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# COMMENCEMENT OF STATE CLAIMS IN FEDERAL COURT: AN EIGHTH CIRCUIT ANALYSIS

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## I. INTRODUCTION

A common misperception is that law and the pursuit of justice hinge solely on the substantive prohibitions and allowances that our edicts provide. However, the judiciary often determines the fate of legal claims by relying on more mundane considerations. Indeed, the nuances of legal procedure are as important as substantive considerations in assuring that a client ultimately prevails.

This article addresses only one aspect of the procedural maze: how to commence a state action in federal court that complies with statute of limitation requirements when filing a state claim pursuant to diversity jurisdiction or a federal question claim coupled with state pendent claims. Part II describes the federal rules regarding commencement of claims in federal court. Part III outlines the Eighth Circuit's laws on commencement of claims, as one example of how federal and state rules can diverge. Part IV discusses the applicability of state statute of limitation and commencement rules to state claims filed in federal court. Part V addresses the problems practitioners face in view of different state and federal standards regarding the commencement of claims, focusing on Eighth Circuit decisions. Finally, Part VI contains several suggestions regarding how state and federal procedural inconsistencies can be reconciled.

## II. FEDERAL RULES—FILE TO BE SAFE

In federal court, a civil action is commenced by *filing* a complaint with the applicable court.[1] Once the claim is filed, the plaintiff has the luxury of waiting 120 days before service of process is required.[2] Take for example a claim alleging unlawful private employment practices under federal law.[3] The Equal Employment Opportunity Commission has exclusive jurisdiction over the claim for a minimum of 180 days.[4] If the Commission takes no action,

1. *See* FED. R. CIV. P. 3.

2. *See* FED. R. CIV. P. 4(c)(1), 4(m). The time for service can be extended "for an appropriate period" if the plaintiff "shows good cause for the failure." FED. R. CIV. P. 4(m).

3. *See* 42 U.S.C. §§ 2000e-2, 2000e-3 (1994); *see also* Whitmore v. O'Connor Management, Inc., 156 F.3d 796 (8th Cir. 1998) (interpreting the limitation bar for claims of unlawful employment practices).

4. *See* 42 U.S.C. § 2000e-5(a)-(f); *see also* Local 179, United Textile Workers of Am., AFL-CIO v. Federal Paper Stock Co., 461 F.2d 849, 851 (8th Cir. 1972) (stating that federal employment discrimination charges must first be filed with

does not enter into a conciliation agreement with the employer, or dismisses the claim during its period of exclusive jurisdiction, the aggrieved party could request and receive a right-to-sue letter.[5] Once the aggrieved party receives a right-to-sue letter, he or she has to commence any claim within ninety days.[6] To ensure compliance with federal commencement rules and avoid any time-bar problems, the aggrieved party will only have to *file* his or her claim within ninety days of receiving a right-to-sue letter.[7] The plaintiff can delay serving the defendant until sometime shortly after the ninety-day commencement requirement expires.[8]

## III. EIGHTH CIRCUIT RULES

### A. *Minnesota, North Dakota, and South Dakota Rules—Serve To Be Safe*

Civil actions commence in federal court upon a filing by the plaintiff.[9] However, state procedural rules do not necessarily mirror federal rules.[10] For instance, in Minnesota, a civil action is commenced by *serving process* upon the defendant.[11] A good exam-

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the EEOC and plaintiff must receive right-to-sue letter from the EEOC before proceeding with a private suit); Rorie v. United Parcel Serv., Inc., 151 F.3d 757, 761 (8th Cir. 1998) (construing the limitation period for federal claims of unlawful employment practices).

5. *See* 42 U.S.C. § 2000e-5(f); *see also* Kent v. Missouri Dep't of Elementary and Secondary Educ., 792 F. Supp. 59, 62 (E.D. Mo. 1992) (stating that a right-to-sue letter is a condition precedent to bringing an employment discrimination suit in federal court), *remanded*, 989 F.2d 505 (8th Cir. 1993) (remanding after Kent received a right-to-sue letter and had exhausted all administrative remedies).

6. *See* 42 U.S.C. § 2000e-5(f)(1); *see also* Kane v. Iowa Dep't of Human Servs., 955 F. Supp. 1117, 1133-35 (N.D. Iowa 1997) (holding that the 90-day requirement for filing suit is subject to equitable tolling).

7. *See* FED. R. CIV. P. 3.

8. Service could be delayed for 120 days, assuming the claim commenced on time by filing within the applicable statute of limitation. *See* FED. R. CIV. P. 4(m); *see also* Lujano v. Omaha Pub. Power Dist., 30 F.3d 1032, 1034-35 (8th Cir. 1994) (stating that plaintiff must serve defendant within 120 days of filing the complaint unless good cause exists for nonservice).

9. *See* FED. R. CIV. P. 3.

10. *Compare* FED. R. CIV. P. 3 *with* MINN. R. CIV. P. 3.01, NEB. REV. STAT. § 25-217 (1995), N.D. R. CIV. P. 3, S.D. CODIFIED LAWS § 15-2-30 (Smith 1984).

