infra*.

[26] 615 F.2d at 612.

[27] *Id.*

party.[28] Although a trial court has discretion to grant or deny a motion for leave to amend, an appellate court may overturn a ruling on a motion to amend if the lower court has abused its discretion.[29] The Fourth Circuit reasoned that since the defendant had notice of all the events giving rise to the action, and of course, notice of the action itself, the amendment would not prejudice the defendant in preparing his case.[30] The Fourth Circuit also reasoned that plaintiff's delay in amending, absent a showing of prejudice or designed dilatoriness, is an insufficient reason for denial.[31] Noting that the trial court had found no prejudice and had denied the motion to amend on other inadequate grounds,[32] the Fourth Circuit held that the district court had abused its discretion in denying leave to amend.[33]

The Fourth Circuit accordingly allowed the plaintiff to amend his complaint to cure his lack of capacity,[34] and then considered whether the amendment could be treated as timely.[35] Under Federal Rule of Civil Procedure 15(c), an untimely amendment may overcome the statute of limitations bar if the amendment concerns matters arising out of the same occurrence set forth in the complaint and is not prejudicial to the movant's opposing party. The Fourth Circuit concluded that the amendment arose out of the occurrence alleged in the complaint because the amendment concerned the plaintiff's capacity to bring suit.[36] The court held that the amendment should relate back in time to the date of the original timely complaint.[37]

In deciding whether state or federal law should control the leave to amend issue, the Fourth Circuit in *Davis* correctly relied on *Hanna v. Plumer*. *Hanna* illustrates that a valid and pertinent federal rule takes

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[28] *Id.* at 613. In Foman v. Davis, 371 U.S. 178 (1962), the Supreme Court paralleled the language of Federal Rule 15(a) to hold that courts should grant leave to amend freely when justice so requires. *Id.* at 182. The *Foman* Court noted several factors that may cause prejudice and justify denial of leave to amend, including undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, and futility. *Id. See generally* Young, *Review of Recent Supreme Court Decisions*, 49 A.B.A. J. 93 (1963). Since the critical factor in determining whether to allow an amendment is notice, no prejudice will ensue if the adverse party has actual knowledge of the action and events giving rise to that action. *See* AKRON, *supra* note 10, at 200; WRIGHT, *supra* note 4, § 66 at 311-13.

[29] *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330 (1970) (decision to grant or deny amendments within discretion of federal district courts); Griggs v. Hinds Junior College, 563 F.2d 179, 180 (5th Cir. 1977) (per curiam) (abuse of discretion to deny leave to amend if no indication of undue prejudice). *See also* 3 MOORE, FEDERAL PRACTICE 15.08[4] (2d ed. 1979).

[30] 615 F.2d at 613.

[31] *Id.* The court noted that plaintiff's four month delay in qualifying did not seem dilatory in light of defendant's five month delay in answering. *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 614.

[35] *Id.*

[36] *Id.*

[37] *Id.*; *see* note 28 *supra*.

precedence over a conflicting state rule.[38] The *Hanna* Court held that a federal rule's validity should be measured under the Constitution and the Rules Enabling Act.[39] *Hanna's* requirement of pertinence dictates that the federal rule should be at least as broad as the conflicting state rule, and designed to apply to the situation at hand.[40]

The Fourth Circuit summarily disposed of the issue whether the federal rule was valid under the Constitution and Rules Enabling Act.[41] Since the Federal Rules of Civil Procedure are presumptively valid under the Constitution, the court's cursory treatment of the constitutional issue was sufficient.[42] The court's Rules Enabling Act analysis, however, was insufficient. The court should have considered whether application of the federal rule impaired a substantive right protected by state law.[43] *Davis* held that the federal rule was valid under the Rules Enabling Act simply because there had been no suggestion to the contrary.[44] Nevertheless, the court's conclusion that the rule was valid under the REA was correct because application of the federal rule did not impair any state substantive right.[45] The state's capacity requirements render administrators subject to judicial supervision in order to ensure equitable distribution of estates.[46] The federal court must respect the state substantive interest in an administrator's capacity.[47] The only effect of rule 15 on the state's judicial supervision of ad-

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[38] *See* 380 U.S. at 474; Westen, *supra* note 22, at 342. Professor Westen uses validity and pertinence as shorthand terms for measuring the scope and applicability of a Federal Rule. *Id.* Professor Westen defines validity as conformity to the Constitution and other statutes regulating federal law. Pertinence means that the purpose of the rule would be met by applying the rule. *Id.*

The *Hanna* Court limited its holding to situations in which state and federal law directly conflict. 380 U.S. at 473-74. The conflict in *Davis* does not involve capacity, which the Federal Rules do not speak to, but does involve leave to amend to reflect capacity. No conflict arises regarding capacity because the federal court necessarily requires an executor to adhere to the state's substantive provisions creating capacity. The conflict arises because under state law, the amendment will not cure plaintiff's incapacity. Under federal law, however, the amendment will cure plaintiff's incapacity. 615 F.2d at 610; *see* notes 14-16 *supra.*

[39] 380 U.S. at 474; *see* note 6 *supra.*

[40] 380 U.S. at 468-69.

