

AMENDING COMPLAINTS TO SUE  
PREVIOUSLY MISNAMED OR  
UNIDENTIFIED DEFENDANTS AFTER THE  
STATUTE OF LIMITATIONS HAS RUN:  
QUESTIONS REMAINING FROM THE  
*KRUPSKI* DECISION

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INTRODUCTION

A plaintiff's difficulty in learning before filing suit the identity and role of possible defendants is not uncommon these days. Complex relationships in governmental, corporate, and societal structures can be hard for a plaintiff to unravel without the benefit of discovery, which becomes available only after suit is filed. Examples include the inability of plaintiffs to identify or correctly name the government officials, police, prison guards, or corporate employees whose conduct injured them,<sup>1</sup> or to identify the persons or entities that engaged in a fraudulent scheme causing financial loss to the plaintiff.<sup>2</sup>

Flexibility in pleading is an important feature of the Federal Rules of Civil Procedure ("Rules"), and Rule 15(a) provides that "[t]he court should freely give leave [to amend] when justice so requires."<sup>3</sup> However, when an amend-

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<sup>1</sup> See, e.g., *Roland v. McMonagle*, No. 12 Civ. 6331, 2014 WL 2861433, at \*1 (S.D.N.Y. June 24, 2014) (in suit by prisoner claiming he was taken to an unmonitored cell where he was beaten and mocked for filing grievances and then transferred to a psychiatric unit to cover up the misconduct, amendment after the running of the Statute of Limitations allowed to add names of officials whose names were unknown).

<sup>2</sup> See, e.g., *In re Bernard L. Madoff Inv. Sec. LLC*, 468 B.R. 620 (Bankr. S.D.N.Y. 2012) (holding that the bankruptcy trustee in a suit against participants in the fraud was not allowed to amend the complaint to add other participants not known after running of the statute of limitations). For a detailed background of the mechanics of the Madoff Ponzi scheme and events preceding the Trustee's complaints, see *In re Bernard L. Madoff Inv. Sec. LLC*, 424 B.R. 122, 125-32 (Bankr. S.D.N.Y. 2010).

<sup>3</sup> FED. R. CIV. P. 15(a)(2). Rule 1 provides that the rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1.

ment is sought after a statute of limitations has run,<sup>4</sup> flexibility in pleading must be balanced against the objectives of the statute of limitations—that suit be filed within a reasonable period of time in order to avoid stale evidence and to accord repose to potential defendants so they can get on with their activities without the fear of suit hanging over them.

Thus, Rule 15(c) seeks to reconcile the conflicting goals of providing flexibility in pleading and ensuring adequate notice through filing suit within a set period. To achieve the necessary balance, Rule 15(c) provides for “relation back” of amendments to the filing date of the original pleading. Thus, an amendment to the claim or party set out in a complaint filed within the statute of limitations period is said to “relate back” to the filing date of the original complaint, and thus is deemed to have been filed within the statute of limitations. The relation back rule contains a number of strict requirements aimed at not undermining the concern of the statute of limitations regarding timely notice to parties.

Lower courts have sometimes taken different approaches to applying those requirements. The Supreme Court, in its 2010 decision in *Krupski v. Costa Crociere S.p.A.*,<sup>5</sup> waded into the controversy over one of the requirements of the relation back principle—that a party brought in by amendment must have known or had reason to know that it would have been sued but for a mistake concerning the proper party’s identity. Although the Court resolved some issues, a number of questions as to changes in party defendants remain, which this article will address.

#### I. RULE 15(C) REQUIREMENTS FOR RELATION BACK

Rule 15(c) requires, first, that the amendment assert “a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading.”<sup>6</sup> In addition, if “the amendment changes the party or the naming of the party against whom a claim is asserted,”<sup>7</sup> the party to be brought in must have, within the period provided by Rule 4(m),<sup>8</sup> “(i) received such notice of the action that it will not be prejudiced in defending on the merits; and (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party’s identity.”<sup>9</sup>

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<sup>4</sup> FED. R. CIV. P. 15(c)(1)(C).

<sup>5</sup> *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538 (2010).

<sup>6</sup> FED. R. CIV. P. 15(c)(1)(B).

<sup>7</sup> FED. R. CIV. P. 15(c)(1)(C).

<sup>8</sup> FED. R. CIV. P. 4(m) provides a ninety-day time period in which a defendant must be served after a complaint is filed, and this ninety-day period also applies to Rule 15(c)(1)(C)(i) and (ii)’s provisions, in effect extending the statute of limitations period by ninety days.

<sup>9</sup> FED. R. CIV. P. 15(c)(1)(C).

A. *Arose out of the Same Conduct, Transaction, or Occurrence Set Out in the Original Pleading (Rule 15(c)(1)(B))*

The same “conduct, transaction, or occurrence” test is a workhorse of the Federal Rules, resorted to by the drafters in a number of different situations.<sup>10</sup> In Rule 15(c)(1)(B), it serves to ensure that there is a substantial nexus between the original and amended pleadings. In the relation back context, the test generally concerns whether the amended pleading relates to the same general conduct or wrong complained of in the original pleading.<sup>11</sup> That is satisfied when the liability-creating events alleged in the amendment were “but different invasions of [plaintiff’s] primary right and different breaches of the same duty.”<sup>12</sup> Alternative tests applied by some courts include whether the amended pleading asserts the “same cause of action” as the original pleading,<sup>13</sup> whether there is a common core of operative facts uniting the original and newly asserted claims;<sup>14</sup> whether there has been fair notice of the transaction, occurrence, or conduct involved;<sup>15</sup> or whether plaintiff will rely on the same kind of evidence offered in support of the original claim to prove the new claim, as opposed to whether the same legal theory is asserted.<sup>16</sup>

A policy-oriented application of the “same conduct, transaction, or occurrence” test in Rule 15(c)(1)(B) would center on whether the defendant would have been put on notice in the original complaint that the case might ultimately encompass the allegations in the amendment. This would be appropriate when there is an amendment of *claims*—in order to ensure that the defendant could have anticipated the amended claim, and thus that the objectives of the statute of limitations are not undermined by relation back.<sup>17</sup> However, when an

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<sup>10</sup> See FED. R. CIV. P. 13(a) (compulsory counterclaim); FED. R. CIV. P. 15(c) (relation back of amendments); FED. R. CIV. P. 20 (permissive joinder of parties).

<sup>11</sup> Swartz v. Gold Dust Casino, Inc. 91 F.R.D. 543, 545–46 (D. Nev. 1981); De Malherbe v. Int’l Union of Elevator Constructors, 449 F. Supp. 1335, 1354–55 (N.D. Cal. 1978); Benco Plastics, Inc. v. Westinghouse Elec. Corp., 387 F. Supp. 772, 783 (E.D. Tenn. 1974).

<sup>12</sup> Blair v. Durham, 134 F.2d 729, 731 (6th Cir. 1943).

<sup>13</sup> United States v. Memphis Cotton Oil Co., 288 U.S. 62, 68 (1933) (the “same cause of action” test has fixed the limits of amendment with increasing liberality); United Exhibitors, Inc. v. Twentieth Century Fox Film Corp., 18 F.R.D. 469, 472 (W.D. Pa. 1956); Porter v. Theo J. Ely Mfg. Co., 5 F.R.D. 317, 321 (W.D. Pa. 1946).

<sup>14</sup> Mayle v. Felix, 545 U.S. 644, 646 (2005); Newell v. Hanks, 283 F.3d 827, 834 (7th Cir. 2002); FDIC v. Jackson, 133 F.3d 694, 702 (9th Cir. 1998); Lambert v. Babcock & Wilcox, Co., 70 F. Supp. 2d 877, 888 (S.D. Ind. 1999) (same transaction if arises from the same core of facts, even if involving a different substantive legal theory than that advanced in the original pleading).

