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# NORTON JOURNAL OF BANKRUPTCY LAW AND PRACTICE

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Managing Editor, Norton Journal of Bankruptcy Law and Practice, Thomson Reuters, 50 Broad Street East, Rochester, NY 14694, (800) 327-2665, ext. 2586, fax (585) 258-3774, clay.mattson@thomsonreuters.com.

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Richard Lieb  
 St. John's University School of Law  
 LL.M. in Bankruptcy Office  
 8000 Utopia Parkway  
 Jamaica, NY 11439  
 (212) 479-6020  
 rlieb@cooley.com

Clay Mattson, Managing Editor  
 Norton Journal of Bankruptcy Law & Practice  
 Thomson Reuters  
 50 Broad Street East  
 Rochester, NY 14694  
 (800) 327-2665, ext. 2586  
 clay.mattson@thomsonreuters.com

# Adding Defendants to Preference Complaints after Expiration of the Limitations Period: A Guide to Amendment and Relation Back after *Krupski v. Costa Crociere*

By Christopher M. Cahill\* and Edward E. Neiger\*\*

## I. Introduction

Bankruptcy plaintiffs seeking to avoid and recover preferential transfers sometimes sue the wrong party and further fail to detect the error within the two-year limitations period set by the Bankruptcy Code.<sup>1</sup> Errors of that kind are common and probably inevitable in large bankruptcy cases, in which the trustee or the debtor-in-possession or successor thereof per a confirmed plan (e.g., liquidation trustee or litigation trustee) files hundreds or even thousands of avoidance complaints on the eve of the expiration of the limitations period.<sup>2</sup>

The plaintiff may seek to rectify such an error by amending its original complaint (the “Original Complaint”) to name a new defendant (a “New Defendant”) in replacement of or addition to the original defendant (“Original Defendant”). Where the limitations period has elapsed prior to the amendment of the complaint naming the New Defendant, the plaintiff likely faces dismissal of the amended complaint against the New Defendant unless plaintiff can establish that the addition of the New Defendant “relates back” to the date on which the original complaint was filed. Amendment of a complaint to add a party, and relation back of the amended complaint to the date of the original complaint are governed by Rule 7015 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), which provides that Rule 15 of the Federal Rules of Civil Procedure (the “Rules”) applies in adversary proceedings.

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\* Christopher M. Cahill, of Lewis & Gellen LLP in Chicago, Illinois, represents debtors, creditors, and other parties in interest in large and middle-market corporate bankruptcy cases. Mr. Cahill is also editor-in-chief of the educational websites [commercialbankruptcyinvestor.com](http://commercialbankruptcyinvestor.com), [commercialbankruptylitigation.com](http://commercialbankruptylitigation.com), and [commercialbankruptcyalternatives.com](http://commercialbankruptcyalternatives.com). Mr. Cahill thanks Hanna R. Maki-Jokela, a summer clerk at Lewis & Gellen LLP, for her editorial assistance with this paper. Mr. Cahill can be reached at [ccahill@lowis-gellen.com](mailto:ccahill@lowis-gellen.com) and 312 628 7193.

\*\* Edward E. Neiger is a co-managing partner of ASK LLP, a premier full-service bankruptcy and commercial collection law firm, with offices in New York and Saint Paul. In addition to his many representations of principal parties in the major bankruptcy cases of our time, Mr. Neiger has published numerous articles in national publications and also writes the Bankruptcy Update column for the New York Law Journal. Mr. Neiger can be reached at [eneiger@askllp.com](mailto:eneiger@askllp.com) and 212.267.7342.

## AMENDMENT & RELATION BACK AFTER KRUPSKI

Rule 15 covers the overlapping terrains of amendments to pleadings and the relation back (to the date of an earlier pleading) of new claims and new parties identified in such amendments to an earlier pleading. This article reviews in detail Rule 15 requirements for amending preference complaints so that the addition of New Defendants relate back to the timely-filed Original Complaint.

The lodestar for any such discussion is *Krupski v. Costa Crociere S.p.A.*,<sup>3</sup> in which the Supreme Court definitively overruled predominant approaches to subsection (c)(1)(C)(ii) of Rule 15, which we will call the “Knowledge/Mistake Condition” for relation back, because it requires a showing that added party “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>4</sup> The *Krupski* opinion also provided a framework for reviewing other relation back issues. As explained in detail below, before *Krupski*, the analysis of whether an amendment adding a New Defendant relates back to the Original Complaint depended upon what the amending party knew and did and whether it showed that it had, in omitting the New Defendant from the Original Complaint, made a “mistake concerning the proper party’s identity” within the meaning of subsection (c)(1)(C)(ii) of Rule 15. This approach was followed, for example, by the Seventh Circuit Court of Appeals in *Hall v. Norfolk Southern Ry Co.*<sup>5</sup> In that case, relation back was denied to an employee plaintiff, who had named the wrong entity as his employer and Original Defendant and sought to amend the complaint after discovering the correct employer.<sup>6</sup> The Court ruled that the plaintiff’s lack of knowledge of the New Defendant meant that he had not made a “mistake” within the meaning of subsection (c)(1)(C)(ii) of Rule 15.<sup>7</sup>

The Seventh Circuit has since correctly recognized that *Krupski* requires instead only that the amending party establish that the New Defendant knew or should have known that it was the (or an) intended target of the plaintiff in the Original Complaint.<sup>8</sup> Thus, to become entitled to relation back, the amending party no longer needs to show that its failure to name the New Defendant in the Original Complaint was due to its mistake. Rather, the amending party needs show that the New Defendant knew or should have known that it was the intended target. *Krupski* represents a Copernican shift in the proof of relation back: the explanandum had been the plaintiff’s actions (why it goofed up in the Original Complaint), but is henceforth the New Defendant’s awareness or constructive awareness that the Original Complaint was aimed at it.

Section II of this article sets the stage by describing the statutory environment of preference litigation and pleading standards with respect to preference complaints. Recently raised pleading standards will tend to uncover problems with the naming of defendants, which can be addressed by amendment and relation back. Section III of the article provides an overview of Rule 15. Section IV discusses each analytical step under Rule 15(a) for amending complaints to add New Defendants. After a close review of the *Krupski* opinion, section V discusses each analytical step under Rule 15(c)

for getting such amendments to relate back to the date of the Original Complaint, which would insulate them from attacks based upon the expiration of the limitations period.

## II. Preference Avoidance Actions, “Transfer Beneficiary” and “Mere Conduit” Nontransferees, and the Twombly/Iqbal Alert

Preference avoidance actions seek to avoid transfers and recover property from transferees of the debtor and certain other parties, as defined in the relevant statute. Preference avoidance complaints have characteristic mechanics and sources of error in the naming of Original Defendants. Recently heightened pleading standards can help confront plaintiffs with how they went wrong.

### A. Avoidance and Recovery of Transfers From Transferees and Transfer Beneficiaries

Section 547(b) of the Bankruptcy Code sets forth the elements of a preference avoidance cause of action. It states, in relevant part, that the trustee may avoid any transfer of an interest of the debtor in property:

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made—
  - (A) on or within 90 days before the date of the filing of the petition;
  - or
  - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider;
  - and
- (5) that enables such creditor to receive more than such creditor would receive if—
  - (A) the case were a case under chapter 7 of this title;
  - (B) the transfer had not been made; and
  - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.”<sup>9</sup>

Section 547(b) provides only for avoidance of the alleged transfer of the debtor’s property. Avoidance cancels the legal effect of the transfer in connection with the effort of the plaintiff trustee or debtor-in-possession (or successor thereof) to seek recovery of the transfer. Section 550 of the Bankruptcy Code, also pled in avoidance complaints, empowers the plaintiff to recover the property transferred (or the value of such property), either from the initial transferee or from subsequent transferees, subject to limitations set forth in that section. Section 550(a) provides in relevant part as follows:

- (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—
  - (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

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(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section (a)(2) of this section from—

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.<sup>10</sup>

Ordinarily, to recover anything, an avoidance complaint must name a transferee as defendant. It is not unusual for a preference complaint to name multiple defendants with respect to a single transfer. A plaintiff might name an initial transferee (section 550(a)(1)) and one or more subsequent transferees (called “immediate” or “mediate” transferees in section 550(a)(2)). A plaintiff should name such defendants with care, for noninitial transferees of subsection (a)(2) can employ the defense set forth in section 550(b): that the recipient took the transfer “for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided.” The availability of that defense can make the difference between a plaintiff’s recovery or nonrecovery (or a defendant’s liability for recovery) of the transfer from a subsequent transferee.

The prior paragraph began with the qualifier “ordinarily” because section 550(a)(1) also provides for recovery from a specific kind of nontransferee: “an entity for whose benefit such transfer was made,” which we will call a “transfer beneficiary.” In *Senior Transeastern Lenders v. Official Comm. Of Unsecured Creditors (In re TOUSA, Inc.)*, the defendant lenders in a fraudulent transfer case unsuccessfully argued that each was a subsequent transferee (within the meaning of section 550(a)(2)) and not a transfer beneficiary (within the meaning of section 550(a)(1)).<sup>11</sup> Thus, the lenders were deprived of the section 550(b) defense.<sup>12</sup>

Among the hundreds (or thousands) of adversary complaints filed by the large-case plaintiff, who had only a short time to bring such suits, some complaints may erroneously name the wrong affiliate as defendant. For example, an Original Complaint may name CF Kane Lda (a company organized as a *Limitada* under the laws of Brazil) as the transferee and Original Defendant, when payment had in fact been made to its subsidiary Xanadu Ohio LLC, which then had forwarded the transfer to another CF Kane Lda subsidiary, Xanadu Michigan, Inc., which had supplied the debtor-plaintiff with goods. Xanadu Ohio LLC may be the initial transferee and Xanadu Michigan, Inc. may be a subsequent transferee, but absent pleading and evidence sufficient to cause the court to disregard the corporate formalities among these affiliates, CF Kane Lda is not liable as a transferee.

Another way for the plaintiff to misfire is to sue the entity to which the transfer was indeed initially directed, but which forwarded the transfer to a second entity without having had independent legal control over the funds. Such a “mere conduit” is not a transferee of a debtor’s property because it

never had “dominion or control” over the property.<sup>13</sup> In our hypothetical example, it is possible that Xanadu Ohio LLC acted solely as payment agent for Xanadu Michigan, Inc. and qualifies as a “mere conduit.”

In *The Global Crossing Estate Representative*, a mere conduit issue arose where the estate representative, on behalf of several affiliated debtors, seeking to recover dividends paid out by the debtors, brought only one complaint at the close of the limitations period against only the debtor’s transfer agent for paying dividends.<sup>14</sup> The estate representative later determined that the Original Defendant was “just a conduit.”<sup>15</sup> Upon that premise, the estate representative’s recovery could come only from parties that received dividends once held by the Original Defendant. Such recovery depended upon whether amendments of the Original Complaint to name dividend recipients as New Defendants complied with the Rule 15(c) provisions for relation back.<sup>16</sup>

In a smaller-scale case, *Alberts v. Arthur Gallagher & Co. (In re Greater Southwest Community Hospital Corp. I)*, the financial advisor to the liquidating trustee advised the latter that insurance broker Arthur J. Gallagher & Co. (“Gallagher”) was the sole transferee of the payments made by debtor.<sup>17</sup> Gallagher’s answer asserted that it was a “mere conduit” insurance broker, which had forwarded such payments to certain insurance companies.<sup>18</sup> The liquidating trustee’s amended complaint, filed after the close of the limitations period, successfully added such insurance companies as initial transferees “to the extent” it would be determined, at some later point, that they and not Gallagher were initial transferees.<sup>19</sup>

#### **B. Informing Plaintiffs Via Rule 8 Motions to Dismiss**

The Original Defendant in *Alberts* used its answer to inform the preference plaintiff of its potential error in identifying defendants. Motions to dismiss complaints for failure to meet Rule 8 pleading standards may likewise alert a preference plaintiff that it sued the wrong party. Prior to *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*, in large bankruptcy cases it was common for preference plaintiffs to file form complaints en masse, commonly listing all affiliated debtors as plaintiffs, reciting the elements of a preference set forth above but few specific facts tailored to the particular complaints, and differing among themselves only with regard to the name of the defendant or group of defendants (each a candidate in an unspecified way for avoidance and recovery of any alleged preference).<sup>20</sup> Possibly such form complaints would also attach an exhibit that identified the dates and amounts of the alleged transfers, and check numbers, where the plaintiffs were extra industrious or fortunate with respect to available data. Thus all co-debtors would be plaintiffs, and perhaps CF Kane Lda, Xanadu Ohio LLC, and Xanadu Michigan, Inc. and their other affiliates would all be named as Original Defendants, but with no allegations as to what was shipped by which Original Defendant to what Debtor, and no specific allegations about any transactional relationship between any specific debtor and any particular Original Defendant.

Rule 8 (incorporated into the Bankruptcy Code by Bankruptcy Rule 7008) requires that a complaint contain, among other things, “a short and plain

statement of the claim showing that a pleader is entitled to relief.”<sup>21</sup> Prior to *Twombly* and *Iqbal*, courts held this to mean that a complaint should not be dismissed for failure to state a claim unless it appeared “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>22</sup> The form complaints arguably met this low pleading standard and the practice of filing such form complaints helped large-case preference plaintiffs get their cases off the ground at minimal cost.

Under *Twombly* and *Iqbal*, notice pleading standards were raised. In *Twombly*, an antitrust case, the United States Supreme Court held that while factual allegations need not be detailed to survive a motion to dismiss for failure to state a claim under Rule 8, they require “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”<sup>23</sup> The Court further stated that a complaint’s allegations must plausibly suggest that the plaintiff has a right to relief, raising that right above a “speculative level.”<sup>24</sup> In *Iqbal*, the Supreme Court held that the heightened pleading standards set forth in *Twombly* apply to all civil suits in federal courts, not just antitrust cases, and stated that plausibility means that the complaint’s allegations must allow “the court to draw the reasonable inference that the defendant is liable for the alleged misconduct.”<sup>25</sup>

After *Twombly* and *Iqbal*, form avoidance complaints have been found by some courts to be insufficient under Rule 8. In *In re Caremerica, Inc.*, applying the heightened pleading standards of *Twombly* and *Iqbal*, the court granted the defendants’ motions to dismiss on Rule 8 grounds.<sup>26</sup> The court reasoned that: (a) the complaint failed to meet the “plausibility” standard because it did not indicate which debtor entity initiated the transfers in question; (b) the complaint’s allegation that the preferential transfers were made for or on account of an antecedent debt was conclusory; and (c) the complaint failed to factually demonstrate that the Debtor was insolvent.<sup>27</sup>

Applying *Twombly* and *Iqbal* to the 177 preference avoidance complaints before it, the court in *In re DPH Holdings Corp.* dismissed all of the complaints as being insufficiently pled under Rule 8 for three reasons: (a) the complaints did not identify which of approximately 40 plaintiffs-debtors were the transferors; (b) the complaints did not allege the particular antecedent debts on account of which the transfers were made; and (c) some of the complaints listed multiple defendants in the same action, but did not assert which defendants were initial transferees and which were subsequent transferees.<sup>28</sup> If that standard were applied to our hypothetical example, only the debtor-transferor could be the plaintiff, and the complaint must name Xanadu Ohio LLC as the initial transferee (if indeed it was a “transferee” — see the discussion above of mere conduit) and Xanadu Michigan, Inc. as the subsequent transferee.

The *DPH Holdings Corp.* dismissal order is consistent in many respects with the repeated holdings of Judge Walrath of the United States Bankruptcy Court for the District of Delaware, which require that preference avoidance complaints must detail the relationship between the plaintiff and defendant, and must identify the transferor precisely by name.<sup>29</sup> Under the Walrath

standard, in our hypothetical example the plaintiff-transferor would have to plead the specific relationship the debtor-transferor had with the Xanadu Ohio LLC and Xanadu Michigan, Inc. A form recitation that a (nonspecified) relationship existed would not suffice.

In sum, Rule 8 requires greater factual precision and amplitude by preference plaintiffs than it once did. Having fired off a barrage of avoidance complaints, the plaintiff may be confronted with Rule 8 motions to dismiss or other pleadings or other communications with Original Defendants that inform the plaintiff that it has sued nontransferees with names distinct from but similar to that of a transferee (such as an “Inc.” instead of the proper “LLP”), or nontransferee affiliates of actual transferees, or mere conduits. The plaintiff may have sued the predecessor to the entity that now holds the transferee’s stock or assets by virtue of a change in control or asset sale that occurred after the transfer was made. The plaintiff may have sued a transferee, but has now learned of a prior and initial transferee with deeper pockets than the Original Defendant, and which is deprived of the section 550(b) defense to boot. The rest of this article instructs such plaintiffs on what is to be done.

### III. Overview of Amendment and Relation Back

Where the plaintiff has misfired in naming Original Defendants and must or should name New Defendants after the limitations period has lapsed, plaintiff must look to Rule 15 to amend the Original Complaint and have such amendment relate back to the date of the Original Complaint. Rule 15 provisions on amendment and relation back resist immediate assimilation even by veteran lawyers. The text of Rule 15 is, in relevant part:

(a) Amendments Before Trial.

(1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:

- (A) 21 days after serving it, or
- (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.

...

(c) Relation Back of Amendments.

(1) When an Amendment Relates Back. An amendment to a pleading relates back to the date of the original pleading when:

- (A) the law that provides the applicable statute of limitations allows relation back;
- (B) the amendment asserts 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; or

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(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

- (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
- (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.<sup>30</sup>

Under subsection (a)(1) of Rule 15, where the defendant has not answered or otherwise pled, the plaintiff may amend its complaint "as a matter of course."<sup>31</sup> In other circumstances, plaintiff must move under subsection (a)(2) of Rule 15 for the court's leave to add the New Defendant or replace the Original Defendant with the New Defendant.<sup>32</sup> As discussed in detail below, motions for leave to amend may be denied on the grounds that the plaintiff's amendment follows undue delay, results from improper motive, prejudices the defendant, or would be futile.

Leave to amend a complaint to add New Defendant may be futile where sought after the expiration of the applicable limitations period. Such futility can be negated if the plaintiff can, pursuant to Rule 15(c), prove that it is entitled to have the amendment deemed to "relate back" to the timely-filed original complaint.

Rule 15(c) provides that an amendment to a complaint to add a New Defendant will relate back if a series of specified conditions is present.<sup>33</sup> Rule 15(c) provides that an amendment will relate back to the original complaint if, in addition to showing that the claim against New Defendant arises from the conduct, transaction, or occurrence set out in the original complaint, the plaintiff can demonstrate that two specified conditions existed "within the period provided by Rule 4(m) for serving the summons and complaint" (which is ordinarily 120 days after the filing of the original complaint).<sup>34</sup> The two conditions are, first, that the New Defendant "received such notice of the action that it will not be prejudiced in defending on the merits" (Rule 15(c)(1)(C)(i));<sup>35</sup> and, second, that the New Defendant "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity" (Rule 15(c)(1)(C)(i)).<sup>36</sup> These two conditions are referred to respectively herein as the "Notice/Prejudice Condition" and the "Knowledge/Mistake Condition." Where either condition does not exist within the Rule 4(m) period, relation back cannot be ordered.<sup>37</sup>

In capsule summary, a preference plaintiff may add a new Defendant after expiration of the limitations period if: first, the plaintiff can fend off assertions that such addition is prejudicial to the New Defendant's defense; second, the claim against the New Defendant relies upon the facts set forth regarding the claim in the original complaint; and third, the plaintiff can establish that, within 120 days after filing the original complaint both of the

following took place: (i) the New Defendant became aware of the original complaint such that New Defendant would not be prejudiced by litigation against it, and (ii) the New Defendant knew or should have known that it was the target of the original complaint. In reviewing the requirements of relation back, we review carefully the holdings and rationale of the *Krupski* opinion, both because that opinion changed fundamentally how courts address the Knowledge/Mistake Condition and because its reasoning bears upon interpretation of Rule 15(c)(1)(C) in other key respects.

#### **IV. Applicable Law for Amending Complaints to Add New Defendants: Rule 15(a)**

With respect to the amendment of pleadings, Rule 15(a) provides as follows:

(a) Amendments Before Trial.

