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Civil Procedure - Federal Rules of Civil Procedure - Scope of Rule 3 - Tolling the Statute of Limitations - Conflict between Rule 3 and State Tolling Statute

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CIVIL PROCEDURE—FEDERAL RULES OF CIVIL PROCEDURE—SCOPE OF RULE 3—TOLLING THE STATUTE OF LIMITATIONS—CONFLICT BETWEEN RULE 3 AND STATE TOLLING STATUTE—The United States Supreme Court has determined that in a federal diversity action, Rule 3 of the Federal Rules of Civil Procedure is not broad enough to displace an integral state tolling provision for purposes of tolling the state statute of limitations.


On August 22, 1975, Fred N. Walker, an Oklahoma resident, suffered permanent injuries when a nail which he was pounding, shattered and struck him in the eye. Walker brought suit against the manufacturer, Armco Steel, in the United States District Court for the Western District of Oklahoma, alleging negligence in manufacture and design. Jurisdiction was based on diversity of citizenship because Walker was a resident of Oklahoma and Armco was a corporation with its principal place of business outside of Oklahoma. On August 19, 1977, the complaint was filed and the summons was issued. Service of process on

3. 446 U.S. at 741-42. Jurisdiction was based on 28 U.S.C. § 1332 (1976), which provides in relevant part:
   (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs and is between—
      (1) citizens of different states . . . .
   . . . .
   (c) For the purposes of this section... a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . .
   Id.
4. 452 F. Supp. at 243. See 446 U.S. at 472. The complaint was filed and the summons was issued according to Rule 3 of the Federal Rules of Civil Procedure which provides that “[a] civil action is commenced by filing a complaint with the court.” FED. R. CIV. P. 3. See 452 F. Supp. at 243-44.
The purpose of Rule 3 is set out in the Advisory Committee’s Notes to Rule 3 which state:
This rule provides that the first step in an action is the filing of the complaint. Under Rule 4(a) this is to be followed forthwith by issuance of a summons and its delivery to an officer for service. Other rules providing for dismissal for failure to prosecute suggest a method available to attack unreasonable delay in prosecuting an action after it has been commenced.
FED. R. CIV. P. 3. 28 U.S.C. app. R. 3 (1976), Notes of Advisory Committee on Rules, note
the defendant's authorized service agent was not effectuated until December 1, 1977. On January 5, 1978, Armco filed a motion to dismiss the complaint because the action was barred by the applicable Oklahoma statute of limitations. The defendant conceded that the complaint had been filed within the two-year statute of limitations, but noted that state law did not allow commencement of the action for purposes of the statute of limitations until service had been made on the defendant. The filing of the complaint within the limitations period would have commenced the action from the filing date only if the plaintiff had served the defendant within the following sixty days. Service was not procured until after the sixty-day period. Although Walker admitted that his case would be barred in state court, he argued against dismissal of the case by asserting that Rule 3 of the Federal Rules of Civil Procedure governs commencement of actions in the federal courts. Under Rule 3, the action would have been commenced with the filing of the complaint, which was within Oklahoma's two-year statute of limitations period.


5. 452 F. Supp. at 243. Walker's delay in service of process is not explained in the record. Walker's counsel stated that the summons was discovered "in an unmarked folder in the filing cabinet" in counsel's office about 90 days after the complaint had been filed. 446 U.S. at 742 n.2. The placing of the summons in the filing cabinet is unexplained. Id.

6. 446 U.S. at 742.

7. Id. at 742-43. Walker filed his complaint within the applicable Oklahoma statute of limitations, OKLA. STAT. tit. 12, § 95 (1971), which runs two years commencing from the date of the injury; however, he did not comply with the additional Oklahoma requirement, OKLA. STAT. tit. 12, § 97 (1971), that service of summons on a defendant is necessary for the commencement of an action for purposes of tolling the Oklahoma statute of limitations. 446 U.S. at 742-43. OKLA. STAT. tit. 12, § 97 (1971) provides in relevant part:

An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons, or if service is sought to be procured by mailing, by a receipt of certified mail containing summons, within sixty (60) days.

Id.

8. See note 7 supra.

9. 446 U.S. at 743.

10. Id. See note 4 supra. Walker argued that Rule 3 governs all aspects of the commencement of an action in federal court, including the tolling of the state statute of limitations. 446 U.S. at 743. He also argued that Armco should have relied on Federal Rule of Civil Procedure 41 which provides for dismissal for failure to prosecute, rather than on the state statute of limitations. Armco replied that a Rule 41 argument was implicit in its motion to dismiss. Neither the district court nor the courts of appeals confronted this issue. Id. at 743 at n.5.

11. 446 U.S. at 743. See note 4 supra.
The issue facing the district court was whether, in a diversity action, state law or Rule 3 should govern the tolling of a state statute of limitations. The district court concluded that because the tolling provision is an integral part of the Oklahoma statute of limitations, the state provision must apply. Thus, the petitioner's complaint was barred by the Oklahoma statute of limitations. The United States Court of Appeals for the Tenth Circuit followed the Supreme Court's decision in *Ragan v. Merchants Transfer and Warehouse Co.*,12 and affirmed the district court's decision.13 Because of a conflict among the circuits,14 the United States Supreme Court granted certiorari to decide whether state law or Rule 3 controls the tolling of the state statute of limitations in a federal diversity action.15 The Supreme Court affirmed the decision of the court of appeals.16

In delivering the opinion of a unanimous Court, Justice Marshall noted that federal courts exercising diversity jurisdiction have often been troubled with whether to apply state or federal law to matters arising in a state-based cause of action.17 The Supreme Court in *Erie Railroad v. Tompkins*18 established the rule that in diversity cases