<sup>15</sup> *FDIC*, 133 F.3d at 702; Morell v. United States, 91 F. Supp. 2d 451, 457 (D.P.R. 2000); Watkins & Son Pet Supplies v. Iams Co., 107 F. Supp. 2d 883, 897 (S.D. Ohio 1999), *aff’d*, 254 F.3d 607 (6th Cir. 2001).

<sup>16</sup> Tran v. Alphonse Hotel Corp., 281 F.3d 23, 36 (2d Cir. 2002). The “same evidence” test is particularly applicable to compulsory counterclaims under Rule 13(a). See Bose Corp. v. Consumers Union of the U.S., Inc., 384 F. Supp. 600, 602 (D. Mass. 1974).

<sup>17</sup> “Where the requirements of the rule are satisfied, amending the complaint to add a new party ‘does not subvert the policies of the statute of limitations.’” Perrin v. Stensland, 240

amendment pertains to *parties*, it seems redundant to apply the “same conduct, transaction, or occurrence” test to determine whether the defendant was put on notice that the case might be expanded; indeed, Rules 15(c)(1)(c)(i) and (ii) expressly spell out more precise standards regarding notice to *parties* to be added.

The issue of notice with respect to the amendment of *parties*, therefore, has been considered by some courts under the more specific conditions for fair notice under Rules 15(c)(1)(C)(i) and (ii). However, (i) and (ii) only set out the requirements for notice to the *party to be brought in*, and not to the *original defendant*. Thus the “same conduct, transaction, or occurrence” requirement of Rule 15(c)(1)(B) can be looked to in order to determine whether the *original defendant* received adequate notice to investigate and prepare for the claim against the party to be brought in so as not to be prejudiced. If an amendment as to parties only serves to correct a misnomer, for example, there is little chance that the original defendant would be prejudiced. However, when an amendment adds an entirely *new defendant*, the standards for notice in (i) and (ii) are more precise and should be examined. These standards would govern a determination as to whether the original defendant should have appreciated that different investigation and preservation of evidence would be necessary if it been put on notice, before the statute of limitations ran, that the party to be brought in would have been sued but for a mistake.

*B. Party Brought in by Amendment Received Such Notice as It Will Not Be Prejudiced—(Rule 15(c)(1)(C)(i))*

Both subsections (i) and (ii) of Rule 15(c)(1)(C) concern adequacy of notice to the party to be brought in, and thus there is potential overlap between these two requirements. If the party to be brought in<sup>18</sup> knew or should have known that, but for a mistake, it would have been sued ((ii)), it would necessarily have received “such notice as it will not be prejudiced” ((i)), because it would have been aware that it might still be added to the suit by amendment. However, some courts have analyzed (i) and (ii) as separate requirements, reading (i) as focusing only on the narrow question of whether the information received by the party to be brought in was adequate.

*1. Adequacy of Information (Rule 15(c)(1)(C)(i))*

Notice under the Federal Rules need not be formal, and constructive notice can be adequate to satisfy the notice requirement of Rule 15(c)(1)(C)(i). Some

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P.3d 1189, 1195 (Wash. Ct. App. 2010) (quoting *North Street Ass’n v. City of Olympia*, 635 P.2d 721 (Wash. 1981)).

<sup>18</sup> The naming of a new defendant in addition to and not in lieu of another defendant misnamed in the original complaint, constitutes a “change” of the party within the meaning of Rule 15(c). *Meredith v. United Air Lines*, 41 F.R.D. 34, 39 (S.D. Cal. 1966); *see also Bayerische Landesbank v. Aladdin Capital Mgmt. LLC*, 289 F.R.D. 401, 406 (S.D.N.Y. 2013) (where amendment of investor’s complaint *added* another company upon discovering that its employees were involved, “[t]here is no requirement, however, that an amendment must replace a party in order to establish a mistake warranting relation back”).

courts have stated that “only service constitutes notice,”<sup>19</sup> and others have required more than mere awareness of the suit.<sup>20</sup> However, the better practice seems to be otherwise.<sup>21</sup> Notice to the party sued may be imputed to the party added by amendment if there is an “identity of interests” between them.<sup>22</sup>

Constructive notice<sup>23</sup> to a party that was not sued originally has been found in many common-sense business relationships where one company, not directly subject to a lawsuit, is aware of an action against another entity. In *Loveall v. Employer Health Services, Inc.*,<sup>24</sup> the corporation named as defendant sent a letter to the company that had sold the allegedly defective product, advising that, in the view of its attorneys, the latter company would likely be drawn into the action. This was found to be sufficient notice.

The issue often arises when the relationship between actors within a governmental, corporate, or institutional structure was not fully understood by the plaintiff who, after the statute of limitations had run, desired to change or add a party it had discovered to be potentially liable. When one party in such a structure is sued within the statute of limitations, other officials may also have

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<sup>19</sup> *Williams v. Army & Air Force Exchange Serv.*, 830 F.2d 27, 30 n.2 (3d Cir. 1987).

<sup>20</sup> *See Gardner v. Gartman*, 880 F.2d 797, 799 (4th Cir. 1989) (suits against the U.S. and certain officials did not constitute notice to the head of the U.S. department where plaintiff worked); *Bell v. Veterans Admin. Hosp.*, 826 F.2d 357, 360 (5th Cir. 1987) (relation back not allowed even though administrative hearings put the party to be joined on notice of the suit).

<sup>21</sup> *See* 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1498.1, at 129–30 (3d ed. 2010). “The conclusion of a growing number of courts and commentators is that sufficient notice may be deemed to have occurred where a party who has some reason to expect his potential involvement as a defendant hears of the commencement of litigation through some informal means.” *Kinnally v. Bell of Pa.*, 748 F. Supp. 1136, 1141 (E.D. Pa. 1990).

<sup>22</sup> The identity of interests concept, a judicial gloss on Rule 15(c)(1), provides that the institution of the action serves as constructive notice of the action to the parties added after the limitations period expired, when the original and added parties are so closely related in business or other activities that it is fair to presume the added parties learned of the institution of the action shortly after it was commenced. The identity of interest principle is often applied where the original and added parties are a parent corporation and its wholly owned subsidiary, two related corporations whose officers, directors, or shareholders are substantially identical and who have similar names or share office space, past and present forms of the same enterprise, or co-executors of an estate.

*Hernandez Jimenez v. Calero Toledo*, 604 F.2d 99, 102–03 (1st Cir. 1979) (citation omitted). *But see Columbus Bd. of Educ. v. Armstrong World Indus., Inc.*, 627 N.E.2d 1033, 1040 (Ohio App. 1993) (service on parent constituted notice to wholly-owned subsidiary, but the third requirement of Rule 15(c)(3)(B) was not met because of lack of showing that the subsidiary knew or should have known that, but for a mistake in identity, the action would have been brought against it).

<sup>23</sup> The terms “constructive notice” and “imputed knowledge” are often used interchangeably. The Supreme Court commented in *Krupski*:

The Court of Appeals stated that it was “imput[ing]” knowledge to *Krupski*. Petitioner uses the terms “imputed knowledge” and “constructive knowledge” interchangeably in her brief, while respondent addresses only actual knowledge. Because we reject the Court of Appeals’ focus on the plaintiff’s knowledge in the first instance, the distinction among these types of knowledge is not relevant to our resolution of this case.

*Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 546 n.1 (2010) (alteration in original) (citations omitted).