(1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.<sup>38</sup>

##### **A. Amendments as a Matter of Course**

Under Rule 15(a)(1), a plaintiff need not seek leave of court to amend its complaint. Where no answer or responsive pleading has been filed, or the plaintiff acts within 21 days after such filing, the plaintiff may amend the original complaint to add a New Defendant "as a matter of course," or, as it is sometimes phrased, "of right."<sup>39</sup> In all other situations, under Rule 15(a)(2), a plaintiff may amend its complaint "only with the opposing party's written consent or the court's leave."<sup>40</sup>

##### **B. Standards for Leave to Amend a Complaint — Detour to Rule 16(b)**

An important detour must be made to Rule 16(b) — and the effect of scheduling orders on amendment — before turning to the standards for amendment by leave of court under Rule 15(a)(2). An amended complaint filed after a scheduling order deadline for filing such amendments could be denied under Rule 16(b), even where standards for leave to appeal under Rule 15(a)(2) can be fulfilled and relation back is called for under Rule 15(c).

Under Rule 16(b), incorporated with the rest of Rule 16 into the Bankruptcy Rules by Bankruptcy Rule 7016, courts during the pre-trial period "must" issue scheduling orders that, among other things, "limit the time to join other parties [and] amend the pleadings[.]"<sup>41</sup> Subsection (b)(4) of Rule 16 provides that "[a] schedule may be modified only for good cause and with

the judge's consent,"<sup>42</sup> Such scheduling orders are standard, indeed practically essential, for bankruptcy courts faced with a deluge of preference adversary proceedings.

The Eleventh Circuit Court of Appeals has cautioned against considering Rule 15(a) leave to amend without regard to Rule 16(b), for to do so would "render scheduling orders meaningless and effectively would read Rule 16(b) and its good cause requirement out of the Federal Rules of Civil Procedure."<sup>43</sup> The Ninth Circuit has held that "good cause" within the meaning of Rule 16(b)(4) is a close correlate of "extraordinary circumstances."<sup>44</sup> Other courts have found that this good cause standard "primarily considers diligence of the party seeking the amendment."<sup>45</sup>

No such good cause exists where a plaintiff cannot demonstrate diligence prior to amending a complaint to add New Defendant after the scheduling order's deadline for doing so, in particular where plaintiff failed to heed clear signals the proper party had not been named in the original complaint.<sup>46</sup> Delay due to untimely or misleading discovery responses can, however, constitute good cause for untimely amendments to pleadings.<sup>47</sup> Denial of good cause under Rule 16(b) does not require a showing of prejudice to the nonmoving party, though such prejudice may be considered as part of a court's application of the good cause standard.<sup>48</sup>

### C. Standards for Leave to Amend a Complaint — Rule 15(a)(2)

Rule 15(a)(2) states that the court's leave to amend should be "freely given when justice so requires."<sup>49</sup> The grant of leave to amend a pleading pursuant to Rule 15(a) is within the discretion of the trial court.<sup>50</sup> In *Foman v. Davis* the Supreme Court instructed that:

[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. — the leave should, as the rules require, be "freely given."<sup>51</sup>

The Second Circuit Court of Appeals has stated that a Rule 15(a) motion "should be denied only for such reasons as undue delay, bad faith, futility of the amendment, and perhaps most important, the resulting prejudice to the opposing party."<sup>52</sup> This principle was applied recently by the U.S. Bankruptcy Court for the Northern District of Illinois in a mass-preferences context. After ruling that a motion to dismiss on Rule 8 grounds was well-grounded in some respects, but noting that the defendants did not argue that there was undue delay, bad faith, dilatory motive, or undue prejudice, the court stated that it "believes that justice requires an amendment given that the adversary proceeding is at the pleading stage and is one of more than 500 adversary proceedings brought by the Liquidation Trust to avoid transfers made by various debtors."<sup>53</sup>

#### 1. Undue Delay

Courts find delay to be "undue" when there is also bad faith or sufficient prejudice to the other party. The rule in the Second Circuit is "to allow a party to amend its pleadings in the absence of a showing by the movant of

prejudice or bad faith.”<sup>54</sup> Further, the Court has held that “[m]ere delay, however, absent a showing of bad faith or undue prejudice, does not provide a basis for the district court to deny the right to amend,”<sup>55</sup> but has also noted that the longer the period of unexplained delay, the less will be required of the nonmoving party to show prejudice.<sup>56</sup> The Third Circuit has reversed denial of leave to amend where the plaintiff’s eleven-month delay was “neither so egregious nor unexplained as to warrant refusal of leave to amend.”<sup>57</sup> The Ninth Circuit has upheld denial of leave to amend based upon a lengthy delay that is not explained by movant.<sup>58</sup> For the Third Circuit Court of Appeals, “prejudice to the non-moving party is the touchstone for the denial of an amendment.”<sup>59</sup>

## 2. Prejudice

To determine whether a New Defendant is prejudiced by the proposed amendment, courts in the Second Circuit consider whether the assertion of the new claim 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>60</sup> Such consideration includes assessment of the amount of time passed, the reasons for delay, “and its practical impact on the other side’s legitimate interests, including both that party’s ability to respond to new claims or defenses and any other prejudice flowing from a delay in the final adjudication of the case.”<sup>61</sup>

Prejudice under Rule 15(a)(2) has been found where a new party is added after the completion of discovery in the immediate advent of trial.<sup>62</sup> The U.S. District Court for the Eastern District of Pennsylvania found no abuse of discretion by the Bankruptcy Court in denying a motion to amend, where plaintiffs: (w) were aware of the basis of the proposed amendments far in advance of the deadline to file all pre-trial motions, (x) missed the deadline for filing all pre-trial motions, (y) filed only after all discovery had been completed, including the depositions of both plaintiffs, and (z) were facing a well-founded (and ultimately meritorious) motion for summary judgment.<sup>63</sup> The court observed that, “[e]ssentially, from within a trial-ready adversary proceeding, appellants [plaintiffs] attempted to bring an entirely new action when it appeared they could not succeed on their original claims” and that “[a]ppellants’ actions have many hallmarks of deliberate strategic behavior.”<sup>64</sup>

By contrast, in *A.V. by Versace, Inc. v. Gianni Versace S.p.A.* the court granted leave to amend to add two corporate defendants, finding no prejudice where no trial date had been set, discovery had not yet been completed, and claims against new defendants did not raise factual claims unrelated to the events in the original complaint.<sup>65</sup>

## 3. Bad Faith or Improper Motive

As with undue delay, in assessing bad faith or dilatory motive, courts look to the reasons why a party did not seek to amend earlier.<sup>66</sup> The U.S. District Court of the Southern District of New York has held that an example of

improper motive would be the filing of an amended complaint to forestall ruling on summary judgment after years of discovery, where the proposed amendment included facts that should have been within the plaintiff's knowledge at the time original complaint was filed.<sup>67</sup> The passage of years of discovery, of course, might also support a finding of prejudice in the absence of bad faith. Courts have denied motions for leave to amend where the amending party has had ample time to amend a pleading before a court takes dispositive action but fails to do so.<sup>68</sup>

#### 4. Futility of Amendment

Futility of amendment is a clear ground for denial of leave to amend.<sup>69</sup> Such futility can include any ground for dismissal of the complaint as amended.<sup>70</sup> The standard for determining futility is the same standard applied in determining legal sufficiency under Rule 12(b)(6).<sup>71</sup> A plaintiff's inability to demonstrate its entitlement to relation back of its proposed amendment to add a New Defendant would substantiate futility where the cause of action against New Defendant would be time-barred by the expiration of the applicable limitations period.<sup>72</sup>

Amendment is logically prior to relation back. The order of subsections in Rule 15 reflects that logical sequence. Subsections 15(a) and (b) are about amendments; subsection 15(c) is about relation back. Courts have held that the propriety of relation back is relevant only after a court has determined that amendment to the pleadings would otherwise be proper.<sup>73</sup> However, because relation back often requires the more technically demanding showing by the plaintiff, some courts have begun the analysis there and have denied leave to amend wholly or partially because the court's rejection of relation back meant that amendment would be futile.<sup>74</sup>

#### V. Rule 15(c) and Relation Back of Amendment to Timely-Filed Complaint

Where a complaint is amended to add a New Defendant after the limitations period has expired, the complaint is not time-barred as to such New Defendant and process may still issue if the addition of the New Defendant "relates back" to a timely-filed complaint.<sup>75</sup> Rule 15(c) governs relation back, and provides in relevant part as follows:

(c) Relation Back of Amendments.

(1) When an Amendment Relates Back.

An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts 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; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the

period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

- (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
- (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.<sup>76</sup>

By contrast to amendment by leave of court under Rule 15(a)(2), relation back under Rule 15(c) is nondiscretionary. Rule 15(c)(1) states simply “[a]n amendment relates back . . . when” certain conditions are fulfilled.<sup>77</sup> Relation back of the amendment that names New Defendant is mandatory if the showing called for by the subsection of the Rule is made.<sup>78</sup> The plaintiff bears the burden of demonstrating entitlement to relation back.<sup>79</sup>

Rule 15(c)(1) presents three routes to relation back, under Rule 15(c)(1)(A), (B), or (C). Rule 15(c)(1)(A), which provides that relation back occurs when “the law that provides the applicable statute of limitations allows relation back,” does not apply to preference cases. The law that provides the applicable statute of limitations for preference actions, section 546(a) of the Bankruptcy Code, is silent about relation back.

Rule 15(c)(1)(B) provides that relation back occurs when “the amendment asserts 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.” By its terms, subsection (c)(1)(B) applies only to the relation back of claims or defenses. Rule 15(c)(1)(C) incorporates subsection (c)(1)(B) as one requirement for the relation back of complaints as against New Defendants.

For the relation back of a complaint as against a New Defendant, Rule 15(c)(1)(C) requires that the plaintiff show the following things:

- \* that the amendment “changes the party or the naming of the party against whom a claim is asserted”
- \* that subsection (B) is satisfied
- \* that “within the period provided by Rule 4(m)”
  - “the party to be brought in by amendment” both
    - “received such notice of the action that it will not be prejudiced in defending on the merits” [the Notice/Prejudice Condition] and
    - “knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.” [the Knowledge/Mistake Condition]

The text of the Rule requires the plaintiff to demonstrate three things. First, the plaintiff must demonstrate something about the amendment, i.e., that it “changes the party or the naming of the party against whom a claim is asserted.” Second, the plaintiff must demonstrate something about the claim involving the New Defendant, i.e., that such claim fulfills subsection (B) and is sufficiently similar factually to a claim made in the Original Complaint.

Third, the plaintiff must demonstrate something about the notice received by the New Defendant and the New Defendant's actual or constructive knowledge regarding the targeting of the Original Complaint and why such targeting went astray.

On its face, the Rule does not require the plaintiff to demonstrate anything about its own knowledge, actual or constructive, concerning the New Defendant or anything else, unless, as many courts have held, the reference to a "mistake" in subsection (c)(1)(C)(ii) imports a burden on the plaintiff to demonstrate that it indeed made such a "mistake." In its 2010 opinion on relation back, *Krupski v. Costa Crociere S.p.A.*, the Supreme Court rejected that reading of the term "mistake" in Rule 15(c)(1)(C)(ii).<sup>80</sup> The *Krupski* Court reviewed the plaintiff's requisite showing under Rule 15(c)(1)(C). The Court's reading of the text of Rule 15(c)(1)(C) and the Court's articulation of the specific policy balance struck by the Rule overturned the approach to the Knowledge/Mistake Condition that had been used by the majority of Circuit Courts of Appeal that had ruled on it. We believe that the Court's textual and policy approach should guide interpretation of the Rule in other respects as well. Analysis of relation back properly begins with a close consideration of *Krupski*.

**A. *Krupski v. Costa Crociere S.p.A.***

Passenger Krupski broke her femur aboard ship.<sup>81</sup> Krupski sued Costa Cruise Lines, the ticket marketing agent (the Original Defendant in the parlance herein), whose name was printed on one side of the cruise line ticket.<sup>82</sup> Costa Crociere S.p.A., the cruise line owner, was the principal for the ticket marketing agent, and was clearly identified as "carrier" on the other side of the ticket, which also contained detailed information on how to pursue claims against carrier.<sup>83</sup> Plaintiff's counsel possessed the ticket throughout preparation for the lawsuit.<sup>84</sup> After the expiration of the limitations period, the ticket marketing agent referred plaintiff to the carrier as the proper defendant.<sup>85</sup> Several months later, plaintiff moved for leave to amend its complaint to replace the Original Defendant as defendant with the carrier (the New Defendant in the parlance herein).<sup>86</sup> Carrier moved successfully for dismissal of the amended complaint on the grounds that the amended complaint did not relate back under Rule 15(c), and the Eleventh Circuit Court of Appeals affirmed.<sup>87</sup> The Supreme Court reversed.

The principal holding of *Krupski* concerned the plaintiff's showing of the Knowledge/Mistake Condition, i.e., that "within the period provided by Rule 4(m) for serving the summons and complaint . . . the party to be brought in by amendment . . . 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>88</sup> The Court stated that, "we hold that relation back under Rule 15(c)(1)(C) depends upon what the party to be added knew or should have known, not on the amending party's knowledge or timeliness in seeking to amend the pleading."<sup>89</sup> The Court held that what the New Defendant knew or should have known, and not what the plaintiff knew, is what must be examined in deciding whether the Knowledge/Mistake Condition has

been fulfilled.

The Supreme Court described how the Eleventh Circuit went wrong. The latter court had focused on the fact that one side of the ticket had clearly identified Costa Crociere as the carrier; thus it had imputed knowledge to Krupski of Costa Crociere's identity as a potential party.<sup>90</sup> Upon that premise, the Eleventh Circuit concluded that it was appropriate to treat Krupski as having chosen to sue the Original Defendant rather than the New Defendant, which is not a "mistake."<sup>91</sup>

Prior to *Krupski*, most courts, like the Eleventh Circuit, began (and often ended) their analysis by determining whether the plaintiff had in fact made a "mistake" within the meaning of the Knowledge/Mistake Condition.<sup>92</sup> The thinking proceeded as follows: if plaintiff cannot show that the Knowledge/Mistake Condition occurred during the Rule 4(m) period, then plaintiff is not entitled to relation back; and if plaintiff did not make a "mistake concerning the proper party's identity" within the meaning of Rule 15(c)(1)(C)(ii), then plaintiff is unable to show that the Knowledge/Mistake Condition occurred within the Rule 4(m) period. In a footnote in *Krupski* devoted to Circuit Court decisions on Rule 15(c)(1)(C)(ii), three of the five cases listed relied upon a determination of whether the plaintiff actually made a mistake.<sup>93</sup>

For the Supreme Court in *Krupski*, though, whether the plaintiff can show that it actually made a mistake is irrelevant, and such inquiry is inconsistent with the language of the Rule and the policy balance struck by the Rule. The proper inquiry, according to *Krupski*, is entirely focused on what the Defendant knew or should have known as to why it was not named in the Original Complaint. Outside of inquiry into New Defendant's actual or constructive knowledge of whether the plaintiff made a mistake, evidence regarding the plaintiff's mistakenness or nonmistakenness has no place in analysis or proof of relation back. Courts may not, after *Krupski*, begin their analysis (much less end it) with determining whether or not the plaintiff actually made a mistake. As we discuss below, some courts after *Krupski* have failed to apply this fundamental holding of the opinion.

In *Krupski*, the Supreme Court rejected "in the first instance" the Eleventh Circuit's focus on the plaintiff's knowledge, and declared that "[t]he question under Rule 15(c)(1)(C)(ii) is not whether Krupski knew or should have known the identity of Cost Crociere as the proper defendant, but whether Costa Crociere knew or should have known that it would have been named as a defendant but for an error."<sup>94</sup> The Court's justification for its holding examined the language of Rule 15 and reviewed the policies balanced in Rule 15, bringing to bear the implications of both language and policy upon proof of the Knowledge/Mistake Condition.

### 1. *Krupski* on the Text of Rule 15(c)(1)(C)(ii)

The text of the Rule provides, in relevant part, that "[a]n amendment to a pleading relates back to the date of the original pleading when . . . within the period provided by Rule 4(m) for serving the summons and complaint . . . the party to be brought in by amendment . . . knew or should have known that the action would have been brought against it, but for a mistake

## AMENDMENT & RELATION BACK AFTER KRUPSKI

concerning the proper party's identity."<sup>95</sup> The Court observed that the Rule "asks what the prospective *defendant* (the New Defendant) knew or should have known during the 4(m) period, and not what the *plaintiff* knew or should have known at the time of filing her original complaint."<sup>96</sup>

The Court did not, however, bar from the proper inquiry all evidence regarding plaintiff or within the plaintiff's possession. Maintaining the Rule text's exclusive focus on the New Defendant's understanding, the Court concluded that evidence of or regarding the plaintiff can be relevant, but "is relevant only" if it bears upon the New Defendant's understanding of whether the plaintiff made a mistake regarding the proper party's identity.<sup>97</sup> For example, evidence from the Original Complaint or plaintiff's actions during the Rule 4(m) period may show that it was reasonable for the New Defendant to conclude — during the Rule 4(m) period — that the plaintiff chose not to sue New Defendant in the Original Complaint even though plaintiff at such time fully understood the legal and factual significance of the New Defendant.<sup>98</sup> Essentially, the Court suggests that the New Defendant may rebut plaintiff's relation back proof by presenting evidence regarding the plaintiff that was known to the New Defendant during the Rule 4(m) period (in particular the Original Complaint and other pleadings) to show that plaintiff failed to sue the New Defendant in the Original Complaint for strategic reasons. Such a showing could negate plaintiff's proof that the New Defendant knew or should have known that it was not originally sued on account of a mistake. The Court noted that Costa Crociere never articulated any strategy that it could reasonably have thought Krupski was pursuing in suing an Original Defendant (the ticketing agent) that was legally unable to provide relief.<sup>99</sup>

Evidence of what the New Defendant said to plaintiff, or the New Defendant's appraisal of the plaintiff's status or capacities may bear upon this inquiry.<sup>100</sup> In *Krupski*, the Court concluded its opinion by discussing how the similarity in names between Original Defendant Costa Cruise Lines and New Defendant Costa Crociere, as well as their close corporate relationship "heighten the expectation" that the New Defendant "should suspect that a mistake has been made" when the Original Defendant is named in a complaint that describes the New Defendant's activities.<sup>101</sup> Noting that the New Defendant supplied the confusing ticket to plaintiff, the Court alluded to evidence in the record that the New Defendant "was aware that the difference between Costa Cruise and Costa Crociere can be confusing" for passengers.<sup>102</sup> In light of these facts, the Court concluded, "Costa Crociere should have known that Krupski's failure to name it as a defendant in her original complaint was due to a mistake concerning the proper party's identity."<sup>103</sup>

While the Supreme Court discussed the meaning of the term "mistake," it did so in a fashion very different from the prior majority approach. Following the method the Court displaced, courts would adopt one delimitation or another of what constitutes a "mistake" and then determine whether the plaintiff had made one or not. In *Krupski*, the Supreme Court's discussion of

the meaning of “mistake” is expressly placed entirely within its inquiry into the New Defendant’s understanding of whether the Original Complaint should have been brought against it.<sup>104</sup>

Thus the Court surveyed the following dictionary definitions of “mistake”: “[a]n error, misconception, or misunderstanding; and erroneous belief”; “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”; and “a state of mind not in accordance with the facts.”<sup>105</sup> The Court did not decide which definitions are more or most apt. After summoning the assemblage of definitions, the Court, in immediate succession: (a) observed that a hypothetical plaintiff’s knowledge of a New Defendant’s existence at the time of the Original Complaint does not preclude such plaintiff from having made a mistake with respect to the New Defendant’s identity, status, or role; and (b) declared that, “[t]he *only* question under Rule 15(c)(1)(C)(ii), then, is whether [the New Defendant] knew or should have known that, absent *some* mistake, the action would have been brought against him.”<sup>106</sup>

With respect to the Knowledge/Mistake Condition, the Court restricts the inquiry to what is or constructively is in the New Defendant’s mind, and discourages over-careful parsing of “mistake.”<sup>107</sup> The text of Rule 15(c)(1)(C), as reviewed by the Court, presents — in stark contrast to prior majority case law on the Knowledge/Mistake Condition — a radical de-emphasis on the actual presence of a mistake by plaintiff, an exclusive emphasis on the New Defendant’s understanding of why it was not sued, and a practical de-emphasis on any exacting standard of “mistake” with respect to why the New Defendant was not sued.<sup>108</sup>

## **2. *Krupski* on the Policy Balance Struck by Rule 15’s Relation Back Provisions**

The Court’s interpretation of the Rule’s text as focusing exclusively on the New Defendant’s understanding is consistent with the Court’s discussion of the policy balance struck by relation back under the Rule: between the statute of limitations protections for the New Defendant, on the one hand, and the preference of the Federal Rules of Civil Procedure “and Rule 15 in particular” for resolving disputes on their merits, on the other.<sup>109</sup> In *Krupski*, the Court concluded that “Rule 15(c) must be understood to freely permit amendment of pleadings and their relation-back so long as the policies of statutes of limitations have been effectively served.”<sup>110</sup> The Court recognizes the “strong interest in repose” for a New Defendant “who legitimately believed that the limitations period had passed without any attempt to sue him.”<sup>111</sup> But the Court characterizes such repose as a “windfall” for a New Defendant “who understood, or who should have understood, that he escaped suit during the limitations period only because the plaintiff misunderstood a crucial fact about his identity.”<sup>112</sup> Under this policy balance, the New Defendant’s understanding that plaintiff knew of the New Defendant at the time of the Original Complaint does not by itself support the latter’s interest

in repose.<sup>113</sup>

**B. Rule 15(c)(1)(C): “the amendment changes the party or the naming of the party against whom a claim is asserted”**

Rule 15(c)(1)(C) introduces the Rule’s provisions for adding or replacing parties by providing that an amendment relates back when “the amendment changes a party or the naming of the party against whom a claim is asserted[.]” Changes to the name of a party are not controversial. Correcting the misidentification of similarly-named and related companies constitutes “the classic case for application of Rule 15(c) relation back.”<sup>114</sup> Where the Original Defendant Xanadu Ohio, Inc. does not exist, and service was effected upon the office of the New Defendant Xanadu Ohio LLC but addressed to “Inc.” rather than the proper “LLC,” an amendment to the Original Complaint to name Xanadu Ohio LLC will relate back to the date of the Original Complaint.<sup>115</sup> In such situation, the nonexistent and misnamed Original Defendant would be replaced by the extant and properly named New Defendant.