11. *See* MINN. R. CIV. P. 3.01 (emphasis added). Minnesota Rule of Civil Procedure 3.01 specifically reads:

> A civil action is commenced against each defendant: (a) when the summons is served upon that defendant, or (b) at the date of acknowledgement of service if service is made by mail, or (c) when the summons is delivered to the sheriff in the county where the defendant resides for

ple is a claim alleging unfair discriminatory employment practices under Minnesota law.[12] When the Minnesota State Commission Against Discrimination chooses not to pursue a discrimination charge and notifies an allegedly aggrieved individual, that individual has forty-five days to commence a civil suit from the date he or she receives notice of the Commission's decision.[13] To avoid time-bar problems under Minnesota rules, the plaintiff will have to file suit *and* serve process on the defendant within the forty-five-day period to ensure compliance with state commencement requirements.[14] Unlike the federal rules, filing *alone* would not suffice to commence a claim under Minnesota law.[15]

Like the Minnesota rule, the North Dakota rule also requires *service* of the summons to initiate a civil action.[16] Thus, a plaintiff can avoid time-bar problems only by filing suit *and* serving the defendant.[17] For example, in a legal malpractice action under North Dakota law, the two-year statute of limitation begins to run when the plaintiff "knows, or with reasonable diligence should know, of the injury, its cause, and the defendant's possible negligence."[18] To comply with the North Dakota rule, a plaintiff in North Dakota must file a petition with the court *and* serve process on the defendant.[19]

Similarly, South Dakota rules require the *service* of the summons upon the defendant to commence an action.[20] The key dif-

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service; but such delivery shall be ineffectual unless within 60 days thereafter the summons is actually served on that defendant or the first publication thereof is made.

*Id.*

12. *See* MINN. STAT. § 363.03(1) (1998).

13. *See* MINN. STAT. § 363.14(1).

14. *See* MINN. R. CIV. P. 3.01.

15. *Compare* FED. R. CIV. P. 3, *with* MINN. R. CIV. P. 3.01.

16. *See* MINN. R. CIV. P. 3.01; N.D. R. CIV. P. 3. The North Dakota rule states: "A civil action is commenced by the service of a summons." N.D. R. CIV. P. 3. *See also* Coman v. Williams, 50 N.W.2d 494, 497 (N.D. 1951) (stating that an action is not commenced upon the mere filing of a complaint).

17. *See* N.D. R. CIV. P. 3.

18. *See* Duncklee v. Wills, 542 N.W.2d 739, 742 (N.D. 1996) (reversing summary judgment because a plaintiff's knowledge ordinarily poses a genuine issue of material fact).

19. *Compare* FED. R. CIV. P. 3, *with* N.D. R. CIV. P. 3 (requiring *both* filing and service for commencement of action).

20. *See* S.D. CODIFIED LAWS § 15-2-30 (Smith 1984). The rule specifically states, "An action is commenced as to each defendant when the summons is served on him, or on a codefendant who is a joint contractor or otherwise united in in-

ference in South Dakota is that an attempt to perfect service will usually suffice so long as it occurs within sixty days of actual service.[21] For example, a plaintiff suing for negligence under South Dakota law must commence an action within three years of the date of the injury.[22] Although a timely action may be commenced under the federal rule by simply *filing* a complaint within the three-year statute of limitation, the action would not be commenced in a timely manner under South Dakota rules unless the plaintiff places the summons in the sheriff's hands within the limitation period and publishes or serves the summons within sixty days thereafter.[23] To comply with the state rules in South Dakota, a plaintiff should be certain to file a complaint, and either (1) serve the defendant with the summons within the statute of limitation, or (2) deliver the summons to the sheriff within the statute of limitation and publish the summons or serve the defendant within sixty days of filing.[24]

### B. *Arkansas, Nebraska, Iowa, and Missouri Rules—File To Be Safe, and Immediately Serve Thereafter*

In some Eighth Circuit states, *filing* a complaint is sufficient to commence a civil action for statute of limitation purposes.[25] Like

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terest with him." *Id.*

21. *See* S.D. CODIFIED LAWS § 15-2-31. This rule, which should be read in conjunction with § 15-2-30, reads:

> An attempt to commence an action is deemed equivalent to the commencement thereof when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants or one of them, usually or last resided; or if a corporation be defendant, to the sheriff or other officer of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business. Such an attempt must be followed by the first publication of the summons, or the service thereof, within sixty days.

*Id.* The requirement in section 15-2-31 mandating publication or service within 60 days is absolute. *See id.*; *see also* Fisher v. Iowa Mold Tooling Co., Inc., 690 F.2d 155, 156 (8th Cir. 1982) (reversing trial court's denial of motion for dismissal of claim for failure to perfect actual service within the South Dakota statute's time requirement).

22. *See* S.D. CODIFIED LAWS § 15-2-14; *see also Fisher*, 690 F.2d at 156.

23. *See* S.D. CODIFIED LAWS §§ 15-2-30, 15-2-31; *see also Fischer*, 690 F.2d at 156.

24. *Compare* FED. R. CIV. P. 3, *with* S.D. CODIFIED LAWS §§ 15-2-30, 15-2-31.