<sup>24</sup> *Loveall v. Emp’r Health Servs., Inc.*, 196 F.R.D. 399, 403 (D. Kan. 2000).

learned of the suit. For example, a plaintiff who sued Gold Dust Casino, Inc., was allowed to relate back her amendment to sue Cavanaugh Properties, a partnership that owned and operated the casino. The court found that service on the president of the casino corporation was adequate to notify the Cavanaugh partnership in which the casino president was also a partner. The court noted: "If a person who receives notice of the legal action within the limitations period should know from the information received that he may be liable to the plaintiff by reason of the claim for relief asserted against another, he has received the notice required by the Rule."<sup>25</sup> The dual capacities of the person originally served "supports the premise that the partnership had such notice of the lawsuit within the limitations period as should have induced it to commence investigations and other preparations to defend itself."<sup>26</sup>

When the same attorney represents both the person or entity served and the one proposed to be brought in through amendment, the latter may be considered to have received notice. For example, in *Williams v. Ward*,<sup>27</sup> the Attorney General's ("AG") knowledge of a civil rights suit against two prison doctors and the superintendent of the prison was imputed to the Commissioner of the Department of Corrections.<sup>28</sup> In *Roland v. McMonagle*,<sup>29</sup> the plaintiff moved, after the statute of limitations had run, to amend the names of the defendant correctional officers he had originally sued by name or Doe designation and who were represented by the Attorney General's office. The court held that,

even if the AG's office did not know [the names of the officers sought to be added], it should have known. Roland's allegations adequately described the officers whom he intended to sue, even if he was mistaken as to their names, and placed the AG's office on notice that it needed to investigate the relevant records to determine those officers' identities and prepare a defense. If the AG's office failed to conduct a proper investigation, it must accept the consequences of its inaction; it cannot now assert ignorance as a basis for opposing the motion to amend.<sup>30</sup>

However, the Second Circuit has suggested an additional requirement if an attorney's knowledge is to be imputed to a new defendant. In *Gleason v.*

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<sup>25</sup> *Swartz v. Gold Dust Casino, Inc.* 91 F.R.D. 543, 547 (D. Nev. 1981).

<sup>26</sup> *Id.*

<sup>27</sup> *Williams v. Ward*, 553 F. Supp. 1024, 1026 (W.D.N.Y. 1983).

<sup>28</sup> *See also* *Kirk v. Cronvich*, 629 F.2d 404, 407-08 (5th Cir. 1980) (knowledge of attorney and deputy sheriff imputed to sheriff); *Florence v. Krasucki*, 533 F. Supp. 1047, 1053-54 (W.D.N.Y. 1982) (defendants listed in the original complaint as "Five Troopers who participated in the acts which are the subject of this action but whose names are unknown" held to have received constructive notice through the Attorney General, the same attorney representing the named defendant police officer).

<sup>29</sup> *Roland v. McMonagle*, No. 12 Civ. 6331, 2014 WL 2861433, at \*3-4 (S.D.N.Y. June 24, 2014).

<sup>30</sup> *Id.* at \*4; *see also* *Samuels v. Dalsheim*, No. 81 Civ. 7050(PKL), 1995 WL 1081308, at \*14 (S.D.N.Y. Aug. 22, 1995) ("It is sufficient for the purpose of constructive notice that . . . defendants' counsel knew or should have known that a particular category of defendants would be added to the action, without necessarily knowing the actual identity of each defendant to be added.").

*McBride*,<sup>31</sup> the court held that “[i]n order to support an argument that knowledge of the pendency of a lawsuit may be imputed to a defendant or set of defendants because they have the same attorney(s), there must be some showing that the attorney(s) knew that the additional defendants would be added to the existing suit.”<sup>32</sup> The assistant corporation counsel assigned to the case submitted an affidavit stating that prior to the amendment, he had no knowledge that any additional defendants would be added to the suit, but the court determined that the corporation counsel should have known that the additional defendants would be added. The plaintiff named the city as a defendant in addition to naming the officers who allegedly beat him, and given these factors, the court found that the corporation counsel should have known that municipal supervisory employees would also be added as defendants.

Constructive notice can be provided through such means as publicity in the press if sufficiently detailed. However, mere publicity concerning general wrongful activities of an organization may not be sufficient to provide notice to an officer not named in the original complaint. *In re IndyMac Mortgage-Backed Sec. Litigation*<sup>33</sup> was a suit against banks that were major participants in the mortgage-backed security markets that crashed in the late 2000s. Plaintiffs sought to relate back an amendment to add a major bank officer based on his being “the subject of multiple lawsuits and news articles questioning his leadership and responsibility for the IndyMac business practices.”<sup>34</sup> These allegations were found to be insufficient to show that he knew or should have known that he would have been sued but for a mistake.

The question of adequate notice has arisen in auto accident cases where a driver is sued without the plaintiff being aware that he has died, and an amendment is sought to substitute the driver’s estate after the statute of limitations has run. Relation back has been allowed due to the “community of interest” between the named and the sought-to-be joined defendants, and insurance carriers are commonly found to fall within the same community.<sup>35</sup>

Viewing Rule 15(c)(1)(C)(i) solely as focusing on the adequacy of information received by the party to be brought in so that it is deemed to have received constructive notice neglects the fact that subsections (i) and (ii) are closely intertwined. Courts often combine the discussion of notice under the two subsections, thus bringing into play the requirement that the notice received must be such that the party will not be prejudiced.

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<sup>31</sup> Gleason v. McBride, 869 F.2d 688 (2d Cir. 1989).

<sup>32</sup> *Id.* at 693.

<sup>33</sup> *In re IndyMac Mortg.-Backed Sec. Litig.*, 718 F. Supp. 2d 495 (S.D.N.Y. 2010).

<sup>34</sup> *Id.* at 507.

<sup>35</sup> LaRue v. Harris, 115 P.3d 1077, 1079 (Wash. Ct. App. 2005) (insurer had knowledge of the accident, and because it shared a community of interest with the estate, its knowledge was imputable to the estate, and the estate was not prejudiced in maintaining a defense because, except for substituting the estate in place of the deceased, the amended claim was the same as the original one).

2. *Such That the Party to Be Brought in Will Not Be Prejudiced*

Rule 15(c)(1)(C)(i) requires additionally that the *party to be brought in* “received such notice of the action that it will not be prejudiced in defending on the merits.” Lack of prejudice can result from having received the notice, and therefore the adequacy of the notice is also relevant. An obvious kind of prejudice that could arise from amending a complaint is delay, if discovery and trial preparation have to be extended because of changing or adding a party. Under Rule 15(a), delay is a proper subject of consideration as to whether an amendment should be allowed in the first place “when justice so requires.”<sup>36</sup> Thus, the Supreme Court has ruled, in the context of changing a *claim* by amendment, that leave to amend should be granted under Rule 15(a) “[i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.”<sup>37</sup>

“Prejudice arises when the amendment would ‘(i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction.’”<sup>38</sup>

When there is a change of a *party*, the lack of prejudice required by Rule 15(c)(1)(C)(i) is even more specific than that required by the Rule 15(a) right to amend. There is a possible overlap between the prejudice that would prevent a court from granting a right to amend at all under Rule 15(a), and the specific prejudice required in subpart (i). However, they do not seem markedly different in most respects, and in fact, courts have not usually attempted to distinguish between them.

Relevant to whether the party to be brought in will be prejudiced is whether the issues raised by bringing in a new party will be similar and will require much the same investigation and evidence as the claim against the original defendant. Where the same defenses will be made by the new defendant as would be made by the original defendant, prejudice will not be found.<sup>39</sup> In *Roland v. McMonagle*,<sup>40</sup> the defendant objected that the two officers to be added would be prejudiced because their defenses differed from those of the original defendants. The court observed that all five officers now sued were alleged to have “acted in concert to deprive [the plaintiff] of his rights in essentially the same

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<sup>36</sup> FED. R. CIV. P. 15(a).