Cases conflict on whether relation back is restricted to the replacement of the Original Defendant by the New Defendant (the “replacement-only” interpretation), as in the pure misnomer situation described immediately above, or whether relation back can also be applied where the New Defendant is added to the Original Defendant in the Amended Complaint.<sup>116</sup> The quoted language of Rule 15(c)(1)(C) and the broader analysis of Rule text and policy in *Krupski* support application of relation back to added New Defendants and do not support the replacement-only interpretation.

**1. Text of Rule 15(c)(1)(C) and the Policy Balance of *Krupski* on Whether New Defendants May Only Replace Original Defendants**

Neither the quoted language of Rule 15(c)(1)(C) nor any other language in the Rule expressly limits relation back to New Defendants that replace Original Defendants. The Rule provides for relation back when “the amendment changes a party *or* the naming of the party against whom a claim is asserted” (emphasis added). As we have seen, the phrase after the “or” — “[the amendment] changes the naming of the party” — refers to a noncontroversial substitution of an “Inc.” for an “LLC.” If the phrase before the “or” — “the amendment changes a party” — is not a redundancy, then it must refer to something else.<sup>117</sup> In *Alberts v. Arthur J. Gallagher & Co. (In re Greater Southeast Community Hosp. Corp. I)*, Judge Teel cited the “plain language” of the quoted passage from the Rule to reject a replacement-only interpretation and apply relation back to an added New Defendant in an avoidance action.<sup>118</sup> In favor of permitting relation back to encompass additional New Defendants, the Fourth Circuit Court of Appeals sensibly observed that “changes a party” logically includes the concept of adding to the original party.<sup>119</sup>

The *Krupski* reading of the Rule undermines the replacement-only interpretation by reading out of the Rule any regard for Plaintiff’s actions except as they inform the New Defendant’s notice and awareness of the claims in

the Original Complaint. The text of the Rule, as read in *Krupski*, directs analysis away from evidence of the Plaintiff's behavior and focuses exclusively on the notice received by, potential prejudice suffered by, and the awareness or constructive awareness of the putative New Defendant of the Original Complaint. As discussed in greater detail below, the New Defendant's notice and awareness is measured ordinarily as of the 120 days after the filing of the Original Complaint. If the New Defendant's notice is received or awareness is delayed until after such period, the plaintiff is not entitled to relation back. Where such 120-day period is completed entirely before the filing of the Amended Complaint, a New Defendant which has sufficient notice and awareness under the Rule cannot know during such period whether it would be an added New Defendant or a replacement for the Original Defendant. Where the New Defendant received notice and attained awareness in the 120 day period, a court following the replacement- only interpretation would — with no policy justification — endow or not endow such New Defendant with a further and absolute protection solely upon whether or not the Plaintiff later sought to replace the Original Defendant with the New Defendant.

In the preference context, as discussed above, an additional New Defendant may be equally subject to the avoidance and recovery of a transfer as an Original Defendant, where, say, the former is the initial transferee and the latter a subsequent transferee or transferee beneficiary, or the other way around. For example, where Xanadu Ohio LLC is the Original Defendant and Xanadu Michigan, Inc. (within the relevant period) both learns of the Original Complaint and is aware that it ultimately received the transfer in question from Xanadu Ohio LLC, it would appear that relation back would apply to the naming of Xanadu Michigan, Inc. in the Amended Complaint. Otherwise put, learning of an Original Complaint during the relevant period and recognizing that it reasonably has such exposure would hit Xanadu Michigan, Inc. with the same force whether or not the Plaintiff later amends the Original Complaint to add Xanadu Michigan, Inc. or to replace Xanadu Ohio LLC with Xanadu Michigan, Inc. According to the replacement- only view, however, the New Defendant's potential liability evaporates at a later time unless the Plaintiff dismisses the Original Defendant when it amends the Original Complaint to name the New Defendant.

The replacement-only view spoils the policy balance the *Krupski* opinion identifies with relation back.<sup>120</sup> As discussed above, the Court in *Krupski* cited two policies balanced by relation back: the policy of the Federal Rules of Civil Procedure in favor of resolving disputes on their merits and the “strong interest in repose” (via application of a bar upon expiration of the limitations period) of a New Defendant “who legitimately believed that the limitations period had passed without any attempt to sue him.”<sup>121</sup> The Court also characterized such repose as a “windfall” for a New Defendant “who understood, or who should have understood, that he escaped suit during the limitations period only because the plaintiff misunderstood a crucial fact about his identity.”<sup>122</sup> The replacement-only interpretation would grant such

a windfall to Xanadu Michigan, Inc. and to any transferee or transferee beneficiary that was not named in the Original Complaint unless the Plaintiff dismisses the Original Defendant — including where such dismissal grants a windfall to such Original Defendant. Thus, the replacement-only interpretation both frustrates Rules policy in favor of resolving disputes on their merits and applies repose to the undeserving.<sup>123</sup>

To return to the first hypothetical situation taken up in this article, the replacement-only interpretation would limit absurdly relation back where CF Kane Lda — the nontransferee parent corporation — was replaced with both initial transferee (or mere conduit) Xanadu Ohio LLP and mediate or successive transferee (or initial transferee if Xanadu Ohio LLC is a mere conduit) Xanadu Michigan, Inc. Under the replacement-only reading, only one New Defendant may replace one Original Defendant with respect to one claim. If the preference plaintiff failed to choose which of the transferees to exclude from the lawsuit, then the more solvent of the two putative New Defendants (let us assume that it is Xanadu Michigan, Inc.) could move successfully for dismissal of the Amended Complaint as regards itself on the grounds that only one New Defendant can replace the Original Defendant. Xanadu Michigan, Inc. would then be most fortunate, and the Plaintiff at best would be left to collect against the less solvent potential New Defendant Xanadu Ohio LLC.

## 2. The Sixth Circuit Applies Relation Back Only to Replacement New Defendants

The Sixth Circuit Court of Appeals has hewn consistently to a replacement-only doctrine, which is based both on the quoted language from Rule 15(c)(1)(C) and upon the “mistake” language of the Knowledge/Mistake Condition set forth in subsection (c)(1)(C)(ii). The Sixth Circuit doctrine was best-articulated in *Venezia v. 12<sup>th</sup> & Division Properties, LLC*.<sup>124</sup> The *Venezia* court followed the Sixth Circuit’s narrow reading of the Rule, which holds that relation back applies solely to misnomers and misidentifications rectified by replacement of the Original Defendant, because any amendment that adds a New Defendant creates a new cause of action not eligible for relation back.<sup>125</sup> Taking up *Krupski* at length, the *Venezia* court read the Supreme Court case not to bar the Sixth Circuit’s approach of both: (a) requiring proof that plaintiff made a “mistake concerning the proper party’s identity” (within the meaning of the Knowledge Mistake Condition of 15(c)(1)(C)(ii)); and (b) limiting eligible mistakes to misnomers and misidentifications.<sup>126</sup>

The *Venezia* Court acknowledged that the *Krupski* Court “made it clear” that the focus of the inquiry under Rule 15(c) should not be on the plaintiff’s knowledge or understanding.<sup>127</sup> However, the *Venezia* Court mischaracterized *Krupski* in declaring that “the plaintiff must nonetheless make a mistake concerning the unnamed party and that, but for that mistake, the unnamed party would have been named as a defendant[.]”<sup>128</sup> The *Venezia* court went on to inquire whether the plaintiff made a mistake, as such is understood in the Sixth Circuit (it had not).<sup>129</sup> The *Venezia* court also determined that the

plaintiffs had been on inquiry notice of the extent of the New Defendants involvement in the business at issue, and thus had made no “mistake of identity that would allow for relation back under Rule 15(c).”<sup>130</sup>

It is true that *Krupski* involved the replacement of one party by another due to a misidentification, and not the addition of a New Defendant, and thus did not expressly hold that relation back applies to added New Defendants. The court in *Jahn v. Bedford Consulting Grp. LLC*, referred to this circumstance in declaring that *Krupski* is not to the contrary of the Sixth Circuit’s replacement-only doctrine.<sup>131</sup> Nevertheless, we believe that the Sixth Circuit’s replacement-only doctrine cannot survive a proper reading of *Krupski*.<sup>132</sup> The Sixth Circuit doctrine is justified in the following steps: One, under Rule 15(c)(1)(C)(ii), relation back is possible only if the plaintiff demonstrates that it made certain kinds of “mistake”; two, the mistakes eligible for relation back are limited to “misnomer or misdescription”; three, the eligible kinds of mistake logically require that the New Defendant replace the misnamed or misdescribed Original Defendant; and four, therefore, a proposed amendment that adds a New Defendant cannot be based upon an eligible kind of mistake.<sup>133</sup>

The Sixth Circuit doctrine bars addition of New Defendants because addition is not logically possible where Plaintiff is required to show that the New Defendant is the correctly named or described version of the Original Defendant. *Krupski* ruled that the Plaintiff need not show any such thing to be entitled to relation back. As discussed above, with respect to the plaintiff’s demonstration of the Knowledge/Mistake Condition, the Supreme Court in *Krupski* limited relevant evidence to that which bears upon the reasonableness of New Defendant’s belief as to whether the Plaintiff meant to sue it in the Original Complaint. Also as discussed above, in so ruling, *Krupski* necessarily removed the requirement — formerly relied upon by most courts — that the Plaintiff show that it made an actual “mistake” within the meaning of subsection (c)(1)(C)(ii). The premise of the Sixth Circuit doctrine has been demolished by *Krupski*. Nevertheless, the doctrine is still embraced by the Sixth Circuit. In an unpublished 2012 opinion, *Smith v. City of Akron*, the Court found that the problem with the Amended Complaint “is that adding new, previously unknown defendants . . . ‘is considered a change in parties not merely a substitution of parties,’ and ‘such amendments do not satisfy the mistaken identity requirement of Rule 15(c).’”<sup>134</sup>

### C. Rule 15(c)(1)(C): “if Rule 15(c)(1)(B) is satisfied”

Subsection (c)(1)(C) of Rule 15 also conditions relation back upon the satisfaction of subsection (c)(1)(B). Subsection (c)(1)(B) requires that “the amendment asserts 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>135</sup> This subsection is satisfied where there is sufficient commonality between facts alleged in the amended and original complaints to preclude a claim of unfair surprise.<sup>136</sup> Stated otherwise, this subsection is satisfied where the proposed amendment would not affect the quality of the notice given by the general fact situation alleged in the original pleading.<sup>137</sup> Where

a preference complaint is otherwise adequately and accurately pled except for the mistake of naming the incorrect party (or not enough correct parties) as Original Defendant, this element of the relation back test is not problematic. As a practical matter, this requirement should be less problematic where plaintiffs observe the enhanced pleading requirements imposed in preference cases as detailed above.<sup>138</sup>

**D. Rule 15(c)(1)(C): “and if, within the period provided by Rule 4(m) for serving the summons and complaint” [the Notice/New Prejudice Condition and Knowledge/Mistake Condition Existed]**

Subsection (c)(1)(C) of Rule 15 requires plaintiff to demonstrate that both of two conditions — the Notice/No Prejudice Condition of subsection (c)(1)(C)(i), and the Knowledge/Mistake Condition of subsection (c)(1)(C)(ii) — existed “within the period provided by Rule 4(m) for serving the summons and complaint.”<sup>139</sup> The period “provided by” Rule 4(m) for service is ordinarily 120 days after the complaint is filed.<sup>140</sup> Rule 4(m) also provides for extension of the time for service “for an appropriate period” if plaintiff shows “good cause” for failure to serve within the 120 days.<sup>141</sup> Hence, where such extension has been ordered, the interval of time within which the plaintiff must establish the existence of the Notice/No Prejudice Condition and Knowledge/Mistake Condition may likewise be extended.<sup>142</sup>

Is such interval different with respect to a foreign New Defendant, such as CF Kane Lda? In *Erie Indemnity Company v. Keurig, Inc.*, the United States District Court for the Northern District of Ohio held that the interval is longer for foreign New Defendants, without reference to any finding of “good cause” to extend the Rule 4(m) period.<sup>143</sup> In that case, the plaintiffs served the Original Defendant under the procedures provided by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters on the 127<sup>th</sup> day after the Original Complaint was filed.<sup>144</sup> The court found that the New Defendant thus had received actual notice within the applicable time for foreign service of process.<sup>145</sup> The court declared that “[u]nder Rule 4(m), a Defendant must normally be served within [120 days after the filing of the complaint] except for ‘good cause’ or where the service is made in a foreign country under Rule 4(f) or 4(j). Fed. R. Civ. P. 4(m).”<sup>146</sup>

The problem with the *Erie Indemnity Company* ruling is that it is not strictly faithful to the language of Rule 4(m). By its terms, Rule 4(m) does not provide that service periods with respect to foreign entities under Rule 4(f) or 4(j)(1) are exceptions to the service period of Rule 4(m). Rather Rule 4(m) excludes Rule 4(f) and 4(j)(1) from the purview of Rule 4(m), by providing that “[t]his subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).”<sup>147</sup> Rule 15(c)(1)(C) states simply that the plaintiff must demonstrate that the conditions existed “within the period provided by Rule 4(m)” and Rule 4(m) states that Rule 4(m) “does not apply to service in a foreign country under Rule 4(f).”<sup>148</sup> It follows that the reference in Rule 15(c)(1)(C) is only to the 120 period in fact “provided by” the

Rule, and to the “good cause” extension provided by the Rule. Under this strict reading of Rule 4(m), any longer period of time to effect service in a foreign country is not “provided by Rule 4(m)” within the language of Rule 15(c)(1)(C). That being so, and returning to the first hypothetical scenario of this article, actual transferee Xanadu Ohio, LLC may learn of the Original Complaint on the very day it is timely served upon its nontransferee parent CF Kane Lda. Nevertheless, Xanadu Ohio, LLC’s actual awareness on such date would not constitute timely notice within the meaning of the Notice/No Prejudice Condition of subsection (c)(1)(C)(i).

**E. “[T]he party to be brought in by amendment: (i) received such notice of the action that it will not be prejudiced in defending on the merits” [the Notice/No Prejudice Condition]**

The Notice/No Prejudice Condition, set forth in Rule 15(c)(1)(C)(i), is that “the party to be brought in by amendment” (i.e., the New Defendant), within the Rule 4(m) period, “received such notice of the action that it will not be prejudiced in defending on the merits.”<sup>149</sup> In *Krupski*, the Supreme Court noted that the district court below had found that the New Defendant Costa Crociere had received “‘constructive notice’” of the Original Complaint with the Rule 4(m) period and had not challenged that finding.<sup>150</sup>

**1. Notice Can be Informal; Corporate Interrelationship Can Establish Informal Notice**

The notice of the Original Complaint received by the New Defendant within the Rule 4(m) period need not be formal, like receipt of a summons and a complaint.<sup>151</sup> The Second Circuit Court of Appeals has held that, for Rule 15(c) relation back purposes, notice is accomplished if the new party “was aware” of the original complaint within the Rule 4(m) period.<sup>152</sup> Notice under Rule 15(c)(1)(C)(i) has been found when actual or imputed.

**(a) Actual Notice**

A most straight-forward case of actual notice was presented by *Varlack v. SWC Carribean, Inc.*, in which the Third Circuit Court of Appeals found no clear error in the trial court’s finding that the New Defendant — a restaurant manager who had wielded a two-by-four against a potential intruder — had received adequate notice within the requisite period because he by chance saw a copy of the Original Complaint against the restaurant and an “Unknown Employee” for personal injuries.<sup>153</sup> Actual notice to the New Defendant affiliate of Original Defendant was found by the Seventh Circuit Court of Appeals in *Joseph v. Elan Motorsports Technologies Racing Corp.*, in which the Original Complaint for breach of employment contract was served on the address common to Original Defendant Elan Motorsports Racing Corp. and to New Defendant Elan Motorsports Technologies, Inc. (out of which office each of these separate but affiliated corporations conducted their operations).<sup>154</sup> The complaint was served upon the employee of a third affiliate, but such person was the same person who had supervised plaintiff on behalf of New Defendant.<sup>155</sup> Actual notice has also been found where the shared resident agent for the Old Defendant and New Defendant received

service.<sup>156</sup> In *The Global Crossing Estate Representative*, the court appeared to contemplate sufficient notice for Rule 15(c)(1)(C)(i) purposes arising from wide reportage of a high-profile bankruptcy case.<sup>157</sup> Of course, a court is likely to consider affidavits from a New Defendant that it did not receive notice.<sup>158</sup>

### (b) Imputed or Constructive Notice

The terms “imputed” or “constructive” notice are used interchangeably in judicial opinions. The two main routes to a finding of imputed or constructive notice are: (a) where an attorney is shared by the Original Defendant and the New Defendant; and (b) where the Original Defendant and New Defendant are related business entities that have a sufficient identity of interests.