[41] 615 F.2d at 612.

[42] *See* U.S. CONST. art. 3, § 2; *see* notes 6 & 22 *supra.*

[43] The *Hanna* Court stressed that the *Erie* doctrine is not the appropriate test of the validity of a Federal Rule of Civil Procedure. 380 U.S. at 470. The *Erie* doctrine was designed to provide the appropriate analysis for the application of federal laws other than Federal Rules of Civil Procedure because the *Erie* case did not involve a Federal Rule of Civil Procedure. *Id.* at 472-73. Whether the test is *Erie* or the Rules Enabling Act, a differentiation between substance and procedure is still necessary. *Id.* at 471; *see* notes 6 & 24 *supra.*

[44] 615 F.2d at 612.

[45] *See* note 23 *supra.*

[46] *See* N.C. GEN. STAT. § 28A-26-3 (1976); note 11 *supra.*

[47] The Supreme Court in both *Erie* and *Hanna* emphasized that legitimate state substantive rights should never be impinged by federal courts. *See* notes 2 & 5 *supra.*

ministrators is to allow an amendment showing an administrator's capacity to relate back in time to the original complaint.[48] The federal rule does not supplant the state requirement that an administrator possess the lawful capacity to distribute an estate's proceeds.[49] Therefore, the state's substantive interest is fairly protected under the federal rule.[50]

Considering *Hanna's* requirement of pertinence, the *Davis* court correctly held that rule 15 was applicable to the plaintiff's attempt to prove his capacity.[51] The Fourth Circuit held, however, that the federal rule only applied indirectly by analogy.[52] Although the plaintiff moved to amend his complaint, his amendment was more accurately a supplemental pleading because he had alleged a subsequent matter, his qualification as an ancillary administrator.[53] The federal rules are silent as to whether courts may treat supplemental pleadings as amendments for the purpose of avoiding the statute of limitations bar.[54] Nevertheless, if prejudice will not result, the statute of limitations will not bar a pleading, whether the pleading is supplemental or by amendment.[55]

Although the substance versus procedure distinction was the *Erie* decision's primary difficulty, in *Hanna*, the Supreme Court properly recognized that in a conflict between a state rule and a Federal Rule of Civil Procedure, the substance versus procedure distinction is necessary to ensure that the requirements of the Rules Enabling Act are met.[57] Most courts, including the Fourth Circuit, have hesitated to rely on *Hanna* because a thorough *Hanna* analysis usually requires a thorough Rules Enabling Act analysis,[58] and the Rules Enabling Act requires a court to

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[48] *See* notes 14 & 15 *supra*.

[49] *See* note 11 *supra*.

[50] In *Davis*, FED. R. CIV. P. 15 allows the plaintiff to proceed with his claim when the state rules would not. *See* notes 14 & 15 *supra*. Nevertheless, the federal rules do not allow the plaintiff to proceed without ever qualifying as an ancillary administrator because allowing an unqualified executor to sue is a substantive state concern. *Id.*

[51] *See* text accompanying note 40 *supra*.

[52] *See* 615 F.2d at 609 n.3.

[53] *Id.* A supplemental pleading is based on occurrences subsequent to the original pleading. FED. R. CIV. P. 15(d). An amendment to a pleading sets forth any original matter which was not adequately presented in the original pleading. FED. R. CIV. P. 15(a), (c).

[54] FED. R. CIV. P. 15.

[55] Rowe v. United States Fidelity & Guar. Co., 421 F.2d 937, 944 (4th Cir. 1970). In *Rowe*, the Fourth Circuit allowed a supplemental pleading to relate back to the timely complaint after concluding that no prejudice would result. *Id.* The policy that Federal Rules of Civil Procedure are to be liberally construed supports the *Rowe* court's treatment of supplemental pleadings. *See id.* at 942-44.

[56] Prior to *Hanna*, the Supreme Court avoided the substance versus procedure distinction when refining *Erie*. *See* notes 5 & 6 *supra*; McCoid, *supra* note 3, at 884; Ely, *supra* note 6, at 694.

[57] 380 U.S. at 470-71.

[58] *See id.* at 471.