<sup>37</sup> *Foman v. Davis*, 371 U.S. 178, 182 (1962). “Mere delay, however, absent a showing of bad faith or undue prejudice, does not provide a basis for a district court to deny the right to amend.” *State Teachers Ret. Bd. v. Fluor Corp.*, 654 F.2d 843, 856 (2d Cir. 1981).

<sup>38</sup> *Soroof Trading Dev. Co. v. GE Microgen, Inc.*, 283 F.R.D. 142, 147 (S.D.N.Y. 2012) (quoting *Block v. First Blood Associates*, 988 F.2d 344, 350 (2d Cir. 1993)).

<sup>39</sup> *See, e.g., Estate of Ratcliffe v. Pradera Realty Co.*, No. 05 Civ. 10272(JFK), 2007 WL 3084977, at \*4 (S.D.N.Y. Oct. 19, 2007).

<sup>40</sup> *Roland v. McMonagle*, No. 12 Civ. 6331, 2014 WL 2861433 (S.D.N.Y. June 24, 2014).

manner,” and the AG’s office could present “largely the same defenses.”<sup>41</sup> Finally, the court found that the procedural posture of the case—with no motion for summary judgment pending and discovery still ongoing—mitigated concerns over prejudice.<sup>42</sup>

3. *Added Party’s Knowledge That, but for a Mistake, It Would Have Been Sued (Rule 15(c)(1)(C)(ii))*

Rule 15(c)(1)(C)(ii) focuses on the knowledge of the *party to be brought in* that it would have been sued “but for a mistake concerning the proper party’s identity.”

[C]ourts . . . apply something akin to a reasonableness test to determine whether the party “should have known” it was the one intended to be sued. Relation back will be refused only if the court finds that there is no reason why the party to be added should have understood that it was not named due to a mistake.<sup>43</sup>

“Because the inquiry is an objective one, the court should consider the totality of the circumstances and the relevant facts at issue.”<sup>44</sup>

Defining what is a mistake has been a major cause of disagreement among lower courts. A number of circuit courts held that if a plaintiff did not know the names of certain defendants and only learned those names after the statute of limitations had run, the amendment would not relate back because it was not a mistake. In *Barrow v. Wethersfield Police Department*,<sup>45</sup> plaintiff sought to add six named police officers to his suit originally filed against the police department and “John Doe” officers. The failure to have sued the officers originally was found to be due to lack of knowledge as to their identities and not a mistake in their names. The Second Circuit noted that the Advisory Committee Notes state that Rule 15(c) deals with the problem of a misnamed defendant.<sup>46</sup> “This commentary,” it stated, “implies that the rule is meant to allow an amendment changing the name of a party to relate back to the original complaint only if the change is the result of an error, such as a misnomer or misidentification.”<sup>47</sup> It went on to cite other circuit courts that had held similarly.

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<sup>41</sup> *Id.* at \*5.

<sup>42</sup> *See also Sorooof Trading*, 283 F.R.D. at 153 (“[A]ny new discovery is not likely to be burdensome, as no new theory of recovery is added—instead, the operative facts at the foundation of the case remain the same.”).

<sup>43</sup> WRIGHT ET AL., *supra* note 21, § 1498.3 at 169–72; *see also* *Jacobsen v. Osborne*, 133 F.3d 315, 319–20 (5th Cir. 1998); *Ratcliffe v. Ins. Co. of N. Am.*, 482 F. Supp. 759, 763 (E.D. Pa. 1980).

<sup>44</sup> *Bowden ex rel. Bowden v. Wal-Mart Stores, Inc.*, 124 F. Supp. 2d 1228, 1242 (M.D. Ala. 2000); *see also* WRIGHT ET AL., *supra* note 21, § 1498.3 at 172 n.4.

<sup>45</sup> *Barrow v. Wethersfield Police Dep’t*, 66 F.3d 466, 469 (2d Cir. 1995).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* The court cited *Worthington v. Wilson*, 8 F.3d 1253, 1256 (7th Cir. 1993) (Rule 15(c)(1)(C) “permits an amendment to relate back only where there has been an error made concerning the identity of the proper party and where that party is chargeable with knowledge of the mistake, but it does not permit relation back where . . . there is a lack of

We are compelled to agree with our sister circuits that Rule 15(c) does not allow an amended complaint adding new defendants to relate back if the newly-added defendants were not named originally because the plaintiff did not know their identities. Rule 15(c) explicitly allows the relation back of an amendment due to a “mistake” concerning the identity of the parties (under certain circumstances), but the lack of knowledge of a party’s identity cannot be characterized as a mistake.

. . . Since the new names were added not to correct a mistake but to correct a lack of knowledge, the requirements of Rule 15(c) for relation back are not met.<sup>48</sup>

The paradigm for a mistake under these decisions that would justify relation back would be a complaint against the government which stated the wrong name of the agency or named the wrong officer or one who was no longer in that position.<sup>49</sup> A number of other circuits adopted a similar interpretation of “mistake” as the Second Circuit’s *Barrow* decision,<sup>50</sup> but other circuits, took a different approach.<sup>51</sup> That approach was essentially that a plaintiff could still make a “mistake” as to the names or responsibilities of parties it did not sue, even if it was aware of those parties’ existence. This circuit split led the Supreme Court to grant certiorari in *Krupski*.

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knowledge of the proper party.”); *Wilson v. United States*, 23 F.3d 559, 563 (1st Cir. 1994); *W. Contracting Corp. v. Bechtel Corp.*, 885 F.2d 1196, 1201 (4th Cir. 1989).

<sup>48</sup> *Barrow*, 66 F.3d at 470.

<sup>49</sup> See *Donald v. Cook Cnty. Sheriff’s Dep’t*, 95 F.3d 548, 560 (7th Cir. 1996).

<sup>50</sup> *Rendall-Speranza v. Nassim*, 107 F.3d 913, 918 (D.C. Cir. 1997) (denying relation back where an employee sued her supervisor for assault and later sought to add the employer, claiming that she was not fully aware of the employer’s responsibility for the supervisor’s actions until it filed an amicus brief stating that the supervisor’s actions were in the course of his employment); *La.-Pac. Corp. v. ASARCO, Inc.*, 5 F.3d 431, 434 (9th Cir. 1993) (mistake as to which of two known parties was the proper successor-in-interest of a company liable to plaintiff does not justify relation back).

<sup>51</sup> *Goodman v. Praxair, Inc.*, 494 F.3d 458, 469–70 (4th Cir. 2007) (rejecting argument that plaintiff’s knowledge of proper corporate defendant’s existence and name meant that no mistake had been made); *Arthur v. Maersk, Inc.*, 434 F.3d 196, 208 (3d Cir. 2006) (“A ‘mistake’ is no less a ‘mistake’ when it flows from lack of knowledge as opposed to inaccurate description.”); *Leonard v. Parry*, 219 F.3d 25, 28–29 (1st Cir. 2000) (plaintiff’s knowledge of proper defendant’s identity was not relevant to whether she made a mistake concerning the identity of the proper party). The First Circuit stated that “[v]irtually by definition, every mistake involves an element of negligence, carelessness, or fault—and the language of Rule 15(c)(3) does not distinguish among types of mistakes concerning identity. Properly construed, the rule encompasses both mistakes that were easily avoidable and those that were serendipitous.” *Id.* at 29. The court also refused to find that the fact that the defense attorney had notified plaintiff’s lawyer of the mistake before the statute ran would prevent relation back. *Id.* at 30. It found that “what the plaintiff knew (or thought he knew) at the time of the original pleading generally is the relevant datum in respect to the question of whether a mistake concerning identity actually took place,” and that what plaintiff learned later is not relevant. *Id.* at 29.