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12. 452 F. Supp. at 245. The district court maintained that disregard of the Oklahoma statute by a federal court would allow a plaintiff greater rights in a federal court than in a state court. *Id.*
13. 337 U.S. 530 (1949). The Court in *Ragan* held that a tolling provision which is an integral part of the state statute of limitations is a part of the state substantive law and therefore must be applied in federal diversity actions. *Id.* at 533-34.
14. Walker v. Armco Steel Corp., 592 F.2d at 1133. The court of appeals maintained that the Oklahoma tolling statute was unquestionably in direct conflict with Rule 3 of the Federal Rules of Civil Procedure. The court held that *Ragan* was controlling because the Oklahoma tolling statute was indistinguishable from the tolling statute in *Ragan*. The appeals court also noted that it was "constrained" to follow *Ragan* because *Ragan* had originated in the Tenth Circuit and still was applied as the law of the Tenth Circuit. 592 F.2d at 1135-36.
15. Four circuit courts had held *Ragan* to be controlling and had upheld the application of state law to determine the commencement of an action. See Walker v. Armco Steel Corp., 592 F.2d 1133 (10th Cir. 1979); Witherow v. Firestone Tire and Rubber Co., 530 F.2d 160 (3d Cir. 1976); Anderson v. Papillion, 445 F.2d 841 (5th Cir. 1971) (per curiam); Groninger v. Davison, 364 F.2d 638 (8th Cir. 1966). Two courts of appeal had upheld the application of Rule 3 to determine the commencement of an action. See Ingram v. Kumar, 585 F.2d 566 (2d Cir. 1978), *cert. denied*, 440 U.S. 940 (1979); Smith v. Peters, 482 F.2d 799 (6th Cir. 1973), *cert. denied*, 415 U.S. 989 (1974).
17. 446 U.S. at 744. The Supreme Court did not uphold the appeals court's contention that there is a direct collision between Rule 3 and the Oklahoma tolling statute, but held that Rule 3 and the Oklahoma tolling statute can co-exist. *Id.* at 752-53.
19. 304 U.S. 64 (1938). In *Erie* the Supreme Court decided that a federal diversity court was required to apply the substantive state law, whether statutory or non-statutory, to determine the duty of a railroad to a trespasser. *Id.* at 80. The *Erie* Court
federal courts are required to apply the nonstatutory as well as the statutory law of the forum state in matters of "general jurisprudence." The *Erie* rule attempted to promote equal protection of the laws for residents and non-residents, to secure uniformity in the administration of state law, and to discourage forum-shopping.

Justice Marshall next addressed the extension of *Erie* in *Guaranty Trust Co. v. York.* The Supreme Court in *York* held that diversity actions at law, as well as in equity, are controlled by the *Erie* doctrine. The *York* Court further determined that a statute of limitations is part of the state cause of action, reasoning that a recovery based on application of the federal law, whether in an action at law or in equity, could not be allowed if a state statute of limitations would have barred recovery had the suit been brought in a state court. Justice Marshall explained that the *York* Court followed the intent of *Erie* that the outcome in a diversity suit in federal court should not materially differ from the result if the suit had been tried in a state court. He agreed stated that federal courts in diversity cases cannot apply a general federal common law merely because the state law is a non-statutory. *Id.* at 78. *Erie* overruled *Swift v. Tyson,* 41 U.S. (16 Pet.) 1 (1842), which did not require federal courts exercising diversity jurisdiction to apply the non-statutory law of the state, but permitted the federal courts to develop a body of "general federal common law" as to matters of general jurisprudence. 304 U.S. at 78 n.18. *Swift* allowed widespread discrimination between residents and non-residents because a non-resident could choose a state or federal forum based on which law would afford him a better outcome. Although attempting to create uniformity of law, the *Swift* doctrine prevented uniformity in the administration of the law of the state. See Note, *Substance, Procedure and Uniformity—Recent Extensions of Guaranty Trust Co. v. York,* 38 GEO. L.J. 115, 124-25 (1949) [hereinafter cited as *Substance, Procedure and Uniformity*].

20. 446 U.S. at 744. Because the *Erie* Court did not set out definite criteria to differentiate state substantive law and state procedural law, federal judges faced problems in characterizing the "substantive" law of the state. *Substance, Procedure and Uniformity,* supra note 19, at 115-16.

21. 304 U.S. at 74-75.


23. *Id.* at 110-12. See 446 U.S. at 745. Prior to the promulgation of the Federal Rules of Civil Procedure, Federal Equity Rules were controlling in suits in equity and federal courts were not bound by state rules to determine when an action was commenced. "What constituted the commencement of a federal equity suit was a matter wholly within the federal equity practice and procedure and was not governed by the state statute of limitations or judicial decisions construing it." 2 MOORE'S FEDERAL PRACTICE ¶ 3.07 at 3-86 n.4 (2d ed. 1980).

24. 446 U.S. at 745. The *York* Court did not apply the *Erie* "substance vs. procedure" test in its pure form; instead, it established an "outcome-determinative" test, defining the substantive laws of the states as those laws which would significantly affect the results of a litigation if they were ignored by a federal court in a diversity case in equity or at law. 326 U.S. at 109-10. This refinement of the *Erie* doctrine was seen by some legal authorities as a major step toward the destruction of the Federal Rules of Civil Procedure. See Keeffe, Gilhooley, Bailey, and Day, *Weary Erie,* 34 CORNELL L. Q. 494 (1949) (doctrine of *Swift v. Tyson* promoted justice) [hereinafter cited as Keeffe]; Merrigan, *Erie*
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with the determination in York that the application of a state statute of limitations in a federal diversity action depends on whether application of the state statute of limitations bears so vitally on a state-created right as to determine the outcome of the case.\(^{25}\)