25. *See* ARK. R. CIV. P. 3; NEB. REV. STAT. § 25-217 (1995); IOWA. R. CIV. P. 48; MO. R. CIV. P. 53.01.

the federal system, however, these states require subsequent service to maintain the action. For example, in Arkansas, civil actions are commenced upon the filing of a complaint with the clerk of the proper court.[26] However, Arkansas rules require that one complete service of process within sixty days of the filing of the complaint unless the court grants an extension.[27] Under Arkansas law, if a plaintiff alleges negligence, the complainant must commence an action within three years of the injury.[28] To tread safely within the guidelines of Arkansas state requirements, a plaintiff must only *file* a complaint with the court within the statute of limitation. But, apart from statute of limitation concerns, the plaintiff must perfect service within sixty days from the date of filing to maintain the action.[29]

One can also commence a civil action in Nebraska simply by filing a petition with the court.[30] However, the action will be dismissed without prejudice if service is not perfected within six months of the filing.[31] For example, in a medical malpractice suit under the Nebraska Hospital-Medical Liability Act, a plaintiff must commence an action within two years "after the alleged act or omission in rendering or failing to render professional services providing the basis for such action."[32] Accordingly, a plaintiff in

26. *See* ARK. R. CIV. P. 3. Rule 3 provides: "A civil action is commenced by filing a complaint with the clerk of the proper court who shall note thereon the date and precise time of filing." *Id.* This rule superceded a previous statute that required not only the filing of a complaint, but also the placing of the complaint and summons in the hands of the sheriff of the proper county. *See id.* and ARK. R. CIV. P. 3 reporter's note, at 1.

27. *See* ARK. R. CIV. P. 3 and ARK. R. CIV. P. 3 reporter's notes, at 2.

28. *See* ARK. CODE ANN. § 16-56-105 (Michie 1987).

29. *Compare* FED R. CIV. P. 4, *with* ARK. R. CIV. P. 3. *See* Brown v. Rinehart, 105 F.R.D. 532, 533 (E.D. Ark. 1985) (dismissing the action for failure to adhere to Arkansas' 60-day service requirement); *but see* Walden v. Tulsair Beechcraft, Inc., 96 F.R.D. 34 (W.D. Ark. 1982) (holding that plaintiff did not need to meet procedural requirements of the Arkansas rule requiring service since federal procedure applied).

30. *See* NEB. REV. STAT. § 25-217 (1995) ("An action is commenced on the date the petition is filed with the court. The action shall stand dismissed without prejudice as to any defendant not served within six months from the date the petition was filed.").

31. *See* Kocsis v. Harrison, 543 N.W.2d 164, 168 (Neb. 1996) (applying Nebraska Revised Statutes section § 25-217 in medical malpractice action).

32. NEB. REV. STAT. § 44-2828 (1993). The statute provides:

> [A]ny action to recover damages based on alleged malpractice or professional negligence or upon alleged breach of warranty in rendering or failing to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failing to

Nebraska must only *file* a petition with the court within the two-year statute of limitation to satisfy commencement requirements for statute of limitation purposes. However, the plaintiff must still serve the defendant within six months of filing to maintain the action.[33]

Like Arkansas and Nebraska, Iowa rules require only the *filing* of a petition with the court to commence a civil action.[34] The statute of limitation is tolled upon the filing of a petition.[35] However, if the petition, original notice, and directions for service are not promptly delivered for service on the defendant, the mere filing of the petition may not protect the claim from dismissal on procedural grounds.[36] A court must dismiss the action if the plaintiff does not serve the defendant within ninety days of filing the petition unless the plaintiff shows good cause for failing to serve.[37] For example, in a personal injury action under Iowa law, a party must

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render professional services providing the basis for such action.

*Id.*; *accord Kocsis*, 543 N.W.2d at 168.

33. *Compare* FED. R. CIV. P. 3, *with* NEB. REV. STAT. § 25-217 (1995).

34. *See* IOWA R. CIV. P. 48. The rule specifically reads, "For all purposes, a civil action is commenced by filing a petition with the court. The date of filing shall determine whether an action has been commenced within the time allowed by statutes for limitation of actions, even though the limitation may inhere in the statute creating the remedy." *Id.*

35. *See id.*; *see also* Henry v. Shober, 566 N.W.2d 190, 192 (Iowa 1997) (applying Iowa commencement rules in personal injury action).

36. *See* IOWA R. CIV. P. 49(f). Rule 49(f) provides:

> If service of the original notice is not made upon the defendant, respondent, or other party to be served within 90 days after filing the petition, the court, upon motion or its own initiative after notice to the party filing the petition, shall dismiss the action without prejudice as to that defendant, respondent, or other party to be served or direct an alternate time or manner of service. If the party filing the papers shows good cause for the failure of service, the court shall extend the time for service for an appropriate period.

*Id.*; *see also Shober*, 566 N.W.2d at 192.

37. *See* IOWA R. CIV. P. 49(f). For claims filed prior to the rule's effective date of January 24, 1998, the Iowa Supreme Court required dismissal of the action if there was an unjustified or abusive delay in completing service. *See* Mokhtarian v. GTE Midwest, Inc. 578 N.W.2d 666, 668 (Iowa 1998) (affirming trial court's dismissal of claim where plaintiff failed to show adequate justification for seven-month delay in serving defendant); *Shober*, 566 N.W.2d at 192-93 (holding that 169-day delay in service was presumptively abusive and that plaintiffs failed to prove the delay was justified).

commence the action within the two-year statute of limitation.[38] Thus, to avoid time-bar problems, a plaintiff must *file* the case within the statute of limitation.[39] Yet even if a plaintiff files a petition with the court within that two-year period, failure to serve the defendant within ninety days without showing good-cause will result in dismissal.[40] To avoid any problem, a plaintiff should file the petition within the applicable statute of limitation and promptly deliver service of process on the defendant.[41]

Similarly, under Missouri rules, *filing* a petition with the court commences a civil action.[42] Service of process has nothing to do with tolling the applicable statute of limitation.[43] For example, in a

38. *See id.* at 191.