#### (i) Imputed Notice from Shared Attorney

The District Court for the Southern District of New York and the U.S. Bankruptcy Court for the District of Delaware are among the many courts that have held that, for Rule 15(c) purposes, notice to one defendant can be imputed to a second where they share an attorney.<sup>159</sup> Some formulations for imputing notice from shared attorneys add the requirement that there be some showing that the attorney knew that the additional defendants would be added to the existing suit,<sup>160</sup> or must have known same.<sup>161</sup> For the notice to be effective for relation back purposes, the attorney in question must have been shared within the Rule 4(m) period referred to in Rule 15(c)(1)(C).<sup>162</sup> The imposition of constructive notice in this context has been based on the theory that the New Defendant is not harmed by not having received actual notice if his attorney has already begun preparing a defense during the applicable period.<sup>163</sup>

#### (ii) Constructive Notice from Identity of Interest

In *Unger v. Caloric Corp. (In re Allbrand Appliance & Television Company, Inc.)*, the Second Circuit Court of Appeals found that under the “so-called identity of interest exemption,” institution of an action against one party “will constitute imputed notice to a party subsequently named by an amendment of the pleading when the parties are closely related in their business activities or linked in their corporate structure.”<sup>164</sup> The Court neither adopted nor rejected the identity of interest exception, but declared that “the parent-subsidary relationship standing alone is simply not enough . . . to establish the identity of interest exception to the relation back rule” and noted that courts accepting the identity of interest rationale “have required substantial structural and corporate identity, such as shared organizers, directors, and officers[.]”<sup>165</sup> In *In re Integrated Resources Real Estate Ltd. P’ships Securities Litig.*, the district court discussed case law of various circuits and affirmed — in the context of the Notice/Prejudice Condition — that “[o]wnership alone is not enough” and that “service upon a subsidiary, without more, is not service upon the parent corporation.”<sup>166</sup>

In some courts, the “ownership is not enough” principle may foreclose relation back ruling unless the plaintiff presents evidence establishing the

substance of the relationship between Original Defendant and New Defendant. In *Playwell Toy, Inc. v. Bureau Veritas Consumer Prod. Services, Inc.*, the plaintiff's amended complaint: (a) alleged that the Original Defendants and the New Defendant are "one and the same" from de facto merger or consolidation; and (b) suggested "an organizational nexus" among the companies.<sup>167</sup> The plaintiff toy manufacturer had settled a tort claim with a customer and sued the testing company and lab company that had issued a safety report (the Original Defendants), and then later sought to add the parent company as a New Defendant after the expiration of the applicable limitations period.<sup>168</sup> Concluding that the amended complaint established that "it may be" that New Defendant is sufficiently linked with Original Defendants (and noting that there had been a test report with a letterhead showing the corporate offices of all three entities that suggested such a nexus), the court overruled the New Defendant's motion to dismiss without prejudice pending further discovery.<sup>169</sup>

Other courts have approved of relation back without having required presentation of evidence as to the substance of the relationship between Original Defendant and New Defendant. In *Tokio Marine Mgmt., Inc. v. Japan Intermodal Transport Co., Ltd.*, the plaintiff shipper initially sued in admiralty the carrier, ship owner, and receiving terminal in connection with a lost shipment of VCRs; the plaintiff added the vessel itself as New Defendant after expiration of the limitations period.<sup>170</sup> The court noted that the Original Complaint had described and named the vessel, and found "there is a sufficient identity of interest between [Original Defendant ship owner] and its vessel such that notice to [Original Defendant ship owner] may be imputed to the vessel and prejudice will not result."<sup>171</sup> In *In re Enron Creditors Recovery Grp.*, a creditor timely filed a proof of claim against a chapter 11 debtor's subsidiary, which had guaranteed payment of the underlying debt.<sup>172</sup> After the passing of the claims bar date, creditor moved to amend its proof of claim to add the parent or to file a late claim against the parent.<sup>173</sup> Applying Rule 15(c), and upon review of the pleadings and arguments (but without further factual development), the bankruptcy court imputed notice of the original proof of claim to the parent, on the grounds that "the parent shared officers with its subsidiary . . . and the two entities were closely related in their business operations and other activities."<sup>174</sup>

## **2. Delay in Moving for Relation Back, by Itself, is Irrelevant to Notice/No Prejudice Condition**

The Notice/No Prejudice Condition requires that the plaintiff show that the New Defendant "received such notice of the action that it will not be prejudiced in defending on the merits[.]"<sup>175</sup> To establish that the New Defendant received notice so that it will "not be prejudiced in defending the case on the merits" may appear to invite an analysis similar to that described above for leave to amend.

Similar to the Rule 15(a) inquiry, as discussed above, delay alone is not sufficient to establish prejudice under Rule 15(c)(1)(C)(i). In *Krupski*, the

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Supreme Court categorically rejected denial of relation back on the speed (i.e., lack thereof) with which plaintiff moved in amending its Original Complaint:

As the contrast between Rule 15(a) and 15(c) makes clear, however, the speed with which a plaintiff moves to amend her complaint or files an amended complaint after obtaining leave to do so has no bearing on whether the amended complaint relates back.<sup>176</sup>

The Court spoke of lack of speed (delay) in isolation. As explained by the Seventh Circuit in *Joseph*, in explaining *Krupski*, “the longer the delay in amending the complaint was, the more likely the new defendant is to have been placed at a disadvantage in the litigation. But carelessness is no longer a ground independent of prejudice for refusing to allow relation back.”<sup>177</sup>

If the plaintiff has otherwise shown that it is entitled to relation back, however, much potential prejudice to the New Defendant would appear to be obviated. First, the plaintiff’s compliance with Rule 15(c)(1)(B) means that plaintiff showed that “the amendment asserts 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>178</sup> Assuming that the New Defendant had notice of the Original Complaint within the Rule 4(m) period, the Amended Complaint’s reliance on the same facts as the Original Complaint would tend to limit discovery burdens on and hence prejudice to the New Defendant.

Second, a showing under Rule 15(c)(1)(C)(ii) that New Defendant was aware or should have been aware within the Rule 4(m) period that it was a target of the plaintiff in the Original Complaint also diminishes the prospect of prejudice to the New Defendant. For example, in *Joseph*, the Seventh Circuit concluded that even six years of delay by the plaintiff in bringing motions for leave to amend and for relation back did not prejudice the New Defendant under Rule 15(c)(1)(C)(i) because the New Defendant — Elan Motorsports Technologies, Inc. — knew from the start that the plaintiff meant to sue it rather than the Original Defendant, Elan Motorsports Technologies Racing Corp., which was an affiliate of the New Defendant and operated out of the same offices.<sup>179</sup> The Court likened the New Defendant to a claimant who failed to mitigate damages: the New Defendant knew right away that it was the intended defendant, yet “sat on its haunches for almost six years while the litigation ground forward, and would still be squatting on its haunches” had the plaintiff not moved to amend the Original Complaint.<sup>180</sup> Thus, the New Defendant brought on itself any harm from the delay.<sup>181</sup>

In *Wilkins-Jones v. County of Alameda*, the U.S. District Court for the Northern District of California, in a suit under federal and state laws protecting those with disabilities, found Rule 15(c)(1)(C)(i) prejudice to deny relation back where the court found a lack of evidence that such New Defendants received notice.<sup>182</sup> The Amended Complaint in that case was filed three and one-half years after the Original Complaint.<sup>183</sup> The court found that the New Defendant’s failure to investigate and secure evidence to mount a defense was understandable given the lack of information about the Original Com-

plaint and their reasonable reliance upon words and conduct of the plaintiff that indicated that she would not sue them.<sup>184</sup> In *Wilkins-Jones*, the Court seemed to regard the lack of notice evidence and the prejudice evidence as mutually reinforcing as regards the plaintiff's failure to show the Notice/No Prejudice Condition.

It is conceivable that, even where relation back cannot be denied, a finding of delay plus abuse of legal process, or of improper purpose, could support denial of leave for amend. In *Springman v. AIG Marketing, Inc.*, an appeal decided prior to *Joseph* or *Krupski*, the Seventh Circuit (as in *Joseph*, Judge Posner wrote the opinion of the Court) noted that even were the conditions for relation back satisfied, a request for leave to amend is subject to the judge's discretion and that it found it "difficult to regard [the trial court's approval of amendment to change defendants] as anything other than an abuse of discretion" where the plaintiff's delay in seeking leave to amend was "gross, unjustified, and not even explained," and that its maintenance of a suit against a party it knew to be the wrong one to sue was "an abuse of legal process."<sup>185</sup> Finally, even where notice requirements and all other requirements for relation back are satisfied, an amendment to add the New Defendant could be denied where such amendment violated an amendment deadline under a scheduling order established pursuant to Rule 16(b).<sup>186</sup>

**G. Rule 15(c)(1)(C)(ii): "the party to be brought in by amendment: . . . (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." [the Knowledge/Mistake Condition]**

The Knowledge/Mistake Condition, set forth in Rule 15(c)(1)(C)(ii), is that the New Defendant "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." The Notice/No Prejudice Condition of Fed. R. Civ. P. 15(c)(1)(C)(i) is distinct from the Knowledge/Mistake Condition. A plaintiff may be able to show that the New Defendant was aware of the original complaint within the Rule 4(m) period (satisfying the Notice/No Prejudice Condition), but be unable to show that the New Defendant knew or should have known during the 4(m) period that it should have been the target of the original complaint. For example, in *Grace v. U.S.A.*, the court concluded that even if the New Defendant had received notice of the lawsuit within the Rule 4(m) period, her awareness of whether she was the real target of the suit would depend upon her familiarity with the technicalities of the Federal Tort Claims Act and the law of agency, and there is no indication that she would have had such knowledge.<sup>187</sup>

**1. Does New Defendant's Perception that Plaintiff Lacks Knowledge of Its Identity Compel Denial of Relation Back?**

A discussion of the Knowledge/Mistake Condition necessarily reprises the more thorough discussion in section V.A. above of *Krupski*, which focused on that requirement of Rule 15(c). In *Krupski*, the Supreme Court clarified that the question under Rule 15(c)(1)(C)(ii) is not whether plaintiff

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knew or should have known the identity of New Defendant as the proper defendant, but whether New Defendant “knew or should have known that it would have been named as the defendant but for an error.”<sup>188</sup> For the Court, the New Defendant’s knowledge and not the plaintiff’s is the issue: “[t]he only question under Rule 15(c)(1)(C)(ii), then, is whether [New Defendant] knew or should have known that, absent some mistake, the action would have been brought against him.”<sup>189</sup> Consistent with that injunction, the Court rejected the New Defendant’s arguments that the plaintiff’s mistake was unreasonable, declaring that “[t]he reasonableness of the [plaintiff’s] mistake is not itself an issue.”<sup>190</sup>

In a preference case, the U.S. Bankruptcy Court for the District of Delaware in *Miller v. Metal Exchange Corporation (In re IH 1, Inc.)* adhered faithfully to *Krupski* by rejecting evidence presented by the New Defendant Pennex as to what the plaintiff in fact knew or did not know about the New Defendant and its affiliate Original Defendant:

With regard to [New Defendant’s] analysis of what Plaintiff knew and did not know, *Krupski* is unequivocal that such an inquiry is irrelevant, except to the extent that the information available to plaintiff “bear upon the defendant’s understanding of whether the plaintiff made a mistake regarding the proper party’s identity.” *Krupski*, 130 S.Ct. at 2493–94. *Krupski* is clear that “[t]he reasonableness of [Plaintiff’s] mistake is not itself an issue.” *Id.* at 2494. *Thus it is not for me to evaluate the information available to Plaintiff and determine whether it should have alerted him to Pennex’s true status.*<sup>191</sup>

As discussed above, nothing in the text of Rule 15(c) requires proof of “what Plaintiff knew or did not know.” In particular, under the reading of the unanimous Court in *Krupski*, the notion of a “mistake concerning the proper party’s identity” does not require that a plaintiff seeking relation back prove that it in fact made such a mistake. Nevertheless, many courts, after *Krupski*, have ruled that the plaintiff’s lack of knowledge as to the identity of the New Defendant forecloses relation back because such lack of knowledge is not a “mistake” within the meaning of the Knowledge/Mistake Condition.<sup>192</sup>

Such cases often involve Original Defendants named as “John Does,” since the plaintiff cannot, at the time of the Original Complaint, identify the police officer or other public official who caused the injuries alleged. For example, in *Demouchette v. Sheriff of Cook Cty.*, survivors of a prisoner who died in custody sued Cook County (Illinois) and unnamed individuals in connection with the medical care of the prisoner.<sup>193</sup> The Original Complaint pled John Does as Original Defendants, and the Amended Complaint replaced the John Does with six named persons (after discovery had revealed identities sought).<sup>194</sup> The court denied relation back, relying on pre-*Krupski* Seventh Circuit Court of Appeals precedent that held that Rule 15(c) does not permit relation back where plaintiff did not know of proper party, because a plaintiff’s failure to name a New Defendant due to the plaintiff’s lack of knowledge is not a “mistake” within the meaning of the Knowledge/Mistake Condition.<sup>195</sup> The court distinguished *Krupski* on the grounds that in that case the plaintiff did not lack all knowledge of New Defendant Costa

Crociere, but had merely mistakenly misidentified another party as owner and operator of the cruise ship.<sup>196</sup>

At least the following two explanations in *Krupski* (discussed at greater length above) should falsify any requirement that the plaintiff must prove that it made one kind of mistake or another, independently of the New Defendant's reasonable belief as to whether it was an intended target of the Original Complaint: (a) *Krupski*'s refusal to endorse a categorical definition of mistake and the Court's placement of its discussion of mistake entirely within the context of consideration of the New Defendant's reasonable belief; and (b) *Krupski*'s limitation of relevant evidence to that which could have informed New Defendant's reasonable belief within the Rule 4(m) period.

But does *Krupski* bar a court from concluding that the Knowledge/Mistake Condition is unfulfilled where a New Defendant reasonably understands that the plaintiff did not know New Defendant's identity during the Rule 4(m) period, because an omission from the Original Complaint out of utter ignorance is not a "mistake"? We believe it does, for the following reasons.

The text of Rule 15(c) does not require the making of such a distinction among mistakes a New Defendant might perceive. A court very well might find that plaintiff's utter ignorance of the identity of the New Defendant fits within "mistake" as that term is treated in *Krupski*'s broad and open-ended discussion of it.<sup>197</sup> Further, in rejecting the New Defendant's arguments that the plaintiff's mistake was unreasonable, and in declaring that "[t]he reasonableness of the [plaintiff's] mistake is not itself an issue," the *Krupski* Court endorsed an ecumenical view of what a "mistake" is with respect to the New Defendant's reasonable belief.<sup>198</sup>

Of decisive importance should be that the policy balance prescribed by the *Krupski* Court would be flouted by adoption of such a rationale for denying relation back. Permitting New Defendants who enjoy the accident of plaintiff's utter ignorance of their identities — notwithstanding that New Defendant had received notice of the Original Complaint, is not prejudiced in preparing a defense, and otherwise can reasonably believe only that it is plaintiff's target — would both frustrate the Rules policy in favor of determining disputes on their merits and grant a windfall to a New Defendant that is not entitled to repose.<sup>199</sup> There is no policy warrant or clear textual command to compel such solicitude for such New Defendants.

## **2. Plaintiff's Evidence Establishing the Knowledge/Mistake Condition**

The party seeking relation-back bears the burden of proof.<sup>200</sup> From the plaintiff's perspective, it may be best to have deposition testimony from the New Defendant wherein he admits that he understood himself to be the target of the Original Complaint. For example, in *Varlack v. SWC Caribbean, Inc.*, the two-by-four wielding restaurant manager testified at a deposition that he had chanced upon the Original Complaint for personal injuries from blunt trauma at the restaurant, which named the restaurant and "Unknown Em-

ployee” as Original Defendants.<sup>201</sup>

Lacking such fortuity, a plaintiff can point to allegations in the Original Complaint that indicate that plaintiff meant to sue a person or entity that had certain characteristics or which played a certain role, though plaintiff in fact named as Original Defendant no such person or entity.<sup>202</sup> Let us call this the “Aim and Miss” scenario. For example, in *Krupski*, the Original Complaint alleged that the Original Defendant Costa Cruise Lines “ ‘owned, operated, managed, supervised and controlled’ ” the ship on which the plaintiff’s injuries occurred.<sup>203</sup> In fact, the Original Defendant was a mere ticketing agent, while the New Defendant Costa Crociere S.p.A. owned and operated the ship.<sup>204</sup> Obviously, *Krupski* meant to sue the latter, and the latter in reviewing the Original Complaint could come to no other reasonable conclusion, as the Court held.<sup>205</sup>

The Knowledge/Mistake Condition has been fulfilled in other “Aim and Miss” cases. In *Bishop v. Best Buy, Co. Inc.*, the district court found that while the plaintiff sued Original Defendant Best Buy Co., Inc., instead of New Defendant Best Buy, L.P., which owned the store, the face of the complaint clearly indicated that plaintiff sought to sue the latter entity as the store owners.<sup>206</sup> In *Barbour v. Emkay, Inc. (Illinois)*, the Original Complaint sought to sue owner of vehicle, which was New Defendant, which had a name similar to nonowner Original Defendant.<sup>207</sup> In *In re IH 1, Inc.*, Judge Walsh of the U.S. Bankruptcy Court for the District of Delaware found that the Original Complaint sought to avoid preferential transfer to Metal Exchange Corporation while incorrectly identifying actual transferee and New Defendant Pennex as a trade name for Metal Exchange Corporation.<sup>208</sup>

The peculiar importance of the Original Complaint lies in the fact that New Defendant, having had notice of the Original Complaint within the Rule 4(m) period, thereby is informed of its contents and its reasonable beliefs as to whether it is a target are informed thereby. Evidence of a close corporate interrelationship between the Original Defendant and New Defendant, discussed above as probative of the notice required for establishing the Notice/No Prejudice Condition, can also help establish the New Defendant’s range of reasonable belief with respect to the plaintiff’s failure to name it in the Original Complaint. In *Krupski*, the Court noted that the marketing agent and carrier “are related corporate entities with very similar names,” and that the “interrelationship and similarity heighten the expectation that Costa Crociere (the carrier) should suspect a mistake has been made when Costa Cruise (the ticket marketing agent) is named in a complaint that actually describes Costa Crociere’s activities.”<sup>209</sup>

In support of its reasoning, the Court cited *Morel v. Daimler-Chrysler AG* and *Goodman v. Praxair, Inc.*<sup>210</sup> In *Morel v. Daimler-Chrysler AG*, the First Circuit Court of Appeals observed that the original complaint conveyed the plaintiff’s attempt to sue the car maker, even though it erroneously named the car maker as Daimler-Chrysler Corporation instead of actual manufacturer (and New Defendant) DaimlerChrysler AG, a legally distinct but related entity; and the latter should have realized that it had not been named

because of plaintiff's mistake.<sup>211</sup> In *Goodman v. Praxair, Inc.*, the Fourth Circuit Court of Appeals observed that the original complaint named the parent company Praxair, Inc. (the Original Defendant), but described accurately the status of subsidiary Praxair Services, Inc. (the New Defendant), and that latter knew or should have known that it had not been named because of plaintiff's mistake.<sup>212</sup> Applying *Krupski*, the courts in *Bishop*, *Barbour*, and *Miller* found similarly.<sup>213</sup>

### 3. New Defendant Rebuttal of Plaintiff's Evidence of Its Reasonable Belief

Naming the wrong party as Original Defendant can be a nonmistake, however, and foreclose satisfaction of the Knowledge/No Mistake Condition, where it was done as a matter of "conscious choice." For the Court in *Krupski*, the element to be demonstrated is the New Defendant's reasonable belief concerning whether the plaintiff's omissions from the original complaint "represented a mistake as opposed to a conscious choice."<sup>214</sup> Finding no such conscious choice shown in the record before it, the Supreme Court in *Krupski* noted that the New Defendant "articulated no strategy that it could reasonably have thought *Krupski* was pursuing in suing a defendant that was legally unable to provide relief."<sup>215</sup> The Court thus suggested a possible rebuttal to a plaintiff's showing that New Defendant knew or should have known that it was a target of the Original Complaint: New Defendant can show that the omission of New Defendant from Original Complaint — and possibly other actions of the plaintiff known to the New Defendant within the Rule 4(m) period — are supported by a strategic rationale, and thus the New Defendant reasonably believed within the Rule 4(m) period that it was not plaintiff's target in the Original Complaint.

The "Aim and Miss" Original Complaints discussed above can be distinguished from "Aim and Hit, But Omit" Original Complaints, where the Plaintiff names some appropriate Original Defendants but then seeks to add one or more New Defendants it omitted. The latter scenario lends itself more readily to the New Defendant's rebuttal of plaintiff's evidence of the Knowledge/Mistake Condition on the grounds that the plaintiff acted strategically in omitting the New Defendant.