Justice Marshall reasoned that the Court in Ragan v. Merchants Transfer and Warehouse Co.\(^{26}\) followed York by holding that state tolling rules which are an integral part of the state statute of limitations are "outcome-determinative," and therefore are binding on federal diversity courts.\(^{27}\) According to the Walker Court, Rule 3 cannot serve as a tolling provision in a diversity case where a state statute of limitations has an integral tolling provision.\(^{28}\) The Court pointed out that the Ragan decision followed from Erie and York's policy that a state-created cause of action cannot be given longer life in a federal court by applying the Federal Rules of Civil Procedure. Otherwise, there would be a different measure of a state-created right in a federal diversity court than in a state court.\(^{29}\)

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\(^{25}\) See York to Ragan—A Triple Play on the Federal Rules, 3 Vand. L. Rev. 711 (1950) (calculated risk for attorney to enter into diversity case; unpredictable when a federal rule will be rejected on ground that it conflicts with substantive state law); 51 Iowa L. Rev. 236, 238 (1965) (mechanical application of outcome-determination test has resulted in uncertainty over application of federal rules).


\(^{27}\) See note 13 supra.

\(^{28}\) 446 U.S. at 746. Because the service requirement was considered to be an essential part of the state cause of action, the Ragan Court decided that the statute of limitations was not tolled until the state statute's requirement of service within the statutory period was met. 337 U.S. at 533-34. See Moore's Federal Practice ¶ 3.07, at 3-88 n.5 (2d ed. 1980) (cases from 1938 until the Ragan decision in 1949 held that Rule 3 commenced an action for purposes of tolling an applicable state statute of limitations); Note, Federal Rule 3 and the Tolling of State Statutes of Limitations in Diversity Cases, 20 Stan. L. Rev. 1281 (1968) (Ragan undercut the uniform rule followed since the adoption of the Federal Rules of Civil Procedure in 1938, that Rule 3 commencement tolls the applicable statutes of limitations).

\(^{29}\) 446 U.S. at 746. The Advisory Committee Notes to Rule 3 state in relevant part: When a Federal or State statute of limitations is pleaded as a defense, a question may arise under this rule whether the mere filing of the complaint stops the running of the statute, or whether any further step is required, such as, service of the summons and complaint or their delivery to the marshal for service. The answer to this question may depend on whether it is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights, to vary the operation of the statute of limitations. The requirements of Rule 4(a) that the clerk shall forthwith issue the summons and deliver it to the marshal for service will reduce the chances of such a question arising.


\(^{29}\) 446 U.S. at 746. Compare Chayes, The Bead Game, 87 Harv. L. Rev. 741, 748-50 (1974) (Ragan wrongly decided because Ragan Court did not consider that plaintiff did not
The Court next discussed its decision in *Hanna v. Plumer.* The *Hanna* Court held that in a civil diversity action Federal Rule 4(d)(1), rather than state law, governs the manner in which process is to be served. Justice Marshall noted that *Hanna* limited the "outcome-determinative" test of *Erie* and *York* by requiring that it be read with attention to the twin evils which *Erie* sought to prevent, forum-shopping and inequitable administration of the laws. He explained

have the opportunities to protect himself against possibility that service would not be effectuated in time in the federal procedural system that he would have had in state procedural system; solution is a total recourse to federal practice) with Ely, *The Necklace,* 87 *Harv. L. Rev.* 753, 756-58 (1974) (Ragan was correctly decided because a total recourse to federal practice, displacing the state tolling statute, would take from the defendant a right that the statute sought to give him).

31. Rule 4(d)(1) provides:
[Service of process shall be made upon] an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.
FED. R. CIV. P. 4(d)(1).
32. *See Mass. Gen. Laws Ann.,* ch. 197, § 9 (West 1958). The Massachusetts statute at issue in *Hanna* did not require an executor or administrator to answer to an action by a creditor of the deceased unless the writ was served by in-hand delivery to the proper representative or a properly executed notice was filed in the appropriate registry of probate. *Id.* See 380 U.S. at 462.
33. 380 U.S. at 463-64.
34. 446 U.S. at 747. *See* 380 U.S. at 468. If the *Hanna* Court had applied the pure "outcome-determinative" test, the Court would have discovered that after service has been made under Rule 4(d)(1), the choice between the state law or the federal rule has a substantial effect on the outcome because once litigation has begun, nearly every procedural variation can be considered "outcome-determinative."

In *Hanna* the Court was not confronted with a problem of forum-shopping because the plaintiff did not bring suit in federal court to avoid a state court rule with which he was unable to comply. Application of the state rule would have merely changed the manner in which process was served. Furthermore, the difference between service being made "in-hand" or being left at a defendant's abode with a responsible adult would not be so substantial as to raise equal protection problems. 380 U.S. at 468-69, cited in 446 U.S. at 747.

Justice Harlan, in his concurring opinion in *Hanna,* stated that the majority misconceived the constitutional premises of *Erie* in exalting the Federal Rules of Civil Procedure over any other law and in stating that *Erie's* main purpose is to discourage forum-shopping. 380 U.S. at 474, 478 (Harlan, J., concurring). Justice Harlan pointed out that *Erie's* primary purpose is to prevent usurpation of states' powers and to protect the rights of nondiverse local parties by the prevention of forum-shopping. *Id.* at 474-75 (Harlan, J., concurring). Justice Harlan proposed that the applicable test for diversity characterization is not the *Hanna* test, but a test which would take into consideration whether the choice of law would substantially affect "those primary decisions respecting human conduct which our constitutional system leaves to state regulation." *Id.* at 475 (Harlan, J., concur-
that the Hanna Court held that where a Federal Rule of Civil Procedure is plainly applicable, the test as to whether a federal rule is controlling is not the Erie doctrine, but whether the federal rule is within the scope of the Rules Enabling Act and within a constitutional grant of power.\(^\text{35}\)

The Walker Court recognized that the case before them was factually indistinguishable from Ragan.\(^\text{37}\) Therefore, the state statute of limiting). See Stason, Choice of Law Within the Federal System: Erie Versus Hanna, 52 CORNELL L.Q. 377, 400-01 (1967) [hereinafter cited as Stason].