39. *See* IOWA R. CIV. P. 48.

40. *See* IOWA R. CIV. P. 49(f); *see also Mokhtarian*, 578 N.W.2d at 668 ("Iowa Rule of Civil Procedure 49(f) now imposes a ninety-day deadline for service of an original notice after filing of a petition.").

41. *Compare* FED. R. CIV. P. 3, *with* IOWA R. CIV. P. 48, 49(f).

42. *See* MO. R. CIV. P. 53.01. The rule specifically commands that "[a] civil action is commenced by filing a petition with the court." *Id.*; *accord* Ostermueller v. Potter, 868 S.W.2d 110, 111 (Mo. 1993) (holding that "[a] civil action is commenced by filing a petition with the court" despite contradictory statutory language).

43. *See* MO. R. CIV. P. 53.01; *Ostermueller*, 868 S.W.2d at 111. At one time in Missouri, courts imposed a service requirement to commence a civil action. *See* Tri-City Constr. v. A.C. Kirkwood & Assoc., 738 S.W.2d 925, 928-29 (Mo. Ct. App. 1987) (citing U.S. Laminating Corp. v. Consolidated Freightways Corp., 716 S.W.2d 847, 849 (Mo. Ct. App. 1986) "and cases there cited") *implied overruling recognized by* Corwin *ex rel.* Wolfe v. Coleman, 879 S.W.2d. 602, 604-07 (Mo. Ct. App. 1994); *accord, e.g.*, Birdsell v. Holiday Inns, 852 F.2d 1078, 1081 (8th Cir. 1988). In doing so, Missouri courts abandoned the plain language of the applicable rule. For example, the Missouri Court of Appeals in *Tri-City* addressed commencement requirements under Missouri law. *See* 738 S.W.2d at 928-29. Missouri Rule of Civil Procedure 53.01 specifically mandates that "[a] civil action is commenced by filing a petition with the court." MO. R. CIV. P. 53.01. In *Tri-City*, however, the court insisted that Rule 53.01 be read "in conjunction with the next following rule, Rule 54.01." 738 S.W.2d at 928. But Rule 54.01 contained *no mention* of how to commence a civil action for statute of limitation purposes, and simply required service of process with "due diligence" as another procedural requirement. *See* MO. R. CIV. P. 54.01. Nevertheless, in the court's strained view, filing a lawsuit did not commence a lawsuit for statute of limitation purposes despite the wording of Rule 53.01; instead, filing "conditionally halted" the statute of limitation, but the action would not be commenced for statute of limitation purposes until the plaintiff served the defendant with due diligence. *Tri-City*, 738 S.W.2d at 928 (citing Votaw v. Schmittgens, 538 S.W.2d 884, 886 (Mo. Ct. App. 1976)). In any case, the court in *Tri-City* reached its commencement conclusion by relying on *U.S. Laminating Corp. v. Consolidated Freightways Corp.*, which the Missouri Supreme Court overruled in *Ostermueller v. Potter*. *Compare Tri-City*, 738 S.W.2d at 929 (citing *U.S. Laminating*, 738 S.W.2d at 849) *with Ostermueller*, 868 S.W.2d at 111 (citing *U.S. Laminating* without jump cite).

negligence action, a plaintiff seeking damages in a Missouri court must commence an action by filing a petition with the court within the five-year statute of limitation.[44] However, an action may still be dismissed if a plaintiff fails to complete service of process with "due diligence."[45] Thus to avoid any problems in Missouri, a plaintiff must *file* a claim within the statute of limitations, but still must complete service of process using "due diligence" to avoid dismissal on other grounds.[46]

## IV. APPLICABILITY OF STATE RULES TO STATE CLAIMS IN FEDERAL COURT—SWIMMING IN THE WAKE OF *ERIE*

Our country was founded on a federalist structure. This federalist structure creates inevitable tension between two binding beliefs: (1) the integrity of state home-rule, and (2) the need for federal uniformity and consensus.[47] The interplay of state and federal judicial procedure is not immune from such conflicts, and the Supreme Court continually struggles to clarify the import of conflicting parameters in the state and federal legal systems.[48] Such prob-

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44. *See Ostermueller*, 868 S.W.2d at 110-11 (five-year statute of limitation applies to negligence action and filing a petition is commencement for statute of limitation purposes); MO. REV. STAT. § 516.120 (1986).

45. *See* MO. R. CIV. P. 54.01. Missouri Rule of Civil Procedure 54.01 provides in relevant part:

> Upon the filing of a pleading requiring service of process, the clerk shall forthwith issue the required summons or other process and, unless otherwise provided, deliver it for service to the sheriff or other person specifically appointed to serve it. If requested in writing by the party whose pleading requires service of process, the clerk shall deliver the summons or other process to such party who shall then be responsible for promptly serving it with a copy of the pleading.

*Id.*

46. *Compare* FED. R. CIV. P. 3, 4(j) *with* MO. R. CIV. P. 53.01, 54.01.