In *In re IndyMac Mortgage-Backed Securities Litigation*, the plaintiffs sued many parties in a sprawling class action against allegedly nonfeasant or misfeasant actors in the mortgage-backed securities corner of the recent financial crisis.<sup>216</sup> The Original Defendants included subsidiaries of then-defunct IndyMac Bank, F.S.B., thirteen nonaffiliate financial institutions that underwrote offerings of securities, and several former officers and directors of securities issuer IndyMac MBS, Inc.<sup>217</sup> The New Defendant, named in an Amended Complaint after the expiration of the relevant limitations period, was IndyMac Bank chairman and CEO Michael Perry.<sup>218</sup> The plaintiffs did not argue that allegations in the original Complaint actually related to Perry (this was not an "Aim but Miss" scenario).<sup>219</sup> Instead, they argued that Perry was the subject of multiple lawsuits and news articles questioning his leadership and responsibility for the bank's business practices and therefore should

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have known he would have been sued.<sup>220</sup> The court found such argument insufficient to show that Perry should reasonably have believed that he was a target of the allegations of the Original Complaint.<sup>221</sup>

In *In re IndyMac Mortgage-Backed Securities Litigation*, the plaintiffs unsuccessfully sought to use the New Defendant's celebrity to establish the Knowledge/Mistake Condition. In *Wilkin-Jones v. County of Alameda*, two New Defendants successfully used their celebrity to rebut plaintiff's showing of the Knowledge/Mistake Condition.<sup>222</sup> The action was brought under federal and state statutes that protect disabled persons, in connection with the plaintiff's arrest and detention in Alameda County, California.<sup>223</sup> The Original Defendant was Alameda County alone.<sup>224</sup> The plaintiff sought to amend her Original Complaint in order to add the county sheriff and deputy sheriff, on account of their roles in county law enforcement policies and administration, rather than for any specific acts of theirs during the arrest and incarceration.<sup>225</sup> The court found that "both defendants have publicly known roles with the County and their involvement in law enforcement is obvious" and that given those roles and involvement, and plaintiff's presumptive knowledge of them, the sheriff and deputy sheriff reasonably believed that plaintiff omitted them from the Original Complaint out of conscious choice.<sup>226</sup>

Another "Aim and Hit, But Omit" scenario was presented by *Esmilla v. The Cosmopolitan Club*, decided after *Krupski*, in which the plaintiff former employee originally sued her employer nightclub for retaliation and later sought by an Amended Complaint to add officers of nightclub as New Defendants.<sup>227</sup> Noting that the Original Complaint mentioned at least five of the seven officers (by name) but named only the nightclub as Original Defendant, the court concluded that the officers could reasonably have viewed the Original Complaint's omission of them as reflecting plaintiff's strategic decision not to sue them.<sup>228</sup>

Our final "Aim and Hit, But Omit" example of strategic choice undoing relation back is a newsworthy transfer avoidance case: *Picard v. Madoff (In re Bernard L. Madoff Investment Securities LLC)*.<sup>229</sup> The trustee, Irving Picard, represented by Baker & Hostetler LLP, sought to add the following as New Defendants: Susan Elkin, Mark Madoff's first wife; Stephanie S. Mack, Mark Madoff's widow; and Deborah Madoff, Andrew Madoff's wife (collectively, the "Spouse Defendants").<sup>230</sup> The Spouse Defendants allegedly received about \$155 million in transfers from Bernard L. Madoff Investment Securities LLC ("BLMIS").<sup>231</sup> The so-called "Bankruptcy Claims" (under sections 544, 545, 547, 548 or 553 of the Bankruptcy Code) as against the New Defendants were time barred by the two-year limitations period established by section 546(a) of the Bankruptcy Code prior to their inclusion in the Amended Complaint.<sup>232</sup> To proceed on the Bankruptcy Claims against the Spouse Defendants, the trustee needed to have the addition of the Spouse Defendants relate back to the date of the Original Complaint.

The trustee failed. The court found that it "was not unreasonable for the Spouse Defendants to believe that their omission from the Original Complaint was not a mistake but rather the result of a fully informed decision"

for two principal reasons.<sup>233</sup> First, the Spouse Defendants were aware that: (a) Mr. Picard was a sophisticated party who had commenced hundreds of lawsuits against transferees of property from BLMIS; (b) Picard possessed many relevant documents, including financial disclosure documents from Madoff pere et fils, that identified the roles, legal status, and interests of the Spouse Defendants; (c) Picard has “a large team of lawyers who had a significant period of time to assist Picard in review and analysis of the documentation”; and (d) despite “extensive knowledge” and “plentiful resources,” Picard omitted all of the Spouse Defendants from the Original Complaint.<sup>234</sup> Second, the Original Complaint contained many faithless servant allegations, which could reasonably be seen as aimed at high-level employees of BLMIS.<sup>235</sup> This latter aspect of the Original Complaint was emphasized by Picard in an interview on the 60 Minutes television program.<sup>236</sup>

The *Madoff* decision raises the following question: should the reasonable awareness of the New Defendant that it is a target of the plaintiff’s Original Complaint depend in part on the capacities of the Plaintiff on display for the New Defendant during the Rule 4(m) period? The court in *Madoff* specifically referred to the “extensive knowledge” and “plentiful resources” and time and legal acumen and sophistication of the plaintiff as circumstances informing the reasonable belief of the New Defendants that their omission from the Original Complaint was no error, mistake, or accident. Compare trustee Picard’s situation with that of the harried large case preference plaintiff introduced at the outset of this article, gamely firing off hundreds or thousands of adversary complaints, having been appointed liquidation trustee but a short time before the limitation period elapsed, having limited access to the liquidating debtors’ jumble of books and records, etc. Let us call the latter trustee Mr. Putupon, who can relate intimately to the cry of the narrator of *Moby-Dick*: “Oh Time, Strength, Patience, and Cash!”<sup>237</sup>

Suppose Xanadu Ohio, LLC received the preferential transfer from the debtor, but then transferred it to Xanadu Michigan, Inc. As in our early hypothetical, Xanadu Ohio, LLC may or may not be a mere conduit, and Xanadu Michigan, Inc. may be an initial transferee (without benefit of the “for value and good faith” defense of section 550(b) of the Bankruptcy Code) or a subsequent transferee (with such defense). Assume Picard sues Xanadu Ohio, LLC but fails to include Xanadu Michigan, Inc. Assume the same for Putupon. Each seeks to amend the Original Complaint after the limitation period elapses, to add Xanadu Michigan, Inc. as New Defendant. Would the result be the same in both cases, with regard to relation back? Or would the sumptuous circumstances of Picard’s litigation forces cause Xanadu Michigan, Inc. to reasonably see its omission from the Original Complaint as “conscious choice,” while the comparatively Dickensian circumstances of Putupon deny such reasonable conclusions and hence relief to Xanadu Michigan?

The imposition on Xanadu Michigan of potential liability (through relation back) merely because a liquidation trustee was appointed tardily would

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not appear to serve any policy of the Bankruptcy Code or the Federal Rules of Civil Procedure. At least, no such policy is served by favoring one New Defendant over the other based solely upon the evident preparedness of the plaintiff. However, as underscored throughout this article, the textual analysis of *Krupski* places the focus squarely on the New Defendant's mind, on its reasonable beliefs. *Krupski*'s policy analysis would award repose to the New Defendant holding one set of beliefs (no reasonable belief that it was the target of the Original Complaint) and deny repose to the New Defendant holding another set of beliefs (no reasonable belief that it was not the target of the Original Complaint). The *Madoff* case is faithful to *Krupski* in illustrating how circumstances of the plaintiff can inform the reasonable beliefs of the New Defendant with respect to whether it was a target of the Original Complaint. With respect to relation back for New Defendants, the Prince of Denmark could say, without irony, that "there is nothing either good or bad, but thinking makes it so."<sup>238</sup>

## Appendix

### Rule 15. Amended and Supplemental Pleadings

#### (a) Amendments Before Trial.

(1) Amending as a Matter of Course.

A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) Other Amendments.

In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) Time to Respond.

Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

#### (b) Amendments During and After Trial.

(1) Based on an Objection at Trial.

If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) For Issues Tried by Consent.

When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move — at any time, even after judgment — to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

#### (c) Relation Back of Amendments.

(1) When an Amendment Relates Back.

An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of

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the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) Notice to the United States.

When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

**(d) Supplemental Pleadings.** On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

## NOTES:

<sup>1</sup>“Bankruptcy Code” refers to title 11 of the United States Code. A preferential transfer, or “preference,” is a transfer or property of a debtor (usually funds), made prior to the bankruptcy case, which has the defining features set forth in section 547 of the Bankruptcy Code and further described in section II of this article. A preference avoidance adversary proceeding is a lawsuit within a bankruptcy case, which is initiated by the filing of an adversary complaint, and pursuant to which a trustee or debtor (or successor to its rights) sues recipients of alleged preferential transfers in order to avoid and recover such transfers. The limitations period, after the expiration of which a preference avoidance adversary complaint cannot be filed, is ordinarily two years after the commencement of the bankruptcy case, per section 546(a) of the Bankruptcy Code. The analysis herein is largely applicable also to pleading rules for the avoidance and recovery of fraudulent transfers under sections 544, 548, and 550 of the Bankruptcy Code.

<sup>2</sup>See, e.g., *In re Global Crossing, Ltd.*, 385 B.R. 52, 56, 49 Bankr. Ct. Dec. (CRR) 224 (Bankr. S.D. N.Y. 2008) (over a six-day period, just prior to the expiration of the limitations period, the Estate Representative filed approximately 1000 adversary complaints to avoid and recover transfers); *In re Mervyn's Holdings, LLC*, 426 B.R. 96, 98 n.2, 52 Bankr. Ct. Dec. (CRR) 248 (Bankr. D. Del. 2010) (pursuant to a cash collateral settlement order, committee took over litigation which special litigation counsel had commenced under enormous time pressure). The court in *The Global Crossing Estate Representative* noted that such plaintiffs

are confronted with information difficulties that include, among other things, the sale of one or more jointly administered debtors' assets to third parties, books and records that cannot be found. The Global Crossing Estate Representative, 385 B.R. at 61. It is also common in such cases for the plaintiff to lack access to former personnel of debtors who possess relevant institutional and transactional memories.

<sup>3</sup>Krupski v. Costa Crociere S. p. A., 560 U.S. 538, 130 S. Ct. 2485, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010).

<sup>4</sup>Fed. R. Civ. P. 15(c)(1)(C)(ii).

<sup>5</sup>Hall v. Norfolk Southern Ry. Co., 469 F.3d 590, 66 Fed. R. Serv. 3d 1009 (7th Cir. 2006).

<sup>6</sup>Hall v. Norfolk Southern Ry. Co., 469 F.3d 590, 593–96, 66 Fed. R. Serv. 3d 1009 (7th Cir. 2006).

<sup>7</sup>Hall v. Norfolk Southern Ry. Co., 469 F.3d 590, 593–96, 66 Fed. R. Serv. 3d 1009 (7th Cir. 2006).

<sup>8</sup>Joseph v. Elan Motorsports Technologies Racing Corp., 638 F.3d 555, 559, 79 Fed. R. Serv. 3d 1 (7th Cir. 2011) (*Krupski* “changed what we and other courts had understood . . . to be the proper standard for deciding whether an amended complaint relates back to the date of the filing of the original complaint”).

<sup>9</sup>11 U.S.C.A. § 547(b).

<sup>10</sup>11 U.S.C.A. § 550.

<sup>11</sup>In re TOUSA, Inc., 680 F.3d 1298, 1313–15, 56 Bankr. Ct. Dec. (CRR) 135, 67 Collier Bankr. Cas. 2d (MB) 1035, Bankr. L. Rep. (CCH) P 82276 (11th Cir. 2012).

<sup>12</sup>No analysis of potential avoidance defendants is complete without consideration of whether, under the facts, a transfer beneficiary is involved. Nevertheless, for the sake of analytical simplicity, the balance of this article primarily considers initial transferees and subsequent transferees.

<sup>13</sup>Section 550(a) of the Bankruptcy Code provides that an avoided transfer may be recovered from an “initial transferee” and other transferees, but does not define “initial transferee.” See 11 U.S.C.A. § 550(a). The leading circuit court case on the “dominion and control” test regarding a possible “mere conduit” is Bonded Financial Services, Inc. v. European American Bank, 838 F.2d 890, 893, 17 Bankr. Ct. Dec. (CRR) 299, 18 Collier Bankr. Cas. 2d (MB) 155 (7th Cir. 1988) (a transferee must have dominion over the money or other asset and the right to put the money to its own purposes); see also In re Factory 2-U Stores, Inc., 2007 WL 2698207 (Bankr. D. Del. 2007) (adopting *Bonded Financial* test and collecting cases); *Paloian v. LaSalle Bank, N.A.*, 619 F.3d 688, 53 Bankr. Ct. Dec. (CRR) 155, Bankr. L. Rep. (CCH) P 81840 (7th Cir. 2010) (trustee for a securitized investment pool not a mere conduit of funds solely because it was obligated to distribute the funds pursuant to a trust agreement); and In re Mervyn’s Holdings, LLC, 426 B.R. 96, 102–05, 52 Bankr. Ct. Dec. (CRR) 248 (Bankr. D. Del. 2010) (distinguishing “mere conduit” principle as an “equitable exception” to *Paloian v. LaSalle Bank, N.A.* and holding trustee bank to be a mere conduit in connection with a leveraged buy-out).

<sup>14</sup>In re Global Crossing, Ltd., 385 B.R. 52, 56, 49 Bankr. Ct. Dec. (CRR) 224 (Bankr. S.D. N.Y. 2008).

<sup>15</sup>In re Global Crossing, Ltd., 385 B.R. 52, 60, 49 Bankr. Ct. Dec. (CRR) 224 (Bankr. S.D. N.Y. 2008).

<sup>16</sup>In re Global Crossing, Ltd., 385 B.R. 52, 56, 57–58 n.2, 75–80, 49 Bankr. Ct. Dec. (CRR) 224 (Bankr. S.D. N.Y. 2008).

<sup>17</sup>In re Greater Southeast Community Hosp. Corp. I, 341 B.R. 91, 94, 64 Fed. R. Serv. 3d 627 (Bankr. D. D.C. 2006), order amended on reconsideration, 2006 WL 2083500 (Bankr.

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D. D.C. 2006).

<sup>18</sup>In re Greater Southeast Community Hosp. Corp. I, 341 B.R. 91, 95, 64 Fed. R. Serv. 3d 627 (Bankr. D. D.C. 2006), order amended on reconsideration, 2006 WL 2083500 (Bankr. D. D.C. 2006).

<sup>19</sup>In re Greater Southeast Community Hosp. Corp. I, 341 B.R. 91, 95, 64 Fed. R. Serv. 3d 627 (Bankr. D. D.C. 2006), order amended on reconsideration, 2006 WL 2083500 (Bankr. D. D.C. 2006).

<sup>20</sup>Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929, 2007-1 Trade Cas. (CCH) ¶ 75709, 68 Fed. R. Serv. 3d 661 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 2009-2 Trade Cas. (CCH) ¶ 76785, 73 Fed. R. Serv. 3d 837 (2009).

<sup>21</sup>Fed. R. Civ. P. 8(a)(2).

<sup>22</sup>See Conley v. Gibson, 355 U.S. 41, 45–46, 78 S. Ct. 99, 2 L. Ed. 2d 80, 9 Fair Empl. Prac. Cas. (BNA) 439, 41 L.R.R.M. (BNA) 2089, 1 Empl. Prac. Dec. (CCH) P 9656, 33 Lab. Cas. (CCH) P 71077 (1957).

<sup>23</sup>Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 550, 127 S. Ct. 1955, 167 L. Ed. 2d 929, 2007-1 Trade Cas. (CCH) ¶ 75709, 68 Fed. R. Serv. 3d 661 (2007).

<sup>24</sup>Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 550, 127 S. Ct. 1955, 167 L. Ed. 2d 929, 2007-1 Trade Cas. (CCH) ¶ 75709, 68 Fed. R. Serv. 3d 661 (2007).

<sup>25</sup>Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868, 2009-2 Trade Cas. (CCH) ¶ 76785, 73 Fed. R. Serv. 3d 837 (2009). For a more detailed discussion of pleading in bankruptcy context under *Twombly* and *Iqbal*, see Bensinger, Context is King — *Twombly*, *Iqbal* and the Art of Pleading in Bankruptcy, 19 J. Bankr. Law and Prac. 669, 669–83 (Dec. 2010).

<sup>26</sup>In re Caremerica, Inc., 409 B.R. 737, 751, 51 Bankr. Ct. Dec. (CRR) 249 (Bankr. E.D. N.C. 2009).

<sup>27</sup>In re Caremerica, Inc., 409 B.R. 737, 751, 51 Bankr. Ct. Dec. (CRR) 249 (Bankr. E.D. N.C. 2009).

<sup>28</sup>In re DPH Holdings Corp., Case No. 05-44481 (Bankr. S.D.N.Y. Sept. 9, 2010) (Drain, J.).

<sup>29</sup>E.g., In re Tweeter Opco, 452 B.R. 150, 154–55 (Bankr. D. Del. 2011) (preference complaint must identify transferor by name and must detail relationship between transferor and transferee, such as the identity of contracts and description of good or services exchanged); In re WBE, LLC, 2011 WL 2607090 at \*3 (Bankr. D. Del. 2011) (complaint stating that any one of multiple defendants could be transferee of various alleged transfers does not give any specific defendant sufficient notice to determine which transfers are sought to be avoided as to it).

<sup>30</sup>Fed. R. Civ. P. 15.

<sup>31</sup>Fed. R. Civ. P. 15(a)(1).

<sup>32</sup>Fed. R. Civ. P. 15(a)(2)

<sup>33</sup>For ease of presentation, in this article the authors refer throughout to the addition of New Defendants even though, as discussed in section V.B. below, some courts restrict the application of relation back under Rule 15(c)(1)(C) to the substitution of a New Defendant for an Original Defendant. Further, this article pertains solely to the amendment of complaints to add New Defendants, and not to other sorts of amendment of complaints or to amendments of other pleadings. As noted by the Supreme Court, Rule 15(c)(1)(C) refers to an amendment of a “pleading” and is therefore not limited to the amendment of a complaint, though the latter is the typical case of Rule 15(c)(1)(C)’s application. *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 130 S. Ct. 2485, 2492, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d

1458 (2010).

<sup>34</sup>See Fed. R. Civ. P. 15(c)(1) and Fed. R. Civ. P. 4(m).

<sup>35</sup>Fed. R. Civ. P. 15(c)(1)(C)(i) (emphasis added).

<sup>36</sup>Fed. R. Civ. P. 15(c)(1)(C)(ii) (emphasis added).

<sup>37</sup>In re Global Crossing, Ltd., 385 B.R. 52, 81, 49 Bankr. Ct. Dec. (CRR) 224 (Bankr. S.D. N.Y. 2008).

<sup>38</sup>Fed. R. Civ. P. 15(a). This article applies Rule 15 to the amendment of a complaint to add a party. Where New Defendants are to be added to Original Defendants (without replacing any of them) some courts view Rule 21, which governs party joinder and is incorporated into the Bankruptcy Rules as Bankruptcy Rule 7021, as governing such amendments. See Gary Friedrich Enterprises, LLC v. Marvel Enterprises, Inc., 2011 WL 1142916 at \*2 (S.D. N.Y. 2011), adhered to on reconsideration, 2011 WL 1344456 (S.D. N.Y. 2011) (in the case of proposed amendment where new defendants are to be added, Rule 21 governs); and Momentum Luggage & Leisure Bags v. Jansport, Inc., 2001 WL 58000 at \*1 (S.D. N.Y. 2001) (same). Rule 21 provides, in relevant part: “On motion or on its own, the court may at any time, on just terms, add or drop a party.” Fed. R.Civ.P. 21. However, courts in the Second Circuit have also noted that “the same standard of liberality” applies under either Rule. Esmilla v. Cosmopolitan Club, 2011 WL 814007 (S.D. N.Y. 2011) (citations omitted); see also FTD Corp. v. Banker’s Trust Co., 954 F. Supp. 106, 109 (S.D. N.Y. 1997) (internal quotation and citation omitted).

<sup>39</sup>See Collier on Bankruptcy ¶ 7015.04 (2012).

<sup>40</sup>Fed. R. Civ. P. 15(a)(2).

<sup>41</sup>Fed. R. Civ. P. 16(b)(1) & (3)(A).

<sup>42</sup>Fed. R. Civ. P. 16(b)(4).

<sup>43</sup>Sosa v. Airprint Systems, Inc., 133 F.3d 1417, 1419, 75 Fair Empl. Prac. Cas. (BNA) 1665, 72 Empl. Prac. Dec. (CCH) P 45215, 39 Fed. R. Serv. 3d 1181 (11th Cir. 1998).

<sup>44</sup>Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 610, 23 Fed. R. Serv. 3d 621 (9th Cir. 1992).

<sup>45</sup>Izaguirre v. Greenwood Motor Lines, Inc., 2011 WL 5325658 at \*2 (D. Idaho 2011), aff’d, 523 Fed. Appx. 482 (9th Cir. 2013); see also Asten v. City of Boulder, 2010 WL 5464298 at \*3 (D. Colo. 2010), report and recommendation adopted, 2010 WL 5464297 (D. Colo. 2010). The standard for “good cause” is the diligence demonstrated by the party in attempting to meet the Court’s deadlines. Colorado Visionary Academy v. Medtronic, Inc., 194 F.R.D. 684, 687, 47 Fed. R. Serv. 3d 353 (D. Colo. 2000) (“Rule 16 erects a more stringent standard [than Rule 15(a)], requiring some persuasive reason as to why the amendment could not have been effected within the time frame established by the court.”).