## a. Krupski v. Costa Crociere S.p.A.

Mrs. Krupski “tripped over a cable and fractured her femur while she was on board the cruise ship *Costa Magica*.”<sup>52</sup> Upon her return home, she acquired counsel and began the process of seeking compensation. She sued an entity named Costa Cruise Lines, based in part on confusing representations on the website and the front of the ticket indicating that Costa Cruise was the carrier. Costa Cruise was in fact only the sales and marketing agent of the carrier Costa Crociere S.p.A. Shortly after the limitations period expired, Costa Cruise informed the plaintiff of the existence of Costa Crociere. Krupski waited 133 days to seek leave to amend and then waited another month to file an amended complaint naming Costa Crociere as a defendant. The district court denied relation back, and Costa Crociere successfully moved for dismissal. The Eleventh Circuit Court of Appeals affirmed.<sup>53</sup> It first decided that Krupski either knew or should have known of the proper party’s identity and that she had made a deliberate choice instead of a mistake in not naming Costa Crociere as a party in her original pleading.

The Supreme Court reversed, holding that relation back under Rule 15(c)(1)(C) depends on what the party to be brought in knew or should have known, not on the amending party’s knowledge or timeliness in seeking to amend the pleading. With Justice Sonia Sotomayor writing for the majority, the Court reasoned that the text of Rule 15 asks what the prospective defendant knew or should have known, not what the plaintiff knew or should have known (the test as determined by the Eleventh Circuit). The opinion further reasoned that Costa Crociere should have known that Krupski’s failure to name it as a defendant was due to a mistake concerning the proper party’s identity. Thus, Krupski should be allowed to add Costa Crociere in her complaint.<sup>54</sup>

The opinion specifically rejected the idea that a plaintiff’s “knowledge of a party’s existence” constitutes an “absence of mistake.” A mistake, it said, is “[a]n error, misconception, or misunderstanding; an erroneous belief.”<sup>55</sup> Thus, merely because a plaintiff knows of a party’s existence does not preclude finding that she made a mistake with respect to that party’s identity:

A plaintiff may know that a prospective defendant—call him party A—exists, while erroneously believing him to have the status of party B. Similarly, a plain-

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<sup>52</sup> Krupski v. Costa Crociere S.p.A., 560 U.S. 538, 541 (2010).

<sup>53</sup> Krupski v. Costa Cruise Lines, N.V., LLC, 330 F. App’x 892, 895–96 (11th Cir. 2009) (per curiam).

<sup>54</sup> Justice Antonin Scalia wrote separately, concurring in part and concurring in the judgment. He noted that he did not support the majority’s use of the Notes of the Advisory Committee to the Federal Rules of Civil Procedure in reaching its decision. Krupski v. Costa Crociere S.p.A., 560 U.S. 538, 557 (2010) (Scalia, J., concurring).

<sup>55</sup> *Id.* at 548–49 (majority opinion) (alteration in original) (quoting Black’s Law Dictionary 1092 (9th ed. 2009)) (citing Webster’s Third New International Dictionary 1446 (2002) (“defining ‘mistake’ as ‘a misunderstanding of the meaning or implication of something’; ‘a wrong action or statement proceeding from faulty judgment, inadequate knowledge, or inattention’; ‘an erroneous belief’; or ‘a state of mind not in accordance with the facts’”)).

tiff may know generally what party A does while misunderstanding the roles that party A and party B played in the “conduct, transaction, or occurrence” giving rise to her claim. If the plaintiff sues party B instead of party A under these circumstances, she has made a “mistake concerning the proper party’s identity” notwithstanding her knowledge of the existence of both parties. The only question under Rule 15(c)(1)(C)(ii), then, is whether party A knew or should have known that, absent some mistake, the action would have been brought against him.<sup>56</sup>

The Court also noted that:

[A] plaintiff might know that the prospective defendant exists but nonetheless harbor a misunderstanding about his status or role in the events giving rise to the claim at issue, and she may mistakenly choose to sue a different defendant based on that misimpression. That kind of deliberate but mistaken choice does not foreclose a finding that Rule 15(c)(1)(C)(ii) has been satisfied.<sup>57</sup>

The opinion found this reading to be consistent with the purpose of relation back:

Our reading is also consistent with the history of Rule 15(c)(1)(C). That provision was added in 1966 to respond to a recurring problem in suits against the Federal Government, particularly in the Social Security context. Individuals who had filed timely lawsuits challenging the administrative denial of benefits often failed to name the party identified in the statute as the proper defendant—the current Secretary of what was then the Department of Health, Education, and Welfare—and named instead the United States; the Department of Health, Education, and Welfare itself; the nonexistent “Federal Security Administration”; or a Secretary who had recently retired from office. By the time the plaintiffs discovered their mistakes, the statute of limitations in many cases had expired, and the district courts denied the plaintiffs leave to amend on the ground that the amended complaints would not relate back. Rule 15(c) was therefore “amplified to provide a general solution” to this problem. It is conceivable that the Social Security litigants knew or reasonably should have known the identity of the proper defendant either because of documents in their administrative cases or by dint of the statute setting forth the filing requirements.<sup>58</sup>

The purpose of relation back in Rule 15(c), the *Krupski* opinion said, is “to balance the interests of the defendant protected by the statute of limitations with the preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits.”<sup>59</sup> Repose is a principal objective sought by the statute of limitations. Thus, “[a] prospective defendant who legitimately believed that the limitations period had passed without any attempt to sue him has a strong interest in repose.”<sup>60</sup> However, “repose would be a windfall for a prospective defendant who understood, or

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<sup>56</sup> *Id.* at 549.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 550–51 (citations omitted).

<sup>59</sup> *Id.* at 550 (citing Advisory Committee’s 1966 Notes 122; 3 Moore’s Federal Practice §§ 15.02[1], 15.19[3][a] (3d ed. 2009)).

<sup>60</sup> *Id.*

who should have understood, that he escaped suit during the limitations period only because the plaintiff misunderstood a crucial fact about his identity.”<sup>61</sup>

The Eleventh Circuit opinion, and other opinions giving a restrictive reading of “mistake,” reflected concern over a plaintiff’s failure properly to investigate the facts (essentially a failure to perform “due diligence”) as to who was the correct defendant. The *Krupski* opinion viewed information in the plaintiff’s possession as relevant only “if it bears on the defendant’s understanding of whether the plaintiff made a mistake regarding the proper party’s identity.”<sup>62</sup> Responding to the defendant’s argument that the key issue under Rule 15(c)(1)(C)(ii) is whether the plaintiff made a “deliberate choice” to sue one party over another, the Court agreed that “making a deliberate choice to sue one party instead of another while fully understanding the factual and legal differences between the two parties is the antithesis of making a mistake concerning the proper party’s identity.”<sup>63</sup> It disagreed, however, with the position that if a plaintiff is aware of the existence of two parties and chooses to sue the wrong one, the proper defendant could reasonably believe that the plaintiff did not make a mistake.

Thus, the Court determined that close scrutiny of the plaintiff’s conduct was not required by the relation back rule.

[Although] a court may consider a movant’s “undue delay” or “dilatory motive” in deciding whether to grant leave to amend under Rule 15(a) . . . the contrast between Rule 15(a) and Rule 15(c) makes clear [that] the speed with which a plaintiff moves to amend her complaint or file[] an amended complaint after obtaining leave to do so has no bearing on whether the amended complaint relates back.<sup>64</sup>

However, the fact remains that “[t]o the extent the plaintiff’s postfiling conduct informs the prospective defendant’s understanding of whether the plaintiff initially made a ‘mistake concerning the proper party’s identity,’ a court may consider the conduct.”<sup>65</sup> But “[t]he plaintiff’s postfiling conduct is otherwise immaterial to the question whether an amended complaint relates back.”<sup>66</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 548.

<sup>63</sup> *Id.* at 549.