Even though a federal rule may be classified as procedural, the rule may still deny rights guaranteed in the first eight amendments or rights guaranteed under the equal protection clause. If a procedural rule violates a right guaranteed under the first eight amendments, such as due process, it is unconstitutional. Similarly, if the federal rule is so different from the appropriate state procedure that it results in grave discrimination against citizens of the state in favor of non-citizens, it is unconstitutional as a violation of the equal protection clause. 27 OHIO ST. L.J. 345, 350-51 (1966).

36. 446 U.S. at 748. See Hanna v. Plumer, 380 U.S. at 471. The supremacy clause of the Constitution, U.S. Const. art. VI, § 2, demands the subservience of state law when a conflict arises between state law and a federal constitutional provision, treaty, or statute which is precisely on point. See Erie R.R. v. Tompkins, 304 U.S. at 78.

In Sibbach v. Wilson & Co., 312 U.S. 1, 13 (1941), the Supreme Court stated that if the Federal Rules of Civil Procedure are within the scope of the Rules Enabling Act and do not exceed constitutional limitations, they would have the force of a federal statute. See 51 CORNELL L.Q. 551, 551 n.5 (1966). But see Stason, supra note 34, at 398-405 (Hanna resulted in an unconstitutional and undesirable result because the Court's application of a Federal Rule of Civil Procedure to an issue which admittedly can be classified as either "substantive" or "procedural" failed to consider the incidental "substantive" effect the federal rule would have on the rights of the parties, thereby thwarting diversity jurisdiction's essential purpose of securing state-created rights in federal courts); 37 MISSOURI L. REV. 734, 738-39 (1972) (mechanical testing fails to analyze sufficiently whether Rule 3 really abridges substantive rights and fails to consider the state's interest in establishing rules for the commencement of an action).

37. 446 U.S. at 748. The Kansas tolling statute, KAN. GEN. STATS. 1935 § 60-308, in Ragan and the Oklahoma tolling statute, OKLA. STAT. tit. 12, § 97 (1971), in Walker are indistinguishable because both provide that an attempt to commence an action is equivalent to actual commencement of the action if the petitioner acts with due diligence and serves the defendant within 60 days after the statute of limitations has run. In both Ragan and Walker the state service requirement necessary to toll the state statute of limitations was determined to be an integral part of the state statute of limitations, which could not be displaced by Rule 3. In addition, in Ragan and Walker service of process was not effectuated until after the two-year statute of limitations and the 60-day service period had run. Accordingly, the Walker Court noted that both cases would have been barred in the applicable state court. 446 U.S. at 748.
tions must be applied to bar the action unless *Ragan* was no longer good law.38 Relying on stare decisis39 and the limits of the *Hanna* decision,40 the Court rejected the petitioner's contention that *Hanna* overruled *Ragan*.41 Justice Marshall stated that the *Hanna* analysis applies only when there is a direct collision between the federal rule and the state law. Thus, according to Justice Marshall, the Court in *Hanna* distinguished, rather than overruled *Ragan*.42 Only if the plain meaning of a federal rule is sufficiently broad to cover the issue before the Court will the Court apply the *Hanna* analysis.43 Justice Marshall determined

38. *Id.* at 749. Some courts have asserted that the *Hanna* decision weakened the authority of the *Ragan* decision. See, e.g., Ingram v. Kumar, 585 F.2d 566 (2d Cir. 1978), cert. denied, 440 U.S. 940 (1979); Smith v. Peters, 482 F.2d 799 (6th Cir. 1973), cert. denied, 415 U.S. 989 (1974). See also Comment, *Statutes of Limitations in Diversity Cases: For Whom the Statute Tolls*, 10 CALIF. W.L. REV. 140, 140-42 (1973) [hereinafter cited as *For Whom the Statute Tolls*].

39. 446 U.S. at 749. The Walker Court stated that although stare decisis is not an absolute doctrine which commands that earlier decisions should never be overturned, caution should be used in rejecting established law. The Court reasoned that the petitioner's reasons for overruling *Ragan* were identical to those which the *Hanna* Court utilized to uphold the validity of *Ragan*. Thus, because the petitioner was asking the Court to reconsider two prior decisions, he was faced with a heavy burden to support such a change in established law. The Court concluded that the petitioner failed to meet this burden. *Id.*

40. 380 U.S. at 472. See 446 U.S. at 749. *Hanna* limited its “direct collision” test to cases where the state law and the federal rule are in a direct collision. *Hanna* also allowed the *Ragan* analysis to co-exist with the “direct collision” test by stating that “this Court has never before been confronted with a case where the applicable Federal Rule is in direct collision with the law of the relevant State . . . .” 380 U.S. at 472. See 446 U.S. at 748 n.7.

Justice Harlan, in a concurring opinion in *Hanna*, maintained that the holding was much too broad. He stated that so much overriding force had been attributed to the Federal Rules of Civil Procedure that it was difficult to envision a case where a conflicting state rule would be allowed to operate. Justice Harlan reasoned that, under *Hanna*, a federal rule would prevail even though a state rule may reflect policy considerations, which, under *Erie*, would fall within the sphere of state legislative authority. 380 U.S. at 478 (Harlan, J., concurring).

41. 446 U.S. at 749. The petitioner contended that *Hanna* overruled *Ragan* because the state statute of limitations in *Ragan* was in direct conflict with Rule 3. Relying on *Hanna*, petitioner asserted that the appropriate question was whether Rule 3 was within the scope of the Rules Enabling Act and within the constitutional power of Congress. The petitioner concluded that, unless Rule 3 violated one of these two restrictions, it should be applied. 446 U.S. at 749. In his concurring opinion in *Hanna*, Justice Harlan concluded that *Ragan* was no longer controlling. 380 U.S. at 476-77 (Harlan, J., concurring).