<sup>46</sup>See Izaguirre, 2011 WL 5325658 at \*3–4 (finding no good cause shown).

<sup>47</sup>Izaguirre v. Greenwood Motor Lines, Inc., 2011 WL 5325658 at \*3–4 (D. Idaho 2011), aff’d, 523 Fed. Appx. 482 (9th Cir. 2013).

<sup>48</sup>Izaguirre v. Greenwood Motor Lines, Inc., 2011 WL 5325658 at \*4 (D. Idaho 2011), aff’d, 523 Fed. Appx. 482 (9th Cir. 2013) (citing Coleman v. Quaker Oats Co., 232 F.3d 1271, 1295, 84 Fair Empl. Prac. Cas. (BNA) 602, 80 Empl. Prac. Dec. (CCH) P 40615, 55 Fed. R. Evid. Serv. 1379 (9th Cir. 2000)).

<sup>49</sup>Fed. R. Civ. P. 15(a)(2).

<sup>50</sup>Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S. Ct. 795, 802, 28 L. Ed. 2d 77, 1971 Trade Cas. (CCH) ¶ 73484, 14 Fed. R. Serv. 2d 1169 (1971); In re Fruehauf Trailer Corp., 2011 WL 2838168 (Bankr. D. Del. 2011) ([l]eave to amend should liberally be granted to ensure that a particular claim will be decided “ ‘on the merits rather than on

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technicalities,' ” quoting *Dole v. Arco Chemical Co.*, 921 F.2d 484, 486–87, 14 O.S.H. Cas. (BNA) 1937, 1991 O.S.H. Dec. (CCH) P 29173, 18 Fed. R. Serv. 3d 546 (3d Cir. 1990)). For the Ninth Circuit Court of Appeals, leave to amend is “to be applied with extreme liberality.” *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 712, 90 Fair Empl. Prac. Cas. (BNA) 931, 80 Empl. Prac. Dec. (CCH) P 40528, 49 Fed. R. Serv. 3d 113 (9th Cir. 2001).

<sup>51</sup>*Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222, 6 Fed. R. Serv. 2d 1234 (1962).

<sup>52</sup>*Aetna Cas. and Sur. Co. v. Aniero Concrete Co., Inc.*, 404 F.3d 566, 603–04 (2d Cir. 2005).

<sup>53</sup>*In re Kimball Hill, Inc.*, 449 B.R. 767, 783, 54 Bankr. Ct. Dec. (CRR) 229 (Bankr. N.D. Ill. 2011).

<sup>54</sup>*Block v. First Blood Associates*, 988 F.2d 344, 350, Fed. Sec. L. Rep. (CCH) P 97387, 25 Fed. R. Serv. 3d 264 (2d Cir. 1993). It is also possible that the nonmovant plaintiff may make a showing, including against the ground of futility. See *Gary Friedrich Enterprises, LLC v. Marvel Enterprises, Inc.*, 2011 WL 1142916 at \*4 (S.D. N.Y. 2011), adhered to on reconsideration, 2011 WL 1344456 (S.D. N.Y. 2011) (discussing rulings on the kinds of evidence that can be used to determine motions for leave to amend, even though some courts liken them to motions to dismiss under Rule 12(b)(6), which ordinarily are adjudicated without resort to outside evidence).

<sup>55</sup>*State Teachers Retirement Bd. v. Fluor Corp.*, 654 F.2d 843, 856, Fed. Sec. L. Rep. (CCH) P 98005 (2d Cir. 1981).

<sup>56</sup>*Block*, 988 F.2d at 350. See also *Arthur v. Maersk, Inc.*, 434 F.3d 196, 204, 2006 A.M.C. 245, 63 Fed. R. Serv. 3d 982 (3d Cir. 2006) (The Third Circuit Court of Appeals has observed that when party fails to take advantage of previous opportunities to amend, without adequate explanation, leave to amend is properly denied.).

<sup>57</sup>*Arthur v. Maersk, Inc.* 434 F.3d at 204 (discussing cases in which lengthy delays have not been found to be “undue”); see also *In re Mortgage Lenders Network, USA, Inc.*, 395 B.R. 871, 877 (Bankr. D. Del. 2008) (discussing cases).

<sup>58</sup>*Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079, R.I.C.O. Bus. Disp. Guide (CCH) P 7401 (9th Cir. 1990) (district court had not abused its discretion in denying leave to amend in part due to a two-year delay); see also *Wilkins-Jones v. County of Alameda*, 2011 WL 3652495 at \*11 (N.D. Cal. 2011), order vacated on other grounds in part by 2012 WL 3116025 (N.D. Cal. 2012) (denying amendment sought after three years of litigation on eve of summary judgment upon finding of substantial prejudice to defendants).

<sup>59</sup>*Arthur v. Maersk, Inc.* 434 F.3d at 204 (internal quotation omitted); and *Adams v. Gould Inc.*, 739 F.2d 858, 868, 5 Employee Benefits Cas. (BNA) 1878, 116 L.R.R.M. (BNA) 3182, 101 Lab. Cas. (CCH) P 11095, 39 Fed. R. Serv. 2d 627 (3d Cir. 1984) (reversing district court denial of leave to amend where motion for leave filed four years after original complaint, where there was no extrinsic evidence of bad faith and plaintiffs had colorable excuse for delay); see also *Schor v. Daley*, 563 F. Supp. 2d 893, 904 (N.D. Ill. 2008), *aff'd*, 576 F.3d 775 (7th Cir. 2009) (plaintiff had unduly delayed filing motion to amend because pending motion to dismiss had been fully briefed for two months and plaintiffs had already amended their complaint 5 months previously and plaintiffs offer no excuse for the delay); and *Adams v. Gould Inc.*, 739 F.2d 858, 868, 5 Employee Benefits Cas. (BNA) 1878, 116 L.R.R.M. (BNA) 3182, 101 Lab. Cas. (CCH) P 11095, 39 Fed. R. Serv. 2d 627 (3d Cir. 1984) (reversing district court denial of leave to amend where motion for leave filed four years after original complaint, where there was no extrinsic evidence of bad faith and plaintiffs had colorable excuse for delay).; and

<sup>60</sup>*Block*, 988 F.2d at 350.

<sup>61</sup>*Sly Magazine LLC v. Weider Publ'ns LLC*, 241 F.R.D. 527 at 531 (S.D.N.Y. 2007) (same).

<sup>62</sup>See *U.S. v. New Castle County*, 116 F.R.D. 19, 24–25, 26 Env’t. Rep. Cas. (BNA) 1454, 18 Env’t. L. Rep. 20188 (D. Del. 1987); see also *Sly Magazine, LLC v. Weider Publications, LLC*, 241 F.R.D. at 533 (motion to join 12 addition parties that requires re-opening of discovery on scale to accommodate so many new defendants would cause significant further delay and expense).

<sup>63</sup>*Madera v. Ameriquet Mort. Co. (In re Madera)*, 2008 U.S. Dist. LEXIS 25864, at \*39–41 (E.D. Penn. Mar. 27, 2008).

<sup>64</sup>*Madera v. Ameriquet Mort. Co. (In re Madera)*, 2008 U.S. Dist. LEXIS 25864, at \*39–41 (E.D. Penn. Mar. 27, 2008).

<sup>65</sup>*A.V. by Versace, Inc. v. Gianni Versace S.p.A.*, 87 F. Supp. 2d 281, 299, 46 Fed. R. Serv. 3d 660 (S.D. N.Y. 2000); see also *Ginsberg v. Government Properties Trust, Inc.*, 2008 WL 3833876 at \*2 (S.D. N.Y. 2008) (amendment of complaint not prejudicial because of the amount of discovery that would be required — given that the claim in the proposed amendment arose from the same transaction that was the subject of the original complaint — no dispositive motions were pending, and no trial date was set; thus defendant will incur little extra time or expense in defending the new claims).

<sup>66</sup>*In re Mortgage Lenders Network, USA, Inc.*, 395 B.R. 871, 879 (Bankr. D. Del. 2008) (finding no bad faith where plaintiff waited to amend in hopes for a settlement, and promptly sought amendment when settlement was not forthcoming).

<sup>67</sup>*Reisner v. General Motors Corp.*, 511 F. Supp. 1167, 1172, 1981-1 Trade Cas. (CCH) ¶ 63936 (S.D. N.Y. 1981), judgment aff’d, 671 F.2d 91, 1982-1 Trade Cas. (CCH) ¶ 64542 (2d Cir. 1982).

<sup>68</sup>See *Williams v. Savage*, 569 F. Supp. 2d 99, 107–08, 71 Fed. R. Serv. 3d 411 (D.D.C. 2008) (discussing cases and concluding that plaintiffs did “flout the rules that provide for the orderly disposition of case and then ask this court’s indulgence so that they may try again”).

<sup>69</sup>*In re Bernard L. Madoff Inv. Securities LLC*, 468 B.R. 620, 622, 56 Bankr. Ct. Dec. (CRR) 85 (Bankr. S.D. N.Y. 2012) (citations omitted).

<sup>70</sup>*In re Bernard L. Madoff Inv. Securities LLC*, 468 B.R. 620, 622, 56 Bankr. Ct. Dec. (CRR) 85 (Bankr. S.D. N.Y. 2012) (citations omitted); see also *Massarsky v. General Motors Corp.*, 706 F.2d 111, 125, 31 Fair Empl. Prac. Cas. (BNA) 832, 31 Empl. Prac. Dec. (CCH) P 33516 (3d Cir. 1983).

<sup>71</sup>*In re Hechinger Investment Co. of Delaware, Inc.*, 297 B.R. 390, 393 (Bankr. D. Del. 2003).

<sup>72</sup>*VKK Corp. v. National Football League*, 244 F.3d 114, 128, 2001-1 Trade Cas. (CCH) ¶ 73195, 49 Fed. R. Serv. 3d 162 (2d Cir. 2001); *In re IH 1, Inc.*, 2011 WL 6934552 at \*3 (Bankr. D. Del. 2011) (same, citing *Garvin v. City of Philadelphia*, 354 F.3d 215, 222, 57 Fed. R. Serv. 3d 829 (3d Cir. 2003),

<sup>73</sup>*Izaguirre v. Greenwood Motor Lines, Inc.*, 2011 WL 5325658 at \*4 (D. Idaho 2011), aff’d, 523 Fed. Appx. 482 (9th Cir. 2013) (citing *Grimsley v. Methodist Richardson Medical Center Foundation, Inc.*, 2011 WL 825749 (N.D. Tex. 2011).

<sup>74</sup>See *Joseph*, 638 F.3d at 559.

<sup>75</sup>*Bishop v. Best Buy, Co. Inc.*, 2010 WL 4159566 at \*2 (S.D. N.Y. 2010), on reconsideration, 2011 WL 4011449 (S.D. N.Y. 2011) and aff’d, 518 Fed. Appx. 55 (2d Cir. 2013) (citation omitted).

<sup>76</sup>Fed. R. Civ. P. 15(c). In *Engrav, Relation Back of Amendments Naming Previously Unnamed Defendants Under Federal Rule of Civil Procedure 15(c)*, 89 Cal. L.R. 1549, 1555–64 (2000), the author presents a history of relation back from the common law through the adoption of the Federal Rules of Civil Procedure in 1938 and the amendments of Rule 15 in 1966 (which expressly provided for relation back re New Defendants) and 1991 (which specified that Rule 4(m) sets the relevant period in which the Notice/Prejudice Condition and

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Knowledge/Mistake Condition must occur). Rule 15 was amended effective December 1, 2007, but the changes made were intended to be stylistic only. In re Global Crossing, Ltd., 385 B.R. 52, 64 n.13, 49 Bankr. Ct. Dec. (CRR) 224 (Bankr. S.D. N.Y. 2008).

<sup>77</sup>Fed. R. Civ. P. 15(c)(1).

<sup>78</sup>Wilkins-Jones, 2011 WL 3652495 at \*10 (citing *Krupski*, 130 S.Ct. at 2496).

<sup>79</sup>*Randall's Island Family Golf Ctrs. v. Acushnet Co.* (In re *Randall's Island Family Golf Ctrs.*), 2002 Bankr LEXIS 1247 \*6 (Bankr. S.D.N.Y. Nov. 8, 2002).

<sup>80</sup>*Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 130 S. Ct. 2485, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010).

<sup>81</sup>*Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 130 S. Ct. 2485, 2490, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010).

<sup>82</sup>*Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 130 S. Ct. 2485, 2490, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010).

<sup>83</sup>*Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 130 S. Ct. 2485, 2490–91, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010).

<sup>84</sup>*Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 130 S. Ct. 2485, 2490–91, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010).

<sup>85</sup>*Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 130 S. Ct. 2485, 2491, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010).

<sup>86</sup>*Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 130 S. Ct. 2485, 2491, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010).

<sup>87</sup>*Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 130 S. Ct. 2485, 2491–92, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010).

<sup>88</sup>Fed. R. Civ. P. 15(c)(1)(C).

<sup>89</sup>*Krupski*, 130 S.Ct. at 2490.

<sup>90</sup>*Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 130 S. Ct. 2485, 2492, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010).

<sup>91</sup>*Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 130 S. Ct. 2485, 2492, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010).

<sup>92</sup>See, generally, Lusardi, Rule 15(c) Mistake: The Supreme Court in *Krupski* Seeks to Resolve a Judicial Thicket, 49 U. Louisville L. Rev. 317, 323–328 (2011) (discussing the “majority rule” that followed this reading of Rule 15(c)(1)(C)); and *Joseph v. Elan Motorsports Technologies Racing Corp.*, 638 F.3d 555, 559–60, 79 Fed. R. Serv. 3d 1 (7th Cir. 2011) (discussing how *Krupski* “cut the ground out from under” the prior method of analyzing the mistake aspect of relation back); and *Goodman v. Praxair, Inc.*, 494 F.3d 458, 467–70, 68 Fed. R. Serv. 3d 850 (4th Cir. 2007) (summarizing cases that parse “mistake” language of the Rule). See also *In re Greater Southeast Community Hosp. Corp. I*, 341 B.R. 91, 98, 64 Fed. R. Serv. 3d 627 (Bankr. D. D.C. 2006), order amended on reconsideration, 2006 WL 2083500 (Bankr. D. D.C. 2006) (“[T]he critical question . . . is whether [plaintiff’s] failure to name the Added Defendants constitutes a mistake . . . as required for the amendment to relate back to the date of the filing of the original complaint.”).

<sup>93</sup>*Krupski*, 130 S.Ct. 2490, 2492 n. 2. The cases that so relied are *Rendall-Speranza v. Nassim*, 107 F.3d 913, 918, 37 Fed. R. Serv. 3d 12 (D.C. Cir. 1997), *Cornwell v. Robinson*, 23 F.3d 694, 705, 64 Fair Empl. Prac. Cas. (BNA) 1254, 65 Empl. Prac. Dec. (CCH) P 43249 (2d Cir. 1994), and *Arthur v. Maersk, Inc.*, 434 F.3d 196, 208, 2006 A.M.C. 245, 63 Fed. R. Serv. 3d 982 (3d Cir. 2006). The cases which anticipated, at least in most respects, the Court’s approach to the Knowledge/Mistake Condition, are *Goodman v. Praxair, Inc.*, 494 F.3d 458, 469–70, 68 Fed. R. Serv. 3d 850 (4th Cir. 2007) and *Leonard v. Parry*, 219 F.3d 25, 28–29, 47

Fed. R. Serv. 3d 167 (1st Cir. 2000).

<sup>94</sup>Krupski, 130 S.Ct. at 2492, n.1 and 2493 (emphasis added).

<sup>95</sup>Fed. R. Civ. P. 15(c)(1)(C) (emphasis added).

<sup>96</sup>Krupski, 130 S.Ct. at 2493 (emphasis in original and parenthetical added).

<sup>97</sup>Krupski v. Costa Crociere S. p. A., 560 U.S. 538, 130 S. Ct. 2485, 2493–94, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010). Elsewhere in the opinion, the Court further explains, “Rule 15(c)(1)(C) does permit a court to examine a plaintiff’s conduct during the Rule 4(m) period, but not in the way or for the purpose respondent or the Court of Appeals suggests. As we have explained, the question under Rule 15(c)(1)(C)(ii) is what the prospective defendant should have understood about the plaintiff’s intent in filing the original complaint against the first defendant. To the extent the plaintiff’s post-filing 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 . . . . The plaintiff’s post-filing conduct is otherwise immaterial to the question of whether an amended complaint relates back.” Krupski v. Costa Crociere S. p. A., 560 U.S. 538, 130 S. Ct. 2485, 2496–97, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010) (citations omitted).

<sup>98</sup>Krupski v. Costa Crociere S. p. A., 560 U.S. 538, 130 S. Ct. 2485, 2494, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010). Elsewhere in the opinion the Court further explains, “When the original complaint and the plaintiff’s conduct compel the conclusion that the failure to name the prospective defendant in the original complaint was the result of a fully informed decision as opposed to a mistake concerning the proper defendant’s identity, the requirements of Rule 15(c)(1)(C)(ii) are not met. This conclusion is in keeping with our rejection today of the Court of Appeals’ reliance on the plaintiff’s knowledge to deny relation back.” Krupski v. Costa Crociere S. p. A., 560 U.S. 538, 130 S. Ct. 2485, 2496, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010).

<sup>99</sup>Krupski v. Costa Crociere S. p. A., 560 U.S. 538, 130 S. Ct. 2485, 2497, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010).

<sup>100</sup>In *In re Bernard L. Madoff Inv. Securities LLC*, 468 B.R. 620, 629, 56 Bankr. Ct. Dec. (CRR) 85 (Bankr. S.D. N.Y. 2012), the court found that in light of the allegations in the Original Complaint and the plaintiff’s conduct, it was not a mistake for the New Defendants to believe their omission from the Original Complaint was the result of a fully-informed decision because, among other things, the plaintiff trustee (the Madoff trustee) was a sophisticated party who had commenced hundreds of adversary proceedings in the bankruptcy case, and who possessed numerous relevant documents and financial disclosure forms that identified the roles, legal status, and interests of the New Defendants, and because the trustee was armed with a large team of lawyers who had adequate time to analyze such documentation. It would appear that a New Defendant can use the capacities of a sophisticated and well-lawyered plaintiff against it in Rule 15(c)(1)(C)(ii) proof.

<sup>101</sup>Krupski v. Costa Crociere S. p. A., 560 U.S. 538, 130 S. Ct. 2485, 2498, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010).

<sup>102</sup>Krupski v. Costa Crociere S. p. A., 560 U.S. 538, 130 S. Ct. 2485, 2498, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010).

<sup>103</sup>Krupski, 130 S.Ct. at 2498.

<sup>104</sup>Krupski, 130 S.Ct. at 2493–94.

<sup>105</sup>Krupski, 130 S.Ct. at 2494 (citations omitted).

<sup>106</sup>Krupski, 130 S.Ct. at 2494 (emphasis added). The emphases placed into the quote by the authors correlate with the Court’s recapitulation of the holding later in the opinion: “The question under Rule 15(c)(1)(C)(ii) is not whether Krupski knew or should have known the identity of Costa Crociere as the proper defendant, but whether Costa Crociere knew or should have known that it would have been named as a defendant *but for an error*.” Krupski,

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130 S.Ct. at 2493 (emphasis added). The Court’s appraisal of “mistake” coheres with the grammatical structure of Rule 15(c)(1)(C)(ii). The phrase “but for a mistake concerning the proper party’s identity” is a dependent clause, whose meaning informs the independent clause “the party to be brought in by amendment . . . knew or should have known that the action would have been brought against it.”

<sup>107</sup>The Fourth Circuit Court of Appeals in *Goodman v. Praxair* anticipated the *Krupski* approach in this regard:

The Rule’s emphasis on notice, rather than on the type of “mistake” that has occurred, saves the courts not only from an unguided and therefore undisciplined sifting of reasons for an amendment but also from prejudicing would-be defendants who rightfully have come to rely on the statute of limitations for repose. The disagreement among courts over which mistakes are forgiven under Rule 15(c) and which mistakes result in dismissal illustrates the perils of the approach.

*Goodman v. Praxair, Inc.*, 494 F.3d 458, 473, 68 Fed. R. Serv. 3d 850 (4th Cir. 2007).