<sup>64</sup> *Id.* at 553 (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962); *WRIGHT ET AL.*, *supra* note 21, § 1498, at 142–43 & nn. 49–50 (2d ed. 1990 & supp. 2010)). The *Krupski* opinion emphasized another difference between Rules 15(a) and 15(c), that while Rule 15(a) leaves discretion to the court as to whether to allow an amendment, Rule 15(c) mandates relation back if the requirements are satisfied. The Court viewed consideration of the plaintiff’s conduct as an additional requirement not provided for in the rule. *Id.*

<sup>65</sup> *Id.* at 554 (citing *Leonard v. Parry*, 219 F.3d 25, 29 (1st Cir. 2000) (“[P]ost-filing events occasionally can shed light on the plaintiff’s state of mind at an earlier time” and “can inform a defendant’s reasonable beliefs concerning whether her omission from the original complaint represented a mistake (as opposed to a conscious choice)”)).

<sup>66</sup> *Id.*

## II. POST-KRUPSKI DEVELOPMENTS

A. *Deliberate Choice Not to Sue*

The *Krupski* opinion said that “a deliberate choice to sue one party instead of another while fully understanding the factual and legal differences between the two parties is the antithesis of making a mistake concerning the proper party’s identity.”<sup>67</sup> It is not clear exactly what situations would permit a court to find that a deliberate choice had been made not to sue a party whom a plaintiff later seeks to bring in by amendment. It is also unclear what degree of certainty would be required to conclude that a plaintiff fully understands the factual and legal differences between the parties. One clear example would be when the plaintiff eschews suing someone for strategic reasons, such as to lull that person or the named defendant into not properly investigating the case while the evidence is still fresh, or for other tactical advantages. That situation, however, would already be ineligible for relation back under the requirement in Rule 15(c) that the notice be “such that party to be brought in would not be prejudiced.”<sup>68</sup>

Even before *Krupski*, courts recognized that there is a difference between correcting a legitimate misunderstanding of the law or facts and strategic motives in making an amendment. In a suit to enjoin a state regulatory board’s order, a court allowed plaintiff cable operators to amend to add individual members of the board where direct suits against the state are barred by the Eleventh Amendment. The court stated that:

While the amendment [sought] here is arguably more substantive than an amendment to correct a simple misnomer or misidentification of a party, it has considerably less in common with the kinds of strategic amendments at issue in the cases cited by Defendants. . . . Failing to anticipate the technical Eleventh Amendment defense raised by the Board and the possible *Ex parte Young* exception to that defense, is, on the facts of this case, the kind of mistake referred to Rule 15(c).<sup>69</sup>

Despite *Krupski*’s admonition that the plaintiff’s lack of due diligence is not the issue, there are situations where relation back is denied for failure properly to investigate. *In re IndyMac Mortgage-Backed Securities Litigation*<sup>70</sup> provides an example of a post-*Krupski* case that found that there had been a “deliberate choice” not to sue a party who was later sought to be brought in. In a massive consolidated case involving the collapse of the mortgage-backed securities market, claims had been made against major financial institutions by states, cities, and pension funds. Wyoming sued Bank of America (“BoA”), but later sought to bring in Merrill Lynch. Citing *Krupski*, the court found that although Wyoming was “quite aware” of Merrill Lynch’s role as an underwriter

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<sup>67</sup> *Id.* at 549.

<sup>68</sup> See *supra* notes 37–43 and accompanying text.

<sup>69</sup> *Mountain Cable Co. v. Pub. Serv. Bd.*, 242 F. Supp. 2d 400, 408–09 (D. Vt. 2003).

<sup>70</sup> *In re IndyMac Mortg.-Backed Sec. Litig.*, 793 F. Supp. 2d 637 (S.D.N.Y. 2011).

and in drafting and disseminating offering documents, it chose not to name Merrill Lynch as a defendant but to sue BoA in its capacity as successor-in-interest to Merrill Lynch.<sup>71</sup> Not only was this a deliberate choice, the court said, but Wyoming had failed to plead any facts that would support holding BoA liable for Merrill Lynch's acts. Merrill Lynch was therefore "entitled to . . . assume that Wyoming, despite having a detailed awareness of Merrill Lynch's role and conduct in the events at issue, chose instead to sue BoA."<sup>72</sup> Thus there is still room after *Krupski* to focus on the plaintiff's knowledge and to find a deliberate choice not to sue that prevents relation back.

### B. *Inexcusable Neglect*

The requirement of "inexcusable neglect" does not appear in the text of any federal or state rule pertaining to relation back. Nevertheless, it has become firmly embedded in the case law of some states as grounds for denying relation back. In this respect, the state law diverges from the federal rule, as articulated in *Krupski*, that Rule 15(c) has only three prerequisites for relation back.<sup>73</sup>

Washington state law imposes a fourth and independent prerequisite for relation back—that the failure to sue originally did not result from inexcusable neglect.<sup>74</sup> In *North Street Association v. City of Olympia*, the Supreme Court of Washington found that plaintiffs were "at all times aware of the necessary parties and yet still failed originally to name them."<sup>75</sup> No reason for the omission appeared in the record, and the court concluded that "[t]he omission therefore must be characterized as inexcusable neglect and, consequently, [the state counterpart to Rule 15(c)] was inapplicable to these cases."<sup>76</sup>

Under *Krupski*, plaintiff's due diligence in not investigating the law and facts adequately is not a basis for denying the relation back of an amendment. However, at some point the plaintiff's extreme lack of due diligence might be-

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<sup>71</sup> *Id.* at 650.

<sup>72</sup> *Id.*

<sup>73</sup> *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 552–53 (2010). ("The Rule plainly sets forth an exclusive list of requirements for relation back, and the amending party's diligence is not among them. Moreover, the Rule mandates relation back once the Rule's requirements are satisfied; it does not leave the decision whether to grant relation back to the district court's equitable discretion. . . . The mandatory nature of the inquiry for relation back under Rule 15(c) is particularly striking in contrast to the inquiry under Rule 15(a), which sets forth the circumstances in which a party may amend its pleading before trial." (citation omitted)).

<sup>74</sup> *See, e.g.*, *South Hollywood Hills Citizens Ass'n v. King Co.*, 677 P.2d 114, 118 (Wash. 1984). "Thus, a court must determine whether the requirements of CR 15(c) are met and the court must determine whether failure to join the plaintiffs earlier was the result of inexcusable neglect." *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wash. 2d 107, 173 (1987); *see also* *Coastal Bldg. Corp. v. City of Seattle*, 828 P.2d 7, 10 n.6 (referring to "CR 15(c), with its judicially super-imposed inexcusable neglect exception to 'relation back'").

<sup>75</sup> *North Street Ass'n v. City of Olympia*, 635 P.2d 721, 726 (Wash. 1981).

<sup>76</sup> *Id.*

come a “deliberate choice” that justifies refusal to relate back under Rule 15(c).<sup>77</sup>

In *Perrin v. Stensland*,<sup>78</sup> the plaintiff was injured in an auto accident and sued the defendant, not knowing that he had died since the accident. He sought to add the defendant’s estate after the statute of limitations had run. The estate argued that the plaintiff was guilty of inexcusable neglect for failing to notice the process server’s designation of defendant’s wife as “Spouse/Widow” on the return of service, and failing to notice her interrogatory response as “widow,” before the statute of limitations expired. The trial court found the delay in suing the estate after learning of the defendant’s death (from March to February) inexcusable.<sup>79</sup> The Court of Appeals, citing *Krupski* but recognizing that it was bound by the Washington “inexcusable neglect” requirement, took a more lenient approach:

In the present case, however, there was no reason to believe [plaintiff] made a strategic choice to avoid naming the estate; no concern about adequate notice to the estate; and no identified prejudice to the estate. The trial court erroneously interpreted the case law as calling for an exercise of equitable discretion to evaluate whether [plaintiff] moved quickly enough to correct his mistake about the identity of the proper defendant. This view is inconsistent with liberal construction of the rule. . . . [H]ere the record provides a satisfactory reason why [plaintiff] initially failed to name the estate as a party: he did not know [the defendant] was dead.<sup>80</sup>

### C. *John Doe Designations*

There was no attempt to sue John Doe defendants in *Krupski*; the amendment simply sought to replace the company originally sued with the company that was the responsible carrier. Thus, many courts that had followed the standard reflected in the Second Circuit’s *Barrow* decision<sup>81</sup> and the Eleventh Circuit’s decision in *Krupski*<sup>82</sup>—that the plaintiff’s knowledge is relevant, and failure to identify individual defendants when the plaintiff knows of their existence cannot be a mistake—have continued to adhere to that rule regarding John Doe defendants.<sup>83</sup> “In essence, these circuit courts have determined that section

<sup>77</sup> See *supra* notes 69–76 and accompanying text.