42. 446 U.S. at 749-50.

43. *Id.* In construing the scope of the Federal Rules of Civil Procedure, the Walker Court noted that the federal rule should not be narrowly construed in order to avoid a direct collision with state law. The Court advocated a plain meaning approach to the Federal Rules of Civil Procedure to determine whether the *Hanna* “direct collision” analysis applies. *Id.* at 750 n.9. Some legal authorities have argued that *Ragan* is no longer controlling because the scope of Rule 3 is broad enough to be in direct conflict with
that Rule 3 is not in direct conflict with the state law in *Walker*
because Rule 3 gives no indication that its intent is to toll a statute of
limitations.44 The language of Rule 3 nowhere explicitly provides a tol-
ling provision.45 Relying on the "plain meaning" of Rule 3, then, the
Court found that in diversity actions Rule 3 governs the date from
which various timing requirements of the federal rules run,46 but does
not affect state statutes of limitations.47

The Court reasoned that in contrast to Rule 3, the Oklahoma tolling
statute48 represents a substantive decision by the state that actual ser-
vice on the defendant is an integral part of the policies served by the
statute of limitations.49 These policies provide for an end to litigation
the state tolling statute in *Ragan*. They conclude that the Hanna test is required. See McCoid, *Hanna v. Plumer: The Erie Doctrine Changes Shape*, 51 Va. L. Rev. 884, 893 (1965); Stason, *supra* note 34, at 403.

44. 446 U.S. at 750. See note 28 *supra*. Before *Ragan*, the federal courts interpreted
Rule 3 as controlling the tolling of the statute of limitations in diversity actions as well as in
purely federal actions. See, *e.g.*, Kessler v. Fleming, 163 F.2d 464, 467 (9th Cir. 1947);
Jeffers, 144 F.2d 26, 28 (10th Cir.), *cert. denied*, 323 U.S. 781 (1944); Reynolds v. Needle,
130 F.2d 161, 162 (D.C. Cir. 1942); Gallagher v. Carroll, 27 F. Supp. 568, 569-70 (E.D.N.Y.
1939). After *Ragan*, Rule 3 has continued to control the tolling of the statute of limitations
in nondiversity federal actions. See, *e.g.*, Moore Co. v. Sid Richardson Carbon & Gasoline
Co., 347 F.2d 921, 925 (8th Cir. 1965), *cert. denied*, 383 U.S. 925 (1966); Badillo v. Central
Steel and Wire Co., 495 F. Supp. 299, 302-04 (N.D. Ill. 1980); Triplett v. Azordegan, 478 F.

45. 446 U.S. at 750. See note 4 *supra*. The *Walker* Court noted that the Advisory
Committee had predicted that under Rule 3 a question could arise as to whether the mere
filing of the complaint stops the running of the statute of limitations or whether further
action is required. See note 28 *supra*. The Court stated that this does not mean that the
Advisory Committee intended Rule 3 to act as a tolling provision for statutes of limitation
but that the Advisory Committee believed that Rule 3 *might* have that effect. 446 U.S. at
750 n.10. One commentator has stated, "It would seem, however, that the filing of the
complaint conditionally suspends the running of the Statute of Limitations, provided the
summons is issued forthwith and served within a reasonable time thereafter." Rotwein,
*Pleading and Practice Under the New Federal Rules—A Survey and Comparison*, 8
Brooklyn L. Rev. 188, 193 (1938).

46. 446 U.S. at 751. Rule 3 controls the timing requirements of the Federal Rules of
Civil Procedure, such as the interposition of compulsory counterclaims, discovery under
Rules 26(a) and 33, summary judgment under Rule 56(a), and two actions on the same
1960).

47. 446 U.S. at 751.

sions scheme stresses the importance of actual service and notice to each defendant.

49. 446 U.S. at 751. The Oklahoma Supreme Court has held that the mere filing of a
lawsuit does not commence an action for purposes of tolling the statute of limitations
because the purpose of statutes of limitation is to give a defendant sufficient notice to
so that there is a time when a defendant may have peace of mind and is not required to put together a defense to an old claim.\textsuperscript{50} According to the Court, these policy considerations make the service requirement an integral part of the statute of limitations, both in this case and in \textit{Ragan}.\textsuperscript{51} The Court found that because the scope of Rule 3 is not broad enough to displace substantive Oklahoma state policies, the Oklahoma tolling statute and Rule 3 can co-exist, each limited to its own sphere of coverage.\textsuperscript{52}

Finding no direct conflict between Rule 3 and the Oklahoma tolling statute, the Court saw \textit{Hanna} as inapplicable.\textsuperscript{53} Instead, the policies of \textit{Erie} and \textit{Ragan} control.\textsuperscript{54} The Court recognized that although application of Rule 3 in \textit{Walker} might not encourage forum-shopping,\textsuperscript{55} its applica-