<sup>108</sup>In *Lusardi*, 49 U. of Louisville L.R. at 320–22, 323–328, the author discusses the evolution of the “mistake” provision of Rule 15(c) and reviews the relevant Advisory Committee’s note, concluding that the latter “does not focus on the term ‘mistake’ and does not treat it as an integral part of the rule. Instead it appears to use ‘mistake’ as a short hand for the type of problems that lead to the need for relation back . . . [And further the] key to relation back for the Advisory Committee was whether the defendant had received notice, not whether the claimant lacked knowledge or committed an error at the time he filed the original claim.”

<sup>109</sup>*Krupski*, 130 S.Ct. at 2494 (citations omitted). See also *Lundy v. Adamar of New Jersey, Inc.*, 34 F.3d 1173, 1184–86, 29 Fed. R. Serv. 3d 496 (3d Cir. 1994) (Becker, J. concurring in the judgment and dissenting in part) (review of advisory committee notes on Rule 15(c) and expressions of liberal pleading practices throughout the Federal Rules of Civil Procedure).

<sup>110</sup>*Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 130 S. Ct. 2485, 2494, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010). See also *In re Global Crossing, Ltd.*, 385 B.R. 52, 69, 49 Bankr. Ct. Dec. (CRR) 224 (Bankr. S.D. N.Y. 2008), which cites with approval *In re Damrill*, 232 B.R. 767, 772 (Bankr. W.D. Mo. 1999) (“Rule 15(c) was primarily intended to alleviate harsh decisions which had defeated claims on technicalities that should have been decided on their merits”).

<sup>111</sup>*Krupski*, 130 S.Ct. at 2494.

<sup>112</sup>*Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 130 S. Ct. 2485, 2494, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010).

<sup>113</sup>*Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 130 S. Ct. 2485, 2494, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010). The *Krupski* policy discussion was anticipated in many respects by that of the Fourth Circuit Court of Appeals in *Goodman v. Praxair, Inc.*, in which the Court described Rule 15’s subtle and complex compromise of two competing policies:

*On the one hand*, the Rules policy in favor of simplicity in pleadings . . . and their liberal amendment, . . . as well as the administration of cases to secure their just determination . . . *On the other hand*, the policy of statutes of limitation are legislative determinations that give defendants predictable repose from claims after the passage of a specified time, and courts must, in recognition of the separation of powers, hesitate to extend or ignore them for judicially created reasons.

*Goodman v. Praxair, Inc.*, 494 F.3d 458, 467–68, 68 Fed. R. Serv. 3d 850 (4th Cir. 2007) (emphasis in original and citations omitted).

<sup>114</sup>*William H. McGee & Co. v. M/V Ming Plenty*, 164 F.R.D. 601, 606 (S.D. N.Y. 1995) (insurer of manufacturer of machines damaged in transit sued mutually-related shippers, including (incorrectly) Kenney Transport, Inc. and was permitted to amend to add Kenney Transport (Korea) Ltd., with such amendment relating back — the court noted that employees of the latter sometimes confused the two).

<sup>115</sup>Lusardi, 49 U. of Louisville L.R. at 319 and 336 (citing, as an example, *Roberts v. Michaels*, 219 F.3d 775, 777–78, 83 Fair Empl. Prac. Cas. (BNA) 653, 80 Empl. Prac. Dec. (CCH) P 40600, 46 Fed. R. Serv. 3d 1035 (8th Cir. 2000)); *Engrav*, 89 Cal. L.R. at 1559–65 (also explaining evolution of this Rule language to the present formulation).

<sup>116</sup>The latter view is embraced by, e.g., *Goodman v. Praxair, Inc.*, 494 F.3d 458, 466–69, 68 Fed. R. Serv. 3d 850 (4th Cir. 2007) (extensive discussion of Rule 15(c) policies and adoption in dicta of application of relation back to added New Defendants); *In re Global Crossing, Ltd.*, 385 B.R. 52, 65, 49 Bankr. Ct. Dec. (CRR) 224 (Bankr. S.D. N.Y. 2008); *In re Greater Southeast Community Hosp. Corp. I*, 341 B.R. 91, 99, 64 Fed. R. Serv. 3d 627 (Bankr. D. D.C. 2006), order amended on reconsideration, 2006 WL 2083500 (Bankr. D. D.C. 2006) (rejecting restriction to replacing defendants based upon “plain language” of Rule 15(c)(3)), and *Doe v. Whelan*, 2010 WL 5093102 at \*2 (D. Conn. 2010). Under this view, the process and applicable standards for adding a New Defendant are the same for replacing an Original Defendant with a New Defendant. *Doe v. Whelan*, 2010 WL 5093102 at \*2. Courts that restrict relation back to replacement of Old Defendant with New Defendant include *Asher v. Unarco Material Handling, Inc.*, 596 F.3d 313, 318–19 (6th Cir. 2010) (an amendment which adds a new party creates a new cause of action and there is no relation back to the original complaint for purposes of limitations); *Asten v. City of Boulder*, 2010 WL 5464298 at \*6 (D. Colo. 2010), report and recommendation adopted, 2010 WL 5464297 (D. Colo. 2010) (not citing any circuit authority, holding that adding a New Defendant is contrary to “plain language” of Rule 15(c)(1)(C)’s “changes a party or the naming of a party against whom a claim is asserted”); and *Telesaurus VPC, LLC v. Power*, 2011 WL 5024239 at \*2–6 (D. Ariz. 2011) (extensive discussion of Rule of Rule 15(c) policy and criticism of *Goodman v. Praxair*).

<sup>117</sup>In *Lundy v. Adamar of New Jersey, Inc.*, (Becker, J., concurring in the judgment and dissenting in part) referred to the same “or” and stated that “[s]ince the Rule on its face draws no distinction between the two scenarios, I feel constrained to conclude that [it] allowed Lundy to relate back the *addition* of the Carlinos as defendants.” *Lundy v. Adamar of New Jersey, Inc.*, 34 F.3d 1173, 1192, 29 Fed. R. Serv. 3d 496 (3d Cir. 1994) (emphasis in original). The Third Circuit Court of Appeals has opined that, “[t]o limit relation back to cases involving misnomer, excluding cases in which the amendment adds a new party, would render the second clause of [the quoted language] superfluous.” *Arthur v. Maersk, Inc.*, 434 F.3d 196, 209, 2006 A.M.C. 245, 63 Fed. R. Serv. 3d 982 (3d Cir. 2006).

<sup>118</sup>In *re Greater Southeast Community Hosp. Corp. I*, 341 B.R. 91, 99, 64 Fed. R. Serv. 3d 627 (Bankr. D. D.C. 2006), order amended on reconsideration, 2006 WL 2083500 (Bankr. D. D.C. 2006).

<sup>119</sup>*Goodman v. Praxair, Inc.*, 494 F.3d 458, 468, 68 Fed. R. Serv. 3d 850 (4th Cir. 2007) (citing *Lundy v. Adamar of New Jersey, Inc.*, 34 F.3d 1173, 1192–93, 29 Fed. R. Serv. 3d 496 (3d Cir. 1994) (Becker, J., concurring in the judgment and dissenting in part)).

<sup>120</sup>In *Engrav*, 89 Cal. L.R. at 1574–77, the author, writing 10 years before *Krupski*, argued that as long as Rule 15(c) notice requirements are met, allowing amendments adding defendants . . . to relate back “would advance the general policy behind the federal rules as well as the specific policy underlying Rule 15(c)’s relation back provision.”

<sup>121</sup>*Goodman v. Praxair, Inc.*, 494 F.3d at 468.

<sup>122</sup>*Krupski*, 130 S.Ct at 2494.

<sup>123</sup>See *Goodman v. Praxair, Inc.*, 494 F.3d at 469 (4<sup>th</sup> Cir. 2007) (“we can discern no policy that would be served by defendant’s restrictive reading of ‘changes’ which would force the amending party to drop a defendant for each defendant he adds” and “[b]ecause no limitations policy is at stake in the interpretation of ‘changes’ the liberal amendment policy of the federal rules becomes paramount”).

<sup>124</sup>*Venezia v. 12th & Div. Properties, LLC*, 2010 WL 3122787 (M.D. Tenn. 2010). Analytically indistinct, but not argued at equal length is *Jahn v. Bedford Consulting Grp.*

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*LLC*, a district court case in which a trustee unsuccessfully sought to add New Defendants from whom it could recover avoided fraudulent transfers. In re U.S. Ins. Group, LLC, 441 B.R. 294, 297–98, 53 Bankr. Ct. Dec. (CRR) 196 (Bankr. E.D. Tenn. 2010). The *Jahn* court noted that the Sixth Circuit’s “replacement only” doctrine has been used to forbid addition of a New Defendant in a preference case. In re U.S. Ins. Group, LLC, 441 B.R. 294, 297–98, 53 Bankr. Ct. Dec. (CRR) 196 (Bankr. E.D. Tenn. 2010) (citing In re Kent Holland Die Casting & Plating, Inc., 928 F.2d 1448, 1449, Bankr. L. Rep. (CCH) P 73866 (6th Cir. 1991).

<sup>125</sup>*Venezia v. 12<sup>th</sup> & Division Properties, LLC*, at \*4. The court in *DeBois v. Pickoff*, 2011 WL 1233665 (S.D. Ohio 2011) recites Sixth Circuit opinions (discussed in a succeeding footnote) and notes that, notwithstanding criticism of the replacement-only interpretation, the Sixth Circuit rule “has consistently been that a Rule 15(c) ‘change’ in parties requires a one-for-one substitution.” *DeBois*, 2011 WL 1233665 at \*10. Further, the court concluded that it is constrained to follow the Sixth Circuit rule unless the United States Supreme Court rules specifically to the contrary, which it did not do in *Krupski*. *DeBois*, 2011 WL 1233665 at \*11–12.

<sup>126</sup>*Venezia v. 12th & Div. Properties, LLC*, 2010 WL 3122787 at \*3–4 (M.D. Tenn. 2010). See also *Engrav*, 89 Cal. L.R. at 1570 (describing how [in 2001] “most courts” hold that a plaintiff’s lack of awareness that another potential New Defendant exists is not a “mistake” but just a lack of knowledge that does not constitute a “mistake” within the Knowledge/Mistake Condition, and hence relation back does not apply to such added New Defendant).

<sup>127</sup>*Venezia v. 12th & Div. Properties, LLC*, 2010 WL 3122787 at \*2–3 (M.D. Tenn. 2010).

<sup>128</sup>*Venezia v. 12th & Div. Properties, LLC*, 2010 WL 3122787 at \*2–3 (M.D. Tenn. 2010).

<sup>129</sup>*Venezia v. 12th & Div. Properties, LLC*, 2010 WL 3122787 at \*4 (M.D. Tenn. 2010).

<sup>130</sup>*Venezia v. 12th & Div. Properties, LLC*, 2010 WL 3122787 at \*5 (M.D. Tenn. 2010).

<sup>131</sup>In re U.S. Ins. Group, LLC, 441 B.R. 294, 297–98, 53 Bankr. Ct. Dec. (CRR) 196 (Bankr. E.D. Tenn. 2010).

<sup>132</sup>In *Joseph v. Elan Motorsports Technologies Racing Corp.*, 638 F.3d 555, 79 Fed. R. Serv. 3d 1 (7th Cir. 2011), the Seventh Circuit Court of Appeals characterized *Krupski* as permitting both substitution by and addition of New Defendants. *Joseph*, 638 F.3d at 559–60. The opinion does not further address this issue.

<sup>133</sup>The authors discuss the *Venezia* opinion because it presents the best-developed argument for the Sixth Circuit’s “replacement only” doctrine. The circuit-level cases are sparse in reasoning, and the notion that an added New Defendant creates a new cause of action appears to have been wholly subsumed within the notion that “mistake” is restricted to misnomer or misdescription that can be rectified only by replacement of the Original Defendant. All reported Sixth Circuit cases declare the doctrine and its longevity and then cite one another without discussion. See *Asher v. Unarco Material Handling, Inc.*, 596 F.3d 313, 318 (6th Cir. 2010); *Cox v. Treadway*, 75 F.3d 230, 240, 43 Fed. R. Evid. Serv. 958, 34 Fed. R. Serv. 3d 243, 1996 FED App. 0028P (6th Cir. 1996); In re Kent Holland Die Casting & Plating, Inc., 928 F.2d 1448, 1449, Bankr. L. Rep. (CCH) P 73866 (6th Cir. 1991); *Smart v. Ellis Trucking Co., Inc.*, 580 F.2d 215, 218, 99 L.R.R.M. (BNA) 2059, 84 Lab. Cas. (CCH) P 10729 (6th Cir. 1978); *Marlowe v. Fisher Body*, 489 F.2d 1057, 1064, 6 Fair Empl. Prac. Cas. (BNA) 1083, 6 Empl. Prac. Dec. (CCH) P 8997 (6th Cir. 1973). Reviewing these cases, one could conclude that the Sixth Circuit’s replacement-only doctrine rests critically on the reasoning of an inapposite case — *U. S. for Use and Benefit of Statham Instruments, Inc. v. Western Cas. & Sur. Co.*, 359 F.2d 521, 10 Fed. R. Serv. 2d 273 (6th Cir. 1966), which predates the 1966 amendments to Rule 15, which themselves added the first predecessor formulation to what is now Rule 15(c)(1)(C)(C)(ii) [as well as the first predecessor formulation of the Rule 15(C) language discussed at the outset of this section of this article]. *Statham Instruments* itself

relies exclusively on *U.S. v. Scheurman*, 218 F. 915 (D. Idaho 1914), which predates the Federal Rules of Civil Procedure by 24 years. Neither of these two fountainheads provides substantial grounds for the Sixth Circuit doctrines ultimately defended in *Venezia*.

<sup>134</sup>*Smith v. City of Akron*, 476 Fed. Appx. 67 (6th Cir. 2012) (quoting *Cox v. Treadway*, 75 F.3d 230, 240, 43 Fed. R. Evid. Serv. 958, 34 Fed. R. Serv. 3d 243, 1996 FED App. 0028P (6th Cir. 1996). There has been some dissent in lower courts within the Sixth Circuit. See, e.g. *Erie Indemnity Co. v. Keurig, Inc.*, 2011 WL 2893013 at \*3 (N.D. Ohio 2011), motion to certify appeal denied, 2011 WL 4361588 (N.D. Ohio 2011) (surveying Sixth Circuit cases and post-*Krupski* district court cases that reaffirm Sixth Circuit case law, but concluding that *Krupski* expanded breadth of qualifying “mistake”).

<sup>135</sup>Rule 15(c)(1)(B).

<sup>136</sup>*Benfield v. Mocatta Metals Corp.*, 26 F.3d 19, 23, R.I.C.O. Bus. Disp. Guide (CCH) P 8599 (2d Cir. 1994).

<sup>137</sup>*In re Austin Driveway Services, Inc.*, 179 B.R. 390, 395, 26 Bankr. Ct. Dec. (CRR) 1056, 33 Collier Bankr. Cas. 2d (MB) 72 (Bankr. D. Conn. 1995). In that case, the court stated that “when the amended pleading does not rely upon the facts and transactions originally pled . . . but rather is based on new facts and different transactions, the proposed amendment will not relate back to the original.” *Id.* (citing *In re Chaus Securities Litigation*, 801 F. Supp. 1257, 1264, Fed. Sec. L. Rep. (CCH) P 96987 (S.D. N.Y. 1992)).

<sup>138</sup>See *In re Lenox Healthcare, Inc.*, 343 B.R. 96, 106–07, 38 Employee Benefits Cas. (BNA) 1505 (Bankr. D. Del. 2006) (Walrath, J.) (pre-*Twombly* and *Iqbal*, discussing factors for “same transaction” requirement in preference cases, finding Original Complaint lacked specifics sufficient to conclude that the requirement was fulfilled).

<sup>139</sup>Fed. R. Civ. P. 15(c)(1)(C).

<sup>140</sup>Fed. R. Civ. P. 4(m). The full text of Rule 4(m) is as follows:

Time Limit for Service. If a defendant is not served within 120 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

<sup>141</sup>Fed. R. Civ. P. 4(m). See *The Global Crossing Estate Representative*, 385 B.R. at 81–85 (Bankr. S.D.N.Y. 2008) (discussing grounds for finding good cause for extension of the Rule 4(m) period, and noting that such grounds were found historically for difficulties in serving known defendants, and not for discovering unknown defendants).

<sup>142</sup>See *The Global Crossing Estate Representative*, 385 B.R. at 89–90 (Bankr. S.D.N.Y. 2008).

<sup>143</sup>*Erie Indemnity Co. v. Keurig, Inc.*, 2011 WL 2893013 at \*4 (N.D. Ohio 2011), motion to certify appeal denied, 2011 WL 4361588 (N.D. Ohio 2011).

<sup>144</sup>*Erie Indemnity Co. v. Keurig, Inc.*, 2011 WL 2893013 at \*4 (N.D. Ohio 2011), motion to certify appeal denied, 2011 WL 4361588 (N.D. Ohio 2011).

<sup>145</sup>*Erie Indemnity Co. v. Keurig, Inc.*, 2011 WL 2893013 at \*4 (N.D. Ohio 2011), motion to certify appeal denied, 2011 WL 4361588 (N.D. Ohio 2011).

<sup>146</sup>*Erie Indemnity Co. v. Keurig, Inc.*, 2011 WL 2893013 at \*4 (N.D. Ohio 2011), motion to certify appeal denied, 2011 WL 4361588 (N.D. Ohio 2011) (emphasis added).

<sup>147</sup>Fed. R. Civ. P. 4(m). Rule 4(f) sets forth the requirements for service in foreign countries and does not impose any specific time limits. Fed. R. Civ. P. 4(f). Rule 4(j)(1) provides that a foreign state or its political subdivisions must be served in accordance with 28 U.S.C.A. § 1608. Fed. R. Civ. P. 4(j)(1).

<sup>148</sup>See Fed. R. Civ. P. 4(m) (emphasis added).

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<sup>149</sup>Fed. R. Civ. P. 15(c)(1)(C)(i). The Supreme Court has expressly declared that Rule 15(c) does not require a plaintiff to move to amend her complaint or to file and serve an amended complaint within the Rule 4(m) period. *Krupski*, 130 S.Ct. at 2497 n. 5; 177 L.Ed.2d at 61 n. 5. “Rule 15(c)(1)(C)(i) simply requires that the prospective defendant has received sufficient “notice of the action” within the Rule 4(m) period that he will not be prejudiced in defending the case on the merits.” *Krupski*, 130 S.Ct. at 2497 n. 5; 177 L.Ed.2d at 61 n. 5.

<sup>150</sup>*Krupski*, 130 S.Ct. at 2497.

<sup>151</sup>*Baez v. Jetblue Airways*, 2010 U.S. Dist. LEXIS 109895 at \*14 (E.D.N.Y. Oct. 15, 2010) (it is sufficient that such notice occur through informal means).

<sup>152</sup>*Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067, 1076, Bankr. L. Rep. (CCH) P 75484, 1994 A.M.C. 1209, 26 Fed. R. Serv. 3d 1451 (2d Cir. 1993).

<sup>153</sup>*Varlack v. SWC Caribbean, Inc.*, 13 V.I. 666, 550 F.2d 171, 175, 1 Fed. R. Evid. Serv. 647, 23 Fed. R. Serv. 2d 37, 40 A.L.R. Fed. 526 (3d Cir. 1977) (no clear error in holding that defendant had adequate notice of the lawsuit when he coincidentally saw a copy of the complaint naming both the restaurant where he was manager and an unknown employee as defendants within the limitations period, because he knew that the “unknown employee” referred to him)

<sup>154</sup>*Joseph v. Elan Motorsports Technologies Racing Corp.*, 638 F.3d 555, 560–61, 79 Fed. R. Serv. 3d 1 (7th Cir. 2011).

<sup>155</sup>*Joseph v. Elan Motorsports Technologies Racing Corp.*, 638 F.3d 555, 560–61, 79 Fed. R. Serv. 3d 1 (7th Cir. 2011).

<sup>156</sup>IH 1, 2011 WL 6934552 at \*4 (shared registered agent for Old Defendant and New Defendant received notice).

<sup>157</sup>*The Global Crossing Estate Representative*, 385 B.R. at 66, n.20.

<sup>158</sup>See *Wilkins-Jones v. County of Alameda*, 2012 WL 3116025 at \*13 (N.D. Cal. 2012).