47. *See In re* Air Crash at Detroit Metro. Airport, 776 F. Supp. 316, 319 (E.D. Mich. 1991) (discussing the choice-of-law tensions that arise between state and federal law when a federal court sits in diversity); *see also* Michael H. Hoffheimer, *Mississippi Conflict of Laws*, 67 MISS. L.J. 175 n.397 (1997) ("Tension between the state court's effort to elaborate a coherent body of choice-of-law law rooted in accommodating conflicting state policies and the federal courts' penchant for specific and predictable rules seems to reflect an underlying tension between demands for coherence and determinacy that may not be reconcilable.") (citing William A. Edmundson, *The Antinomy of Coherence and Determinacy*, 82 IOWA L. REV. 1, 1-20 (1996)).

48. *See, e.g.*, Walker v. Armco Steel Corp., 446 U.S. 740, 751-52 (1980) (holding that when there is no federal rule directly on point, state service requirements

lems are particularly acute in the diversity context, where *state claims* are adjudicated in *federal court* because of the parties' differing state citizenship.[49]

In one of its earliest pronouncements on the subject, the Supreme Court faced a potential clash between state and federal judicial doctrine in the diversity case of *Swift v. Tyson*.[50] In *Swift*, the Court considered whether to apply New York common law to a soured loan arrangement allegedly secured by negotiable paper.[51] The Court obliquely reasoned that federal common law should prevail over nonstatutory and nonconstitutional state law in diversity cases, with federal courts basing their opinions "not on the decisions of the local tribunals, but [on] the general [federal] principles and doctrines of commercial jurisprudence."[52] Unfortunately, the *Swift* decision led to a legacy of discrimination in favor of noncitizens, prevention of uniformity in the administration of state law, and forum shopping.[53]

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that are an integral part of the state statute of limitation should control in an action based on state law which is filed in federal court under diversity jurisdiction); Hanna v. Plumer, 380 U.S. 460, 472-74 (1965) (holding that Rule 4(d)(1) of the Federal Rules of Civil Procedure, not state law, governs service of process in a civil action in which federal jurisdiction is based on diversity of citizenship, and where there is a "direct collision" between the federal and state law); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 531-34 (1949) (holding that in diversity actions, federal courts must follow state law requiring service of summons within statute of limitation period rather than Federal Rules of Civil Procedure, when the cause of action is created by state law); Guaranty Trust Co. v. York, 326 U.S. 99, 108-12 (1945) (ruling that federal courts must follow state statute of limitations in diversity actions); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that state law, whether determined by the legislature or the court, shall be applied in any case not governed by the U.S. Constitution or Acts of Congress), *overruling* Swift v. Tyson, 41 U.S. 1 (1842).

49. *See* 28 U.S.C. § 1332 (1994) (explaining diversity jurisdiction requirements); *see, e.g.*, Fischer v. Iowa Mold Tooling Co., 690 F.2d 155, 158 (8th Cir. 1982) (dismissing claim for failure to perfect actual service within the South Dakota statute's time requirement); *Walker*, 592 F.2d at 1136 (dismissing claim in diversity action for failure to serve within the limits imposed by Oklahoma law); Brown v. Rinehart, 105 F.R.D. 532, 533-34 (E.D. Ark. 1985) (holding that in diversity action, complaint which was filed on last day of limitation period and not served within 60 days of filing, was not timely commenced under Arkansas rule).

50. 41 U.S. 1 (1842); *see also* John B. Corr, *Thoughts on the Vitality of Erie*, 41 AM. U. L. REV. 1087 (1992) (analyzing *Swift v. Tyson* as foundation for *Erie R.R. Co. v. Tompkins*).

51. *See Swift*, 41 U.S. at 3-5.

52. *Id.* at 18.

53. *See Walker*, 446 U.S. at 745 (holding that a diversity case should follow state law over Rule 3 of the Federal Rules of Civil Procedure "in determining when an action is commenced for the purpose of tolling the state statute of limita-

The Court took a breather for nearly one hundred years before revisiting the implications of *Swift*.[54] In 1938, the Supreme Court reviewed the seminal case of *Erie Railroad Co. v. Tompkins*.[55] Tompkins was walking on a commonly used beaten footpath that was parallel to a railway track in Pennsylvania.[56] He was hit and injured when an Erie Railroad freight train with an allegedly protruding door whizzed by him.[57] Tompkins brought a federal court diversity negligence claim against the railroad in the company's state of incorporation, New York.[58] Pennsylvania common law explicitly considered those who used pathways along railroads to be trespassing, whereas New York common law was silent on the subject.[59] Tompkins urged the Court to create a general federal common law holding that those who used common footpaths adjacent to railroad tracks were rightfully on the premises as licensees.[60] The railroad argued that the federal court should apply the law of Pennsylvania, since Tompkins was a Pennsylvania resident and the accident occurred in Hughestown, Pennsylvania.[61] The Court, clearly troubled by the forum shopping and disadvantages stemming from *Swift*, overturned its earlier pronunciation and forcefully declared that outside of federal constitutional and statutory matters, "the law to be applied in any [diversity] case is the law of the State."[62] Now that the general rule was clarified, the Court could turn its attention to the detail work.

Seven years later, the Court had reason to review the logical outgrowths of *Erie* in a statute of limitation context.[63] *Guaranty Trust Co. v. York*[64] involved an action filed by non-accepting note-

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tions"); *see also* Ann V. Crowley, *Rule 4: Service by Mail May Cost You More Than a Stamp*, 61 IND. L.J. 217 (1986) (describing strict application of language of rule using service by mail).

54. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (overruling *Swift* and holding that state law applies in cases not governed by the U.S. Constitution or acts of Congress); *see also* Geri J. Yonover, *A Kinder, Gentler Erie: Reining in the Use of Certification*, 47 ARK. L. REV. 305 (1994) (discussing the facts of *Erie* and current applications by the courts).

55. 304 U.S. 64 (1938).

56. *See id.* at 69.

57. *See id.*

58. *See id.*

59. *See id.* at 70.

60. *See id.*

61. *See id.*

62. *Id.* at 78.

63. *See* Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

64. *Id.*

holders against a trustee for an alleged breach of fiduciary duties.[65] The case was filed in a New York federal district court, but New York law would have time-barred the action.[66] The Court reviewed the issue of "whether, when no recovery could be had in a State court because the action is barred by the statute of limitations, a federal court [exercising diversity jurisdiction] in equity can take cognizance of the suit . . . ."[67] The Court held that in diversity actions federal courts should defer to state procedural limitations that are "a matter of substance," or "significantly affect the result of a litigation."[68] According to the Court, federal courts exercising diversity jurisdiction should defer to state statutes of limitation in particular, because statutes of limitation impacted state-created rights "vitally and not merely formally or negligibly."[69] The Court then applied the New York statute of limitation and barred the claim, extending the logic of *Erie* in declaring:

> [T]he outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. . . . [F]or the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.[70]

In a nutshell, the Court found that the New York statute of limitation rule was an integral part of the state-law cause of action and should therefore govern time-bar issues in a federal court diversity action.[71]

If the *York* case was somehow ambiguous regarding the application of state statutes of limitation in diversity cases, the Court's next attempt in *Ragan v. Merchants Transfer & Warehouse Co.* appeared definitive.[72] *Ragan* was decided only four years after *York*,

65. *See id.* at 100-01.
66. *See id.* at 99.
67. *Id.* at 108-09.
68. *Id.* at 112.
69. *Id.* at 110.
70. *Id.* at 109.
71. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 745 (1980).
72. *See* Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949); *see generally* Yonover, *supra* note 54 (pointing to continued viability of *Ragan* after *Swift*).

and revolved around an automobile accident and resulting tort action.[73] The plaintiffs in *Ragan* filed suit within two years of the accident in a federal district court in Kansas.[74] However, Kansas law did not deem an action commenced until process was served.[75] Although the plaintiffs filed the claim twenty-three months after the accident, the defendant was not served for several additional months; as a result, the defendant was not served within the twenty-four month Kansas statute of limitation.[76] The plaintiffs argued simply that "the Federal Rules of Civil Procedure determine the manner in which an action is commenced in the federal courts."[77]

The Court disagreed and barred the claim, finding that the service requirement was a vital part of the state's statute of limitation, and that the Court could not provide the cause of action with "longer life in the federal court than it would have had in the state court" without violating the prescripts of *Erie* and *York*.[78] The Court in no uncertain terms rejected the argument that Rule 3 of the Federal Rules of Civil Procedure governed the tolling of the applicable state statute of limitation, in an action filed in federal court pursuant to diversity jurisdiction.[79]

Naturally, the Court could not resist the allure of complexity and threw a monkey wrench into a gelling line of cases with the 1965 decision in *Hanna v. Plumer*.[80] In *Hanna*, an automobile accident victim filed a personal injury suit in a federal district court in Massachusetts against a Massachusetts citizen who died some time after the accident.[81] The plaintiff left copies of the summons and complaint with the executor's wife at his residence in compliance with Rule 4 of the Federal Rules of Civil Procedure.[82] Rule 4 permitted service by leaving a summons copy at a defendant's residence with an individual of suitable discretion, but Massachusetts law required in-hand service to the executor or administrator of an estate.[83] The Court distinguished *York* and *Ragan* by noting that

73. *See Ragan*, 337 U.S. at 530.
74. *See id.* at 531.
75. *See id.*
76. *See id.* at 531, nn.1-4.
77. *Id.* at 533.
78. *Id.* at 533-34.
79. *See id.*
80. *See* Hanna v. Plumer, 380 U.S. 460 (1965); *see generally* Corr, *supra* note 50 (describing twin aims of *Erie* in *Hanna v. Plumer*).
81. *See Hanna*, 380 U.S. at 461.
82. *See id.*; *see also* FED. R. CIV. P. 4(d)(1).
83. *See Hanna*, 380 U.S. at 461-62.

"the difference between the two [state and federal] rules would be of scant, if any, relevance to the choice of forum. Petitioner, *in choosing her forum,* was not presented with a situation where application of the state rule would wholly bar recovery . . . ."[84] Thus, the Court decided to apply the federal rule "[al]though choice of the federal or state rule will at this point have a marked effect upon the outcome of the litigation . . . ."[85] Moreover, the Court explained that *Erie* and later cases involved application of state rules in a diversity action where the applicable federal rule was not broad enough to *directly conflict.*[86]

In a concurring opinion, Justice Harlan noted that the Court barely mentioned or adequately distinguished the *Ragan* decision, which in his view demanded the application of the Massachusetts rule.[87] Harlan criticized the majority for "setting up the Federal Rules as a body of law inviolate," but concurred in the result in part because he felt that "the [*Ragan*] decision was wrong."[88] Although the harmony between *Ragan* and *Hanna* was ambiguous, the majority opinion's analysis read at root that in event of a "direct collision," the applicable federal rule would control if passed in compliance with the Rules Enabling Act and the Constitution.[89]

The *Erie* line of cases as compounded by *Hanna* led to a circuit split on the issue of whether state statute of limitation tolling requirements directly conflicted with the applicable federal rule.[90] In order to resolve the issue, the Court granted certiorari in the case of *Walker v. Armco Steel Corp.*[91] In *Walker,* an Oklahoma carpenter filed a state products liability claim in federal court against a foreign nail manufacturer, after the carpenter permanently injured

84. *Id.* at 469 (emphasis added).