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\item adequately prepare his defense. \textit{C & C Tile Co. v. Independent School Dist. No. 7, 503 P.2d 554, 555 (Okla. 1972)}. The Oklahoma Supreme Court has also stated that a statute of limitations is a statute of repose whose purpose is to run against those who are neglectful of their rights and who fail to use reasonable and proper diligence in enforcing them. \textit{Seitz v. Jones, 370 P.2d 300, 302 (Okla. 1962)}.
\item The \textit{Walker} Court pointed out that, although \textit{OKLA. STAT. tit. 12, § 151 (1971)} provides that "[a] civil action is deemed commenced by filing in the office of the court clerk of the proper court a petition and by the clerk's issuance of summons thereon," section 97, not section 151, controls the commencement of an action for statutes of limitations purposes. \textit{446 U.S. at 752 n.13}. Section 97 qualifies section 151 because section 97 represents a substantive decision by Oklahoma that the "timely" commencement of an action is assured only when the plaintiff diligently attempts to make service and makes service of the summons within 60 days. \textit{See Tyler v. Taylor, 578 P.2d 1214, 1215 (Okla. App. 1977)}. Section 97 is employed when there is a question under Oklahoma law as to whether summons is "timely" served. \textit{Id. The Walker} Court concluded that because section 97 and section 151 can both be applied in state court, each for a separate purpose, Rule 3 and section 97 can both be applied in a diversity action. \textit{446 U.S. at 752 n.13}.
\item \textit{446 U.S. at 751}.
\item \textit{Id. at 751-52}. The Court in \textit{York} reasoned that statutes of limitation are a part of the state substantive law because they have a significant effect on whether there will be a recovery on a state-created right. Because statutes of limitation bear so vitally on a state-created right, the \textit{York} Court concluded that a federal court in a diversity case should apply them. \textit{326 U.S. at 110-11}.
\item \textit{446 U.S. at 751-52}.
\item \textit{Id. at 752}. In limiting its holding to cases where there is no \textit{Hanna} "direct collision" between state law and a federal rule, the \textit{Walker} Court found no reason to address whether Rule 3 is within the scope of the Rules Enabling Act and within a grant of constitutional power. \textit{Id. at 752 n.14}. \textit{See Ely, The Irrepressible Myth of Erie, 87 HARV. L. REV. 693 (1974) [hereinafter cited as Ely]}
\item \textit{446 U.S. at 752-53}. The essential policies underlying \textit{Erie} and \textit{Ragan} are discouragement of forum-shopping, avoidance of the inequitable administration of justice, and promotion of uniformity in the administration of state law. \textit{Id. at 746-47, 753}. \textit{See Ragan v. Merchants Transfer and Warehouse Co., 337 U.S. at 532; Erie R.R. v. Tompkins, 304 U.S. at 74-75}.
\item \textit{446 U.S. at 753}. The \textit{Walker} Court noted that there is no indication that when the petitioner filed his suit in federal court he had any reason to believe that he would avoid the state service requirement. He was not confronted with a situation where adherence to the state rule would have absolutely barred recovery. \textit{Id. at 753 n.15}.
\end{itemize}
lication would result in an inequitable administration of justice because it would give a state-created cause of action longer life in a diversity action in federal court than in a state court. The Court concluded that in the absence of a controlling federal rule, a state-based cause of action that is barred in the state court by the state statute of limitations should not be allowed to proceed to judgment in a federal court merely because of the fortuity of diversity of citizenship. Such a distinction between state and federal plaintiffs cannot be supported by the policies underlying diversity jurisdiction.

Walker is the Supreme Court's most recent determination of the applicability of the Federal Rules of Civil Procedure in diversity cases when a federal rule differs from the accepted state law. The Supreme Court in Erie Railroad v. Tompkins established that in federal diversity cases, a federal court must apply the substantive laws of the forum state; leaving procedural matters subject to the Federal Rules of Civil Procedure. The question facing the Court after Erie was whether a matter should be characterized as substantive or procedural and, accordingly, whether a federal rule or state law should control.

56. Id. at 753.
57. Id.
58. 304 U.S. at 78. See note 19 and text accompanying notes 19-21 supra. The Erie Court reached this conclusion by interpreting section 34 of the Judiciary Act of 1789. Section 34 of the Judiciary Act of 1789 provides: "That: the laws of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92 (current version at 28 U.S.C. § 1652 (1976)).

Legal authorities have developed varying interpretations of the Judiciary Act of 1789. Compare Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 HARV. L. REV. 49, 51, 52 (1923) (the word "laws" had been inserted into final version of section 34 of the Judiciary Act of 1789 to replace the phrase "the Statute laws of the several states . . . and their unwritten and common law. . . ." as a matter of form rather than as a substantive alteration of the text); Mishkin, Some Further Last Words on Erie—The Thread, 87 HARV. L. REV. 1682, 1686-87 (1974) (courts do not have power to displace state social policies in areas of state competence; therefore, courts must broadly construe section 34 of the Judiciary Act of 1789); Stason, supra note 34, at 386-87 (Erie interpretation of Section 34 of the Judiciary Act of 1789 has a constitutional basis found in Erie's underlying policies of intrastate uniformity of result in actions based on state-created rights and in prevention of discrimination against parties unable to claim diversity jurisdiction; with Keeffe, supra note 24, at 496 (Swift v. Tyson was not unconstitutional; Erie Court had preconceived notion to abolish an undesirable judicial policy, when convenient, whether or not weight of authority at time of decision supported such decision).

59. See Substance, Procedure and Uniformity, supra note 12, at 115-16. The Erie Court did not formulate clear criteria to distinguish between state substantive law and state procedural law. After Erie, courts relied on the abstract characterizations of substance and procedure established in conflict of laws or similar fields where the substantive-procedural dichotomy had been utilized. The Erie policy did not control the interpretation of the law, but was merely a factor to be considered together with the established abstract characterizations of substance and procedure. Id.
In *Guaranty Trust Co. v. York* the Supreme Court had to decide between application of the state statute of limitations which would have barred recovery, and application of federal law which would have given the state-created cause of action a longer life. In resolving this issue, the *York* Court did not characterize the statute of limitations as substantive or procedural. Instead, the *York* Court developed an "outcome-determinative" test which required that the result in federal court be identical to the result in state court had the suit been initiated there. Accordingly, the *York* Court held that if the applicable state statute of limitations were ignored in federal court, uniformity of result between state courts and a federal diversity court sitting within the forum state would be thwarted.