<sup>78</sup> *Perrin v. Stensland*, 240 P.3d 1189, 1190 (Wash. Ct. App. 2010).

<sup>79</sup> “I think they would have been in good faith then. It would have been excusable neglect . . . but they waited until February.” *Id.* at 1195.

<sup>80</sup> *Id.* at 1197.

<sup>81</sup> See *supra* text accompanying notes 46–49 and accompanying text.

<sup>82</sup> See *supra* notes 54–63.

<sup>83</sup> Decisions indicating that circuit courts will continue to follow the rule that lack of knowledge is not a mistake regarding John Doe designations include *Hogan v. Fischer*, 738 F.3d 509, 517–18 (2d Cir. 2013) (*Barrow* rule remains valid law); *Smith v. City of Akron*, 476 F. App’x 67, 69 (6th Cir. 2012) (Rule 15(c) only “allows relation back for the mistaken identification of defendants, not for defendants to be named later through ‘John Doe,’ ‘Unknown Defendants,’ or other missing appellations.”); *Flournoy v. Schomig*, 418 F. App’x 528, 532 (7th Cir. 2011) (“[t]he untimely amendment would not ‘relate back’ to the date of his original complaint because [plaintiff] made no mistake; he simply lacked knowledge of

[15](c)(1)(C) simply does not cover the John Doe situation.”<sup>84</sup> Nevertheless, there is disagreement between courts as to whether that position is consistent with *Krupski*.

There is no provision in the federal statutes or Federal Rules of Civil Procedure either authorizing or prohibiting the use of fictitious names like John Doe when a party does not know the actual names or identities.<sup>85</sup> However, many federal courts have held that use of John Doe designations is not permissible.<sup>86</sup> In some circuits, such as the Ninth Circuit, these designations are not favored, but are permissible where the identity of the alleged defendant is not known at the time of the filing of the complaint. In such circumstances, the plaintiffs should be given an opportunity through discovery to identify the unknown defendant.<sup>87</sup> Some state court rules expressly provide for Doe designations.<sup>88</sup>

Prior to *Krupski*, a number of courts refused to allow John Doe or other general descriptions of defendants to be amended later when the identities are discovered. One might think that inability to identify certain defendants prior to discovery would be a paradigm for relation back under Rule 15(c), especially since it also must be shown that the party to be brought in had such notice that it would not be prejudiced and should have known it would have been sued but for a mistake. The continuation of a strict interpretation of the relation back rule as not allowing substitution for fictitious names seems particularly to reflect the concern of some federal courts over spurious civil rights suits against governments that join individual officials without naming them. Another concern is that Doe designations will be used to serve as “placeholders” for individuals for whom there is no present reason to suspect liability.

Excluding fictitious names from Rule 15(c) relation back has been based on a variety of rationales. The “lack of knowledge is not a mistake” rationale was often invoked before *Krupski*, and seems to have survived *Krupski* in some courts.

By naming John Doe as the second defendant, plaintiffs did not make a mistake in identification. They accurately identified the second defendant as unknown. Because plaintiffs’ failure to name John Doe stemmed from lack of knowledge

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the proper defendants”); *Everett v. Prison Health Servs.*, 412 F. App’x 604 (4th Cir. 2011) (a party cannot add Doe defendants later because the relation back rule only allows substitution of mistakenly identified defendants). *But see Joseph v. Elan Motorsports Techs. Racing Corp.*, 638 F.3d 555, 559–60 (7th Cir. 2011) (a different panel restating the *Krupski* requirements as the test).

<sup>84</sup> *Palacio v. City of Springfield*, 25 F. Supp. 3d 163, 166 (D. Mass. 2014).

<sup>85</sup> *Craig v. United States*, 413 F.2d 854, 856 (9th Cir. 1969).

<sup>86</sup> *See Carol M. Rice, Meet John Doe: Is It Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U. PITT. L. REV. 883 (1996).

<sup>87</sup> *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980); *see also Johnson v. Udall*, 292 F. Supp. 738, 751 (C.D. Cal. 1968).

<sup>88</sup> *See infra* text accompanying note 100.

rather than a mistake in identification, the plain language of Rule 15(c)(3) [now Rule 15(c)(1)(C)] does not permit relation back.<sup>89</sup>

It has been suggested that the “lack of knowledge” argument is only relevant after *Krupski* as to whether an amendment should be permitted at all under Rule 15(a), rather than whether there was a mistake under Rule 15(c).<sup>90</sup> In any event, after *Krupski* the “no mistake” rationale is hard to justify. Some pre-*Krupski* cases have also found the use of fictitious names to be a “deliberate choice” not to sue named defendants.<sup>91</sup> Exclusion of substitution for fictitious names has also been said to prevent their use “to circumvent statutes of limitations because replacing a ‘John Doe’ with a named party in effect constitutes a change in the party sued.”<sup>92</sup>

Since *Krupski*, a number of courts have continued to view substitutions for Doe designations as not qualifying for relation back. Some circuit courts have simply ignored *Krupski* as not applying to Doe designations, while others have reiterated their previous “no mistake” precedents. An interesting development is how the Second Circuit has dealt with its pre-*Krupski* approach in *Barrow*.<sup>93</sup> In *Hogan v. Fischer*,<sup>94</sup> a prisoner, acting *pro se*, brought a § 1983 civil rights action against various correction officers, including some designated as John Doe, alleging that masked officers sprayed him with an unknown substance while he was in his cell, apparently a mixture of fecal matter, vinegar, and machine oil. The Second Circuit ruled that plaintiff could not substitute names obtained through discovery for the Doe defendants after the statute of limitations had run. Without mentioning *Krupski*, it held the plaintiff was not entitled to relation back under Rule 15(c)(1)(C) because “[t]his Court’s interpretation of

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<sup>89</sup> *Henry v. FDIC*, 168 F.R.D. 55, 59 (D. Kan. 1996); *accord Jacobsen v. Osborne*, 133 F.3d 315, 320–21 (5th Cir. 1998); *see also Butler v. Robar Enters., Inc.*, 208 F.R.D. 621, 623–24 (C.D. Cal. 2002) (amendment to substitute employer’s CEO for a “John Doe” defendant in employment discrimination suit did not relate back because the employee made no mistake in identifying the correct defendant in the original complaint; “the courts of appeal that have confronted the issue are in near-unanimity that lack of knowledge is not a ‘mistake.’”); *Bass v. World Wrestling Fed’n Entm’t, Inc.*, 129 F. Supp. 2d 491, 508 (E.D.N.Y. 2001) (when plaintiff knew of employee’s involvement when she filed her complaint, but did not attempt to excuse her failure to name him as a defendant, not a case of mistaken identity).