85. *Id.*

86. *See id.* at 470.

87. *See id.* at 476 (Harlan, J., concurring).

88. *Id.* at 476-77 (Harlan, J., concurring); *see also* Walker v. Armco Steel Corp., 446 U.S. 740, 749 n.8 (1980) (summarizing Justice Harlan's concurrence in *Hanna*).

89. *See Hanna,* 380 U.S. at 472; *see also* Rules Enabling Act, 28 U.S.C. § 2072 (Supp. 1995) (granting the Supreme Court the power to prescribe general rules of practice and procedure in the lower federal courts for the purpose of resolving conflicts in procedural rights).

90. *See Walker,* 446 U.S. at 744 n.6 (outlining the disagreement in the lower federal courts); *see also* Jack J. Rose, *Erie R.R. and State Power to Control State Law: Switching Tracks to New Certification of Questions of Law Procedures,* 18 HOFSTRA L. REV. 421 (1989) (examining the conflict between federal and state courts as to the application and utilization of certification procedures).

91. *See Walker,* 446 U.S. at 744.

his eye while pounding a nail into a concrete wall.[92] The complaint was filed just three days before the expiration of time allotted by Oklahoma's applicable two year statute of limitation, and according to Oklahoma law, the plaintiff had a sixty day grace period after filing to serve process on the defendant.[93] In Oklahoma, only service of process commences an action for the purposes of tolling the state statute of limitation.[94] When the plaintiff failed to serve process within the two year and sixty day period, the federal district court dismissed the complaint as barred by the Oklahoma statute of limitation, and the Tenth Circuit affirmed.[95]

On review, the Supreme Court began its analysis in *Walker* by describing the case as "indistinguishable" from *Ragan*.[96] The Court clarified that *Hanna* did not overrule *Ragan*, and noted that unlike *Hanna* there was no "direct collision" between the state and federal rules in this case.[97] The Court then commanded federal deference to Oklahoma's "substantive decision":

> Rule 3[of the Federal Rules of Civil Procedure] simply states that "[a] civil action is commenced by filing a complaint with the court." There is no indication that the Rule was intended to toll a state statute of limitations, much less that it purported to displace state tolling rules for purposes of state statutes of limitations. In our view, in diversity actions Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations.[98]

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92. *See id.* at 741.

93. *See id.* at 743.

94. *See id.* at 742-43.

95. *See id.* at 743-44; *see also* Walker v. Armco Steel Corp., 452 F. Supp. 243 (D. Okla. 1978), *aff'd*, 592 F.2d 1133 (10th Cir. 1979).

96. *See Walker*, 446 U.S. at 748. In fact, as noted by the Court "the predecessor to the Oklahoma statute in this case was derived from the predecessor to the Kansas statute in *Ragan*." *Id.* (citing Dr. Koch Vegetable Tea Co. v. Davis, 145 P. 337, 340 (1914)).

97. *See Walker*, 446 U.S. at 750-52.

98. *Id.* at 750-51 (citations and footnotes omitted). *Walker* explicitly declined to address the applicability of state or federal statute of limitation tolling provisions if the underlying cause of action is based on federal law. *See id.* at 751 n.11. The Supreme Court eventually considered the issue in *West v. Conrail*:

> When the underlying cause of action is based on state law, and federal jurisdiction is based on diversity of citizenship, state law not only provides the appropriate period of limitations but also determines whether service must be effected within that period. Respect for the State's substantive

In the view of the Court, Rule 3 and the Oklahoma rule could "exist side by side . . . each controlling its own intended sphere of coverage without conflict."[99] The Court was adamant that the service requirement was an "integral" part of Oklahoma's statute of limitation, and that "Rule 3 does not replace such policy determinations found in state law."[100] In short, the Court refused to sanction a situation where a state claim that would otherwise be barred in state court would survive in the federal forum "solely because of the fortuity that there is diversity of citizenship between the litigants."[101]

There is an undeniable tension between *Hanna* and the *Ragan* and *Walker* cases. Although the law governing when to apply conflicting state and federal procedural rules in federal court is tortured, for the purposes of this article one thing is clear. Regardless of the interplay between other federal and state rules, in diversity cases, *Walker, Ragan* and *York* mandate the application of state statutes of limitation, inclusive of state commencement requirements.