The *York* decision was interpreted in *Ragan v. Merchants Transfer & Warehouse Co.* to command that not only must a federal diversity court apply state substantive law, but that it must also qualify or limit a state-created action when the local law so directs. The Supreme Court in *Ragan* determined that state tolling rules are controlling in federal diversity actions because application of Rule 3 would be "outcome-determinative." The *Ragan* Court noted that in certain instances tolling provisions are an integral part of the state statute of limitations. Again the Court did not characterize either a statute of

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60. 326 U.S. at 109-10. See text accompanying notes 23-25 supra.
61. Id. at 108-09. See note 24 supra. The *York* Court reasoned that the "outcome-determinative" test promoted *Erie's* policy of insuring that where a federal court is exercising diversity jurisdiction, the outcome is the same as it would be if tried in a state court. The *York* Court stated that a "mechanical" *Erie* "substance vs. procedure" test would have led to unreasoned distinctions between "substance" and "procedure." 326 U.S. at 109.

*York's* "outcome-determinative" test has been criticized as being too broad to determine whether state law or a Federal Rule of Civil Procedure is controlling in a diversity action. Dissenting in *York*, Justice Rutledge stated: "It is exactly in this borderland, where procedural or remedial rights may or may not have the effect of determining the substantive ones completely, that caution is required in extending the rule of the *Erie* case by the very rule itself." Id. at 115 (Rutledge, J., dissenting).
62. Id. at 108-09.
63. 337 U.S. at 532-33.
64. Id. Although the case could have been resolved by merely employing the "outcome-determinative" test, the Court also affirmed the lower court's determination that the tolling provision was an "integral" part of the state statute of limitations. Several cases have relied on *Ragan* to determine that even where the state tolling provision is not an integral part of the state statute of limitations, application of Rule 3 rather than the state tolling provision is outcome-determinative. See, e.g., Groninger v. Davison, 364 F.2d 638 (8th Cir. 1966); Sylvester v. Messler, 351 F.2d 472 (6th Cir. 1965) (per curiam), cert. denied, 382 U.S. 1011 (1966); Anderson v. Phoenix of Hartford Ins. Co., 320 F. Supp. 399 (W.D. La. 1970); Gatilff v. Little Audrey's Transp. Co., 317 F. Supp. 1117 (D. Neb. 1970). See also For whom the Statute Tolls, supra note 38, at 138.
65. 337 U.S. at 532.
limitations or a tolling provision as substantive or procedural. The Court merely decided that a federal court sitting in a diversity case could not ignore a state statute that would lead to a different result in federal court than in a state court. The Ragan Court reasoned that to do otherwise would conflict with the goals of Erie and York.66

In the aftermath of Ragan, federal courts differed in their interpretation of whether a state statute of limitations with a tolling provision usurps a tolling provision implicit in Rule 3. Some courts distinguished Ragan by reasoning that if the state tolling provision is not an integral part of the state statute of limitations, Rule 3 is applicable in a federal diversity action.67 Other courts maintained that Rule 3 always acts as a tolling provision, and therefore is controlling in diversity actions.68 Still others followed Ragan on the basis that the non-application of state tolling rules in a federal diversity action is outcome-determinative.69

A shift away from the outcome-determinative test was first evidenced by the Supreme Court in Byrd v. Blue Ridge Electric Cooperative.70 The Byrd Court decided that a trial by jury to resolve disputed factual questions was an essential federal policy which did not infringe on a state right so substantially as to require application of the state law.71 A state court had held that the issue of immunity should be decided by a judge and not a jury.72 The respondent contended that under Erie the federal court must apply this state holding to assure that the state-created immunity will be granted uniformly.73 The Byrd Court rejected

66. Id. See note 29 supra.
69. See, e.g., Hardwick v. Smith, 286 F.2d 81 (10th Cir. 1961); Ziegler v. Akin, 261 F.2d 88 (10th Cir. 1958); Murphy v. Citizens Bank of Clovis, 244 F.2d 511 (10th Cir. 1957); Byrd v. Bates, 243 F.2d 670 (5th Cir. 1957); Doyle v. Moylan, 141 F. Supp. 95 (D. Mass. 1956).
70. 356 U.S. 525 (1958). See Stason, supra note 34, at 392-94 (Byrd's "policy-balancing" test undercut Erie policy of uniformity and violated tenth amendment's command that rights created under powers reserved to states cannot be infringed by application of federal "procedural" law in diversity actions—"a step in the direction of federal power taken at the expense of federalism").
71. 356 U.S. at 540. The Byrd Court maintained that an essential feature of the federal system is the distribution of trial functions between judge and jury and the assignment of disputed factual questions to the jury under the command of the seventh amendment. Id. at 537. The state interest involved in Byrd was the policy of achieving the uniform enforcement of state-created rights and obligations. Id. at 538.
73. 356 U.S. at 534.
this contention, reasoning that even though a jury determination of the issue may substantially affect the outcome of the case, the York test does not invariably prevail when there are affirmative, countervailing federal concerns.\textsuperscript{74}

In Hanna v. Plumer the Supreme Court determined that the Federal Rules of Civil Procedure are immune from attack as outcome-determinative.\textsuperscript{75} The Hanna Court reasoned that because a federal rule is rationally capable of characterization as procedural, the matter is within the power of Congress and the federal courts to regulate.\textsuperscript{76} The Hanna Court noted, however, that when the scope of the federal rule is not broad enough to cover the matter in question, Erie mandates the application of the state statute.\textsuperscript{77}

Subsequent to Hanna, courts of appeals reached different conclusions about when the statute of limitations is tolled in a diversity action. Several courts followed Ragan, deciding that state statutes and not the provision of Rule 3 govern when the statute of limitations is tolled.\textsuperscript{78} In other circuits, courts decided that Rule 3 governs, disregarding any application of the Hanna Court's holding that the scope of Rule 3 is not broad enough to serve as a tolling provision.\textsuperscript{79} Courts applying Rule 3 reasoned that the decision as to the commencement of an action is not related to the substantive issues of the case, but is only a procedural question which determines whether an action is to continue.\textsuperscript{80}

\textsuperscript{74} Id. at 536-37. The Byrd Court turned away from the rather simple view of York that federal diversity courts should apply state rules when the application of the federal rule would change the result in federal court from that in a state court. See Leathers, supra note 18, at 812.