<sup>159</sup>See IH 1, 2011 WL 6934552 at \*4 (discussing cases); and *Abdell v. City of New York*, 759 F. Supp. 2d 450, 455 (S.D. N.Y. 2010) and *B.J.S. v. State Educ. Department/University of State of N.Y.*, 2011 WL 3651051 at \*15 (W.D. N.Y. 2011), report and recommendation adopted, 2011 WL 4549192 (W.D. N.Y. 2011), as amended, (Sept. 30, 2011) (same).

<sup>160</sup>See *Rodriguez v. City of New York*, 2011 WL 4344057 (S.D. N.Y. 2011) (finding no imputed notice to John Doe officers merely through notice of Original Complaint to corporation counsel); *Berry v. Village of Millbrook*, at \*5 (S.D.N.Y. Sep. 29, 2010) (constructive notice found where New Defendant had been clearly identified in Original Complaint and the attorney knew or should have known that New Defendant would be added to suit); and *Kregler v. City of New York*, 821 F. Supp. 2d 651 (S.D. N.Y. 2011) (comparing its facts to those of *Berry*, finding no constructive knowledge where no mention of New Defendant to attorney within requisite period). In *In re Teligent Services, Inc.*, 372 B.R. 594, 602–03 (S.D. N.Y. 2007), the court found notice to common attorney to be insufficient because plaintiff did not show attorney to know specifics of claims).

<sup>161</sup>*Blaskiewicz v. County of Suffolk*, 29 F. Supp. 2d 134, 139, 42 Fed. R. Serv. 3d 1324 (E.D. N.Y. 1998).

<sup>162</sup>*Garvin v. City of Philadelphia*, 354 F.3d 215, 223, 57 Fed. R. Serv. 3d 829 (3d Cir. 2003); *Tarta v. Nation Care, Inc.*, 864 F. Supp. 2d 173, 82 Fed. R. Serv. 3d 1042 (D.D.C. 2012).

<sup>163</sup>*Velez v. Fogarty*, 2008 WL 5062601 at \*5 (S.D. N.Y. 2008).

<sup>164</sup>*In re Allbrand Appliance & Television Co., Inc.*, 875 F.2d 1021, 1025, 16 Fed. R. Serv. 3d 1311 (2d Cir. 1989). See also *Ex parte Novus Utilities, Inc.*, 85 So. 3d 988 (Ala. 2011) (collecting cases on “identity of interest” theory of constructive notice).

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- <sup>165</sup>Unger v. Caloric Corp., 875 F.2d at 1025 (2d Cir. 1989).
- <sup>166</sup>In re Integrated Resources Real Estate Ltd. Partnerships Securities Litigation, 815 F. Supp. 620, 646, Fed. Sec. L. Rep. (CCH) P 97311 (S.D. N.Y. 1993).
- <sup>167</sup>Playwell Toy, Inc. v. Bureau Veritas Consumer Prod. Services, Inc., 2008 U.S. Dist. LEXIS 83001 (W.D.N.Y. Sept. 19, 2008) at \*2–4 & 16.
- <sup>168</sup>Playwell Toy, Inc. v. Bureau Veritas Consumer Prod. Services, Inc., 2008 U.S. Dist. LEXIS 83001 (W.D.N.Y. Sept. 19, 2008) at \*2–4.
- <sup>169</sup>Playwell Toy, Inc. v. Bureau Veritas Consumer Prod. Services, Inc., 2008 U.S. Dist. LEXIS 83001 (W.D.N.Y. Sept. 19, 2008) at \*16–17.
- <sup>170</sup>Tokio Marine Mgmt., Inc. v. Japan Intermodal Transport Co., Ltd, 1991 U.S. Dist. LEXIS 15977 (S.D.N.Y. Nov. 7, 1991) at \*1–2.
- <sup>171</sup>Tokio Marine Mgmt., Inc. v. Japan Intermodal Transport Co., Ltd, 1991 U.S. Dist. LEXIS 15977 (S.D.N.Y. Nov. 7, 1991) at \*9.
- <sup>172</sup>In re Enron Creditors Recovery Corp., 370 B.R. 90, 92–93, 48 Bankr. Ct. Dec. (CRR) 117 (Bankr. S.D. N.Y. 2007).
- <sup>173</sup>In re Enron Creditors Recovery Corp., 370 B.R. 90, 92–93, 48 Bankr. Ct. Dec. (CRR) 117 (Bankr. S.D. N.Y. 2007).
- <sup>174</sup>In re Enron Creditors Recovery Corp., 370 B.R. 90, 97, 48 Bankr. Ct. Dec. (CRR) 117 (Bankr. S.D. N.Y. 2007).
- <sup>175</sup>Rule 15(c)(1)(C)(i).
- <sup>176</sup>Krupski, 130 S.Ct. at 2496 (citations omitted).
- <sup>177</sup>Joseph, 638 F.3d at 560.
- <sup>178</sup>Rule 15(c)(1)(B).
- <sup>179</sup>Joseph, 638 F.3d at 560.
- <sup>180</sup>Joseph, 638 F.3d at 560–61.
- <sup>181</sup>Joseph, 638 F.3d at 561.
- <sup>182</sup>Wilkins-Jones v. County of Alameda, 2012 WL 3116025 at \*14 (N.D. Cal. 2012).
- <sup>183</sup>Wilkins-Jones v. County of Alameda, 2012 WL 3116025 at \*1 (N.D. Cal. 2012).
- <sup>184</sup>Wilkins-Jones v. County of Alameda, 2012 WL 3116025 at \*14 (N.D. Cal. 2012).
- <sup>185</sup>Springman v. AIG Marketing, Inc., 523 F.3d 685, 690 (7th Cir. 2008).
- <sup>186</sup>See Izaguirre v. Greenwood Motor Lines, Inc., 2011 WL 5325658 (D. Idaho 2011), *aff'd*, 523 Fed. Appx. 482 (9th Cir. 2013)
- <sup>187</sup>Grace v. U.S., 754 F. Supp. 2d 585, 605, 266 Ed. Law Rep. 152 (W.D. N.Y. 2010).
- <sup>188</sup>Krupski, 130 S. Ct. at 2493.
- <sup>189</sup>Krupski v. Costa Crociere S. p. A., 560 U.S. 538, 130 S. Ct. 2485, 2494, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010).
- <sup>190</sup>Krupski v. Costa Crociere S. p. A., 560 U.S. 538, 130 S. Ct. 2485, 2494, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010); 177 L.Ed.2d at 58.
- <sup>191</sup>IH 1, 2011 WL 6934552 at \*6 (emphasis added); see also *Barbour v. Emkay, Inc.* (Illinois), 2011 WL 3438189 at \*4 (E.D. Pa. 2011) (“As in *Krupski*, it is irrelevant whether Plaintiff knew or should have known at an earlier stage that [New Defendant] Emkay, Inc. Trust was the proper defendant. The only issue was whether Emkay, Inc. Trust knew or should have known that it was the proper defendant in Plaintiff’s lawsuit, but for Plaintiff’s mistake.”).

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<sup>192</sup>In *Martinez v. Gabriel*, 2012 WL 1719767 at \*2 (D. Colo. 2012), the court denied relation back with regard to named New Defendants replacing John Does unknown to plaintiff at time of the Original Complaint, citing precedent from the 10<sup>th</sup> Circuit Court of Appeals that “ ‘a plaintiff’s lack of knowledge of the intended defendant’s identity is not a ‘mistake concerning the identity of the proper party.’ ” *Martinez*, 2012 WL 1719767 at \*2 (quoting *Garrett v. Fleming*, 362 F.3d 692, 696, 58 Fed. R. Serv. 3d 396 (10th Cir. 2004)). The court concluded that, “[t]hus, as a matter of law, Plaintiff did not make a “mistake” within the meaning of Rule 15(c) regarding the identities of the parties she intended to sue.” *Garrett*, 362 F.3d 692. In a footnote, the court contended that the Tenth Circuit’s interpretation of Rule 15(c) is consistent with the prevailing law in every other circuit to address this issue. *Garrett*, 362 F.3d 692 n. 2 (citing *Smith v. City of Akron*, 476 Fed. Appx. 67 (6th Cir. 2012) (collecting circuit court cases)). See also *Daniel v. City of Matteson*, 2011 WL 198132 at \*4 (N.D. Ill. 2011); *MAKS, Inc. v. EODT General Sec. Co.*, 2011 WL 6151424 at \*4 (E.D. Tenn. 2011); *Rodriguez v. City of New York*, 2011 WL 4344057 at \*9–10 (S.D. N.Y. 2011); *Dominquez v. City of New York*, 2010 WL 3419677 at \*2–3 (E.D. N.Y. 2010); and *Lelieve v. Orosa*, 2011 WL 5103949 at \*4–5 (S.D. Fla. 2011).

<sup>193</sup>*Demouchette v. Sheriff of Cook County*, 2011 WL 1378712 at \*2 (N.D. Ill. 2011).

<sup>194</sup>*Demouchette v. Sheriff of Cook County*, 2011 WL 1378712 at \*2 (N.D. Ill. 2011).

<sup>195</sup>*Demouchette v. Sheriff of Cook County*, 2011 WL 1378712 at \*2 (N.D. Ill. 2011).

<sup>196</sup>*Demouchette v. Sheriff of Cook County*, 2011 WL 1378712 at \*2 (N.D. Ill. 2011).

<sup>197</sup>*E.g., Abdell v. City of New York*, 759 F. Supp. 2d 450, 457 (S.D. N.Y. 2010),

<sup>198</sup>*Krupski*, 130 S.Ct. at 2494; 177 L.Ed.2d at 58.

<sup>199</sup>*Engrav* argues that, in these circumstances, the plaintiff’s failure to name the New Defendant “is nothing more than a procedural technicality” and denial of relation back “contravenes the purpose of the Federal Rules.” *Engrav*, 89 Cal. L.R. at 1574 and 157. *Lusardi* argues that a New Defendant who knows that plaintiff does not have any understanding of the New Defendant’s identity should not be given the windfall of the statute of limitations any more than a prospective defendant whose status or role was not fully understood.” *Lusardi*, 49 U. Louisville L. Rev. at 338.

<sup>200</sup>*Randall’s Island Family Golf Ctrs. v. Acushnet Co. (In re Randall’s Island Family Golf Ctrs.)*, 2002 Bankr LEXIS 1247 \*6 (Bankr. S.D.N.Y. Nov. 8, 2002).

<sup>201</sup>*Varlack v. SWC Caribbean, Inc.*, 13 V.I. 666, 550 F.2d 171, 175, 1 Fed. R. Evid. Serv. 647, 23 Fed. R. Serv. 2d 37, 40 A.L.R. Fed. 526 (3d Cir. 1977). (no clear error in applying relation back where New Defendant saw a copy of the Original Complaint naming both the restaurant where he was manager and an “Unknown Employee” as defendants, because he knew that “Unknown Employee” referred to him).

<sup>202</sup>See *In re IndyMac Mortgage-Backed Securities Litigation*, 718 F. Supp. 2d 495, 507, Fed. Sec. L. Rep. (CCH) P 95778 (S.D. N.Y. 2010).

<sup>203</sup>*Krupski*, 130 S.Ct. at 2490.

<sup>204</sup>*Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 130 S. Ct. 2485, 2490, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010).

<sup>205</sup>*Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 130 S. Ct. 2485, 2498, 177 L. Ed. 2d 48, 2010 A.M.C. 1564, 76 Fed. R. Serv. 3d 1458 (2010).

<sup>206</sup>*Bishop v. Best Buy, Co. Inc.*, 2010 U.S. Dist. LEXIS 110631 at \*10–11 (S.D.N.Y. Oct. 13, 2010).

<sup>207</sup>*Barbour v. Emkay, Inc. (Illinois)*, 2011 WL 3438189 (E.D. Pa. 2011).

<sup>208</sup>*In re IH 1, Inc.*, 2011 WL 6934552 (Bankr. D. Del. 2011). See also *Joseph v. Elan Motorsports Technologies Racing Corp.*, 638 F.3d 555, 79 Fed. R. Serv. 3d 1 (7th Cir. 2011) (Original Defendant had similar name to New Defendant, but the Original Complaint made it

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clear that it aimed to sue New Defendant employer of plaintiff); and *Goodman v. Praxair, Inc.*, 494 F.3d 458, 68 Fed. R. Serv. 3d 850 (4th Cir. 2007) (Original Complaint named the parent company Praxair, Inc., but described accurately the status of subsidiary and New Defendant Praxair Services).

<sup>209</sup>Krupski, 130 S.Ct. at 2498 (parentheticals added).

<sup>210</sup>Krupski, 130 S.Ct. at 2498.

<sup>211</sup>*Morel v. DaimlerChrysler AG*, 565 F.3d 20, 27, Prod. Liab. Rep. (CCH) P 18230 (1st Cir. 2009).

<sup>212</sup>*Goodman v. Praxair, Inc.*, 494 F.3d 458, 473–75, 68 Fed. R. Serv. 3d 850 (4th Cir. 2007).

<sup>213</sup>*Bishop v. Best Buy, Co. Inc.*, 2010 U.S. Dist. LEXIS 110631 at \*10–11 (S.D.N.Y. Oct. 13, 2010); *Barbour v. Emkay, Inc.* (Illinois), 2011 WL 3438189 at \*5 (E.D. Pa. 2011); and *IH 1*, 2011 WL 6934552 at \*3.

<sup>214</sup>Krupski, 130 S.Ct. at 2497; in *Global Crossing Estate Representative*, decided prior to *Krupski*, the bankruptcy court identified two cases within the Second Circuit in which courts found that the Original Defendant had been sued as a matter of plaintiff's "tactical choice." *Global Crossing Estate Representative*, 385 B.R. at 69 n.2. The cases cited are *Cornwell v. Robinson*, 23 F.3d 694, 705, 64 Fair Empl. Prac. Cas. (BNA) 1254, 65 Empl. Prac. Dec. (CCH) P 43249 (2d Cir. 1994) (plaintiff knew the identities of those who had harassed and discriminated against her and chose not to name them in the original complaint) and *Hedvat v. Rothschild*, 175 F.R.D. 183, 38 Fed. R. Serv. 3d 787 (S.D. N.Y. 1997). See also *Barisoff v. Hollywood Baseball Ass'n*, 71 F. Supp. 493, 507, 19 L.R.R.M. (BNA) 2479, 12 Lab. Cas. (CCH) P 63686 (S.D. Cal. 1947), judgment aff'd, 166 F.2d 1023, 22 L.R.R.M. (BNA) 2108, 14 Lab. Cas. (CCH) P 64519 (C.C.A. 9th Cir. 1948) ("The requisite knowledge typically is established by allegations respecting a named party that, in fact, concern the originally un-named party the plaintiff seeks to add.").

<sup>215</sup>Krupski, 130 S.Ct. at 2497; 177 L.Ed.2d at 60.

<sup>216</sup>*In re IndyMac Mortgage-Backed Securities Litigation*, 718 F. Supp. 2d 495, 499, Fed. Sec. L. Rep. (CCH) P 95778 (S.D. N.Y. 2010).

<sup>217</sup>*In re IndyMac Mortgage-Backed Securities Litigation*, 718 F. Supp. 2d 495, 499, Fed. Sec. L. Rep. (CCH) P 95778 (S.D. N.Y. 2010).

<sup>218</sup>*In re IndyMac Mortgage-Backed Securities Litigation*, 718 F. Supp. 2d 495, 505–06, Fed. Sec. L. Rep. (CCH) P 95778 (S.D. N.Y. 2010).

<sup>219</sup>*In re IndyMac Mortgage-Backed Securities Litigation*, 718 F. Supp. 2d 495, 507, Fed. Sec. L. Rep. (CCH) P 95778 (S.D. N.Y. 2010).

<sup>220</sup>*In re IndyMac Mortgage-Backed Securities Litigation*, 718 F. Supp. 2d 495, 507, Fed. Sec. L. Rep. (CCH) P 95778 (S.D. N.Y. 2010).

<sup>221</sup>*In re IndyMac Mortgage-Backed Securities Litigation*, 718 F. Supp. 2d 495, 507, Fed. Sec. L. Rep. (CCH) P 95778 (S.D. N.Y. 2010).

<sup>222</sup>*Wilkins-Jones v. County of Alameda*, 2011 WL 3652495 (N.D. Cal. 2011), order vacated on other grounds in part, 2012 WL 3116025 (N.D. Cal. 2012).

<sup>223</sup>*Wilkins-Jones v. County of Alameda*, 2011 WL 3652495 at \*1 (N.D. Cal. 2011), order vacated on other grounds in part, 2012 WL 3116025 (N.D. Cal. 2012).

<sup>224</sup>*Wilkins-Jones v. County of Alameda*, 2011 WL 3652495 at \*1 (N.D. Cal. 2011), order vacated on other grounds in part, 2012 WL 3116025 (N.D. Cal. 2012).

<sup>225</sup>*Wilkins-Jones v. County of Alameda*, 2011 WL 3652495 at \*10 and 13 (N.D. Cal. 2011), order vacated on other grounds in part, 2012 WL 3116025 (N.D. Cal. 2012).

<sup>226</sup>*Wilkins-Jones v. County of Alameda*, 2011 WL 3652495 at \*13 (N.D. Cal. 2011),

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order vacated on other grounds in part, 2012 WL 3116025 (N.D. Cal. 2012).

<sup>227</sup>*Esmilla v. The Cosmopolitan Club*, 2011 U.S. Dist. LEXIS 23784 (S.D.N.Y. Mar. 3, 2011) at \*1–4.

<sup>228</sup>*Esmilla v. The Cosmopolitan Club*, 2011 U.S. Dist. LEXIS 23784 (S.D.N.Y. Mar. 3, 2011) at \*10. The *Esmilla* court refers also to *VKK Corp. v. National Football League*, 187 F.R.D. 498, 500 (S.D. N.Y. 1999) (noting that the proposed new defendant, as unsuccessful prospective ownership group, reasonably believed that it had not been sued for strategic reasons, where the original complaint identified other unsuccessful prospective ownership groups, but named only successful groups as defendants). *Id.*

<sup>229</sup>*In re Bernard L. Madoff Inv. Securities LLC*, 468 B.R. 620, 56 Bankr. Ct. Dec. (CRR) 85 (Bankr. S.D. N.Y. 2012).

<sup>230</sup>*In re Bernard L. Madoff Inv. Securities LLC*, 468 B.R. 620, 623, 56 Bankr. Ct. Dec. (CRR) 85 (Bankr. S.D. N.Y. 2012).

<sup>231</sup>*In re Bernard L. Madoff Inv. Securities LLC*, 468 B.R. 620, 623, 56 Bankr. Ct. Dec. (CRR) 85 (Bankr. S.D. N.Y. 2012).

<sup>232</sup>*In re Bernard L. Madoff Inv. Securities LLC*, 468 B.R. 620, 628, 56 Bankr. Ct. Dec. (CRR) 85 (Bankr. S.D. N.Y. 2012).

<sup>233</sup>*In re Bernard L. Madoff Inv. Securities LLC*, 468 B.R. 620, 629, 56 Bankr. Ct. Dec. (CRR) 85 (Bankr. S.D. N.Y. 2012).

<sup>234</sup>*In re Bernard L. Madoff Inv. Securities LLC*, 468 B.R. 620, 629, 56 Bankr. Ct. Dec. (CRR) 85 (Bankr. S.D. N.Y. 2012).

<sup>235</sup>*In re Bernard L. Madoff Inv. Securities LLC*, 468 B.R. 620, 630, 56 Bankr. Ct. Dec. (CRR) 85 (Bankr. S.D. N.Y. 2012).

<sup>236</sup>*In re Bernard L. Madoff Inv. Securities LLC*, 468 B.R. 620, 630, 56 Bankr. Ct. Dec. (CRR) 85 (Bankr. S.D. N.Y. 2012). The program aired on September 27, 2009, just prior to the October 2, 2009 filing of the Original Complaint. *In re Bernard L. Madoff Inv. Securities LLC*, 468 B.R. 620, 630, 56 Bankr. Ct. Dec. (CRR) 85 (Bankr. S.D. N.Y. 2012). Thus, any Spouse Defendant awareness of that program arose during the Rule 4(m) period.

<sup>237</sup>Herman Melville, *Moby-Dick* (1854), chapter 32.

<sup>238</sup>William Shakespeare, *Hamlet*, Act II, Scene 2.