## V. PROBLEMS ARISING FROM CONFLICTING FEDERAL AND STATE STATUTE OF LIMITATION COMMENCEMENT REQUIREMENTS IN THE EIGHTH CIRCUIT—SHARKS IN THE *ERIE* TANK

As illustrated by the case law, problems arise when a state claim is filed in federal court within the applicable statute of limitation, but service is postponed. Even if a federal claim is filed within the statute of limitation, any pendent or independent state claim may

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> decision that actual service is a component of the policies underlying the statute of limitations requires that the service rule in a diversity suit "be considered part and parcel of the statute of limitations." This requirement, naturally, does not apply to federal-question cases.
>
> . . . .
>
> . . . Although we have not expressly so held before, we now hold that when the underlying cause of action is based on federal law . . . the action is not barred if it has been "commenced" in compliance with Rule 3 . . . .

481 U.S. 35, 39 & n.4 (1987) (citations omitted) (quoting *Walker*, 446 U.S. at 752). This language left unresolved the applicability of state statute of limitation and commencement rules to pendent state claims in federal question cases. *See infra* notes 104 and 136 and accompanying text.

99. *Walker*, 446 U.S. at 752.

100. *Id.*

101. *Id.* at 753.

still require service before the statute of limitation is satisfied. In other words, depending on state commencement requirements, the state claims are endangered if service, as well as filing, does not occur within the applicable state statute of limitation.

The problem was recognized by the Federal Rules of Civil Procedure Advisory Committee as early as 1937.[102] Despite the Advisory Committee's recognition of the problem, the federal rules have no built in safeguards that harmonize conflicting federal and state statute of limitation commencement requirements.[103] Although the issue appears resolved by *Ragan* and *Walker*, practitioners in the Eighth Circuit repeatedly stumble over the application of state statute of limitation rules to state claims filed in federal

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102. The 1937 adoption notes of the Advisory Committee on Rules read:

> When a Federal or State statute of limitations is pleaded as a defense, a question may arise under this rule whether the mere filing of the complaint stops the running of the statute, or whether any further step is required, such as, service of the summons and complaint or their delivery to the marshall for service. The answer to this question may depend on whether it is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights, to vary the operation of statutes of limitations.

FED. R. CIV. P. 3, advisory committee's note 4.

According to the Supreme Court, the Federal Rules Advisory Committee "predicted the problem" that is the subject of this article, and may have expected but did not intend that Rule 3 serve as a tolling provision for statute of limitation purposes regarding state claims in diversity actions. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 750 n.10 (1980).

103. The Advisory Committee apparently thought that Rule 4 of the Federal Rules of Civil Procedure would adequately deal with the issue of conflicting state and federal statute of limitation commencement requirements. The Advisory Committee notes for Rule 3 read, "[t]he requirement of Rule 4(a) that the clerk shall forthwith issue the summons and deliver it to the marshall for service will reduce the chances of such a question [regarding conflicts between state and federal statute of limitations commencement requirements] arising." FED. R. CIV. P. 3, advisory committee's note 4.

However, Rule 4 of the Federal Rules of Civil Procedure does not require the clerk to deliver the summons to the marshall for service after issuing the summons. In fact, the clerk is to "issue [the summons] to the plaintiff for service on the defendant." FED. R. CIV. P. 4(b) (Supp. 1998). The rule elaborates, "plaintiff is responsible for service of a summons and complaint within the time allowed . . . ." *Id.* 4(c)(1). Only "[a]t the request of the plaintiff," will the court "direct that service be effected by a United States marshall . . . ." *Id.* 4(c)(2). Even upon request by the plaintiff, the court has discretion in deciding whether a marshall should be the one to serve the summons. *Id.* ("the court *may* direct") (emphasis added).

court.[104]

For example, *Sieg v. Karnes*[105] involved the ramifications of an automobile accident between residents of two different states.[106] The plaintiff filed suit in federal district court on the last day available under the applicable South Dakota statute of limitation, and her attorney personally served the defendant on that same day.[107] However, under South Dakota law, the attorney's personal delivery was not a valid method of serving a defendant.[108] Since South Dakota requires service for an action to be commenced, and the service in this case was invalid, the court dismissed the claim as time-barred by the statute of limitation.[109]

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104. This confusion occurs despite explicit warnings in the annotated federal code. The general federal statute of limitation for civil actions is followed by practice commentary which cautions practitioners that "[t]he line of a limitations inquiry in a diversity case . . . is in any event a straight one" since "resort to state law in a diversity case has been carried right down to a determination of the moment that the action is deemed commenced . . . ." 28 U.S.C.A. § 1658 (Practice Commentary) (West 1994 & Supp. 1998) (citing *Walker*).

Similarly, the annotated federal rules take pains to put practitioners on notice regarding the implications of *Walker*:

> As long as the complaint has been filed [in federal court] on or before the last day – *the assumption would run* – the action is timely and the summons and complaint can be served at any time during the 120 days that follow [pursuant to Rule 4(j) of the Federal Rules of Civil Procedure] . . . . The foregoing is true enough as a general principle when jurisdiction is based on a federal question, or any other ground of jurisdiction except diversity of citizenship. *When diversity is the jurisdictional basis for the federal action, however, Rule 3 emphatically does not govern for purposes of the statute of limitations. The rule applicable in a diversity case to determine whether the statute of limitations has been satisfied is taken from the law of the state in which the federal court happens to be sitting.*

28 U.S.C.A. [FED. R. CIV. P.] 3 (Practice Commentary) (emphasis added). In fact, the practice commentary in the annotated federal rules is followed by a large-font, bold-faced caption that reads "WARNING TO PLAINTIFFS ABOUT RELYING ON RULE 3 IN DIVERSITY CASES," followed by the