\textsuperscript{75} 380 U.S. at 466-67. See note 34 and text accompanying notes 31-36 supra.

\textsuperscript{76} 380 U.S. at 471. But see Stason, supra note 34, at 402. Stason asserts that in the "grey" area, where matters are rationally capable of being classified as substantive or procedural, courts have always determined the characterization in a meaningful way. Stason argues that the Hanna test does not set a responsible guide for classification within the "grey" areas, but merely states that where an appropriate characterization is difficult, the federal rule will be applied, even at the expense of constitutional guarantees. Id.

\textsuperscript{77} 380 U.S. at 470.

\textsuperscript{78} See, e.g., Rose v. K.K. Masutoku Toy Factory Co., 597 F.2d 215 (10th Cir. 1979); Walker v. Armco Steel Corp., 592 F.2d 1133 (10th Cir. 1979), aff'd, 446 U.S. 740 (1980); Lindsey v. Dayton-Hudson Corp., 592 F.2d 1118 (10th Cir. 1979); Witherow v. Firestone Tire & Rubber Co., 530 F.2d 160 (3d Cir. 1976); Anderson v. Papillion, 445 F.2d 841 (5th Cir. 1971) (per curiam); Groninger v. Davison, 364 F.2d 638 (8th Cir. 1966).


\textsuperscript{80} See Ingram v. Kumar, 585 F.2d at 568-69; Smith v. Peters, 482 F.2d at 801-04; Sylvestri v. Warner & Swasey Co., 398 F.2d at 604-06.
Recent Decisions

The Court's discussion in *Walker* has revived *Ragan* without abandoning the *Hanna* analysis. The Court has recognized that the two lines of analysis can co-exist, each in its own sphere of influence. The test in *Hanna* assures that application of the Federal Rules of Civil Procedure will not be subject to challenge by state rules when the plain meaning of the federal rule is specifically on point. But where a conflict exists between a state rule and a federal rule not specifically on point, the *Walker* analysis has revitalized the "characterization" test of *Erie*, the "outcome-determination" test of *York*, and an examination of the effect of a non-application of the state law on the twin aims of *Erie* as required by *Hanna*. In the *Walker* analysis none of these tests appears to be controlling.

In previous cases problems have arisen when a single test was used as the sole criterion for determining whether state or federal law was controlling in a diversity action. "Grey" areas resulted where a matter could not be clearly "characterized" by the *Erie* test as substantive or procedural. In these "grey" areas there was no clear guidance for the courts as to how to characterize a matter. The result was that matters within the "grey" area were usually characterized by the courts as a part of the state law. Exclusive use of the *York* outcome-determination test creates the problem that at a certain stage in a judicial proceeding any procedural matter can be classified as outcome-determinative. The *Walker* Court organized these tests in such a way as to give them a new legitimacy.

81. 446 U.S. at 752.
82. 380 U.S. at 471.
83. See 446 U.S. at 751-52. See notes 19-20, 58-59 and accompanying text supra.
84. See 446 U.S. at 753. See notes 24 and 61 and text accompanying notes 22-25, 60-62 supra.
85. 446 U.S. at 752-53. See 380 U.S. at 468. See text accompanying note 34 supra.
The Court's determination that the service requirement was an "integral" part of the state statute of limitations is a crucial part of its analysis because it allowed the Court to characterize the service requirement as substantive. The first time the Supreme Court applied the "integral" part test to a dispute between state law and a federal rule not directly on point was in *Ragan v. Merchants Transfer and Warehouse Co.* In *Ragan* the Supreme Court did not explain the meaning of "integral." The *Ragan* Court merely adopted the court of appeals' determination that the service requirement was an integral part of the state statute of limitations. However, the court of appeals decision did not clearly define the specific considerations underlying the integral part test. The *Walker* Court's integral part analysis more clearly defined the integral part test by emphasizing the state policies underlying the service requirement. Because the state service requirement promoted the same policies as the statute of limitations, the service requirement was determined to be an "integral" part of the state statute of limitations. As future courts apply the "integral" part test to characterize a state service requirement as substantive, the test will be further defined. Following the *Walker* rationale, each court will have to look to the state policies underlying the state service requirement to determine whether the service requirement is an "integral" part of the state statute of limitations. In the absence of state court decisions explaining the policies underlying the state service requirement, a court will have to decide whether the state service requirement promotes the same policies as the statute of limitations. These courts may find it necessary to more clearly define what is "integral" by determining whether the service requirement is located within the same statutory scheme or is in some other way intimately connected with the state statute of limitations. Future courts may also extend the "integral" part test to characterize other state laws as substantive.

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92. Id. at 751-52. See text accompanying notes 12-17, 26-29, 51 *supra*.
93. 446 U.S. at 751-52. See notes 48-49 and text accompanying notes 48-52 *supra*.
In resolving a conflict between Rule 3 and a state tolling statute, the Walker Court utilized the Erie characterization test, the York outcome-determination test, and Hanna's limitation of the application of the outcome-determination test by a consideration of the twin aims of Erie. The Walker Court also further discussed the "integral" part test of Ragan, looking to the policies of the tolling provision to determine if it was an integral part of the statute of limitations. Because the Court based its decision on a determination that Ragan was controlling, it did not need to discuss extensively the application of the tests to the facts. Only future decisions will clarify the relationship of these tests.

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