<sup>90</sup> *See Leonard v. Parry*, 219 F.3d 25, 30 n.5 (1st Cir. 2000) (“A few cases tend to suggest that if plaintiff’s own inexcusable neglect was responsible for the failure to name the correct party, an amendment substituting the proper party will not be allowed, notwithstanding adequate notice to the new party. Although this factor is germane to the question of permitting an amendment, it is more closely related to the trial court’s exercise of discretion under Rule 15(a) whether to allow the change than it is to the satisfaction of the notice requirements of Rule 15(c).” (quoting *WRIGHT ET AL.*, *supra* note 21, § 1498, at 142–43)).

<sup>91</sup> *Hedvat v. Rothschild*, 175 F.R.D. 183, 190 (S.D.N.Y. 1997) (amendment to add partners of brokerage firm sued in original complaint would not relate back because failure to join them was a deliberate strategic choice and not the result of any mistake as to who was intended to be sued).

<sup>92</sup> *Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067, 1075 (2d Cir. 1993) (citations omitted). John Doe substitutions, then, “may only be accomplished when all of the specifications of Fed.R.Civ.P. 15(c) are met.” *Id.*

<sup>93</sup> *See supra* text accompanying notes 46–49.

<sup>94</sup> *Hogan v. Fischer*, 738 F.3d 509, 512 (2d Cir. 2013).

Rule 15(c)(1)(C) makes clear that the lack of knowledge of a John Doe defendant's name does not constitute a 'mistake of identity.'<sup>95</sup>

However, this was not the only rationale in the decision. The court invoked the rarely-used provision in Rule 15(c)(1)(A) that permits an amended pleading to relate back when "the law that provides the applicable statute of limitations allows relation back."<sup>96</sup> The New York statute of limitations law "creates a special procedure for claims alleged against John Doe defendants."<sup>97</sup> To take advantage of this provision, there are two requirements: the party must "exercise due diligence" to identify the defendant by name prior to the running of the statute of limitations, and must describe the Doe party "in such form as will fairly apprise the party that [he] is the intended defendant."<sup>98</sup> The court proceeded to find both requirements were satisfied; the plaintiff had tried unsuccessfully to find the names, and "[h]is complaint describes with particularity the date, time, and location of the alleged spraying incident," and "substantial detail concerning the appearance of his alleged assailants."<sup>99</sup>

New York's "due diligence" requirement would seem to import back into the relation back analysis what *Krupski* said was not permissible under the federal rule—the knowledge and conduct of the plaintiff. However, the court viewed the provision in Rule 15(c)(1)(A) that permits relation back when state statute of limitations law allows it as affording "a more forgiving principle of relation back than the one provided in this rule."<sup>100</sup> This curious result was achieved after the Second Circuit's failure to recognize that *Krupski* had rejected its *Barrow* precedent. It does indicate that, in certain jurisdictions, recognition of fictitious designations in state statutes of limitations can be critically important. A district court decision from the First Circuit took a similar approach in a case involving civil rights claims under Massachusetts law in *Palacio v. City of Springfield*,<sup>101</sup> finding it therefore unnecessary to resolve the split among the federal circuits.

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<sup>95</sup> *Id.* at 518 (citing *Barrow v. Wethersfield Police Dep't*, 66 F.3d 466, 470 (2d Cir. 1995)).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* Section 1024 of the Civil Practice Laws and Rules of New York reads:

A party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. If the name or remainder of the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly.

N.Y. C.P.L.R. 1024 (McKinney 2013); *see also* CAL. CIV. PROC. CODE § 474 (West 2015) (California's Code of Civil Procedure permits a plaintiff to name Doe defendants if ignorant of their identity, and relation back of amendments substituting names is allowed). California, however, does not require a newly named defendant to have notice of the suit within the statute of limitations period. *See* James E. Hogan, *California's Unique Doe Defendant Practice: A Fiction Stranger Than Truth*, 30 STAN. L. REV. 51, 100 (1977).

<sup>98</sup> *Hogan*, 738 F.3d at 519 (quoting *Bumpus v. N.Y.C. Tr. Auth.*, 66 A.D.3d 26, 30 (N.Y. App. Div. 2009)).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 518.

<sup>101</sup> *Palacio v. City of Springfield*, 25 F. Supp. 3d 163, 166 (D. Mass 2014).

## CONCLUSION

Complex relationships in governmental, corporate, and societal structures can often be hard to unravel when a plaintiff has to determine what defendants to sue for his injuries. Thus, flexibility in pleading is an important feature of the Federal Rules of Civil Procedure, and Rule 15(a) provides that “the court should freely give leave [to amend] when justice so requires.”

However, when an amendment is sought after the applicable statute of limitations has run, flexibility in pleading must be balanced against the objectives of the statute of limitations that suit be filed within a reasonable period of time in order to avoid stale evidence and accord repose to potential defendants. Rule 15(c) provides for “relation back” of amendments to the filing date of the original pleading. The relation back rule contains a number of strict requirements aimed at not undermining the concern of the statute of limitations for timely notice to parties. Lower courts have sometimes taken different approaches to applying those requirements. The Supreme Court, in its 2010 decision in *Krupski v. Costa Crociere S.p.A.*,<sup>102</sup> waded into the controversy over one of the requirements—that a party to be brought in by amendment must have known or had reason to know that it would have been sued but for a mistake concerning the proper party’s identity. Although *Krupski* resolved some issues, a number of questions remain as to when changes in party defendants will relate back.

*Krupski* held that relation back under Rule 15(c)(1)(C) depends on what the party to be brought in knew or should have known, not on the amending party’s knowledge, diligence in discovering the correct parties, or timeliness in seeking to amend the pleading. This resolved a split in the circuits that resulted from some courts having denied relation back based on the plaintiff’s diligence, concluding that the plaintiff had not made a “mistake,” but only lacked knowledge of the correct identity or name of the defendant. The Second Circuit has continued to hold to that rationale in cases involving Doe designations, choosing to ignore *Krupski* as not having involved Doe designations. This reflects the concern that various courts have shown in past years that easy resort to Doe designations in suits against police, prison, and governmental officers could interfere with proper government operations. But there is little basis for such a concern and no reason that the *Krupski* rationale that looks only to the knowledge of the added defendant should not apply to governmental defendants as well. The dilemma of a plaintiff whose civil rights have been violated by a government officer whose name or identity is not known is just great as Mrs. *Krupski*’s inability to discover within the statute of limitations period the correct corporation that owned the vessel on which she was injured.

There are still situations in which *Krupski* would deny relation back. The decision was clear that amendments will not relate back when plaintiff is shown

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<sup>102</sup> See *supra* Part 1.B.3.a.

to have made a deliberate choice not to sue (as for strategic reasons).<sup>103</sup> It is also possible that when there was inexcusable neglect in not discovering the name or identity of the party before the statute of limitations has run, relation back may be denied.<sup>104</sup>

As the lower federal courts wrestle with how broadly to apply *Krupski*, one intermediate possibility is giving importance to the provisions in Rule 15(c)(1)(A) that permits relation back when “the law that provides the applicable statute of limitation allows relation back.” The Second Circuit in *Hogan v. Fischer*<sup>105</sup> relied on a New York statute that allows relation back in suits against Doe defendants so long as the plaintiff exercised due diligence prior to the running of the statute of limitations to identify the Doe defendant who is described so as to apprise it that it is intended to be sued. This state law “due diligence” requirement as to the plaintiff seems contrary to *Krupski*, but it did permit the Second Circuit to approve relation back. State statutes or court precedents providing for relation back in Doe defendant cases could achieve the desirable result of permitting amendments to relate back in similar situations.

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<sup>103</sup> See *supra* notes 69–76 and accompanying text.

<sup>104</sup> See *supra* text accompanying notes 76–82.

<sup>105</sup> *Hogan*, 738 F.3d at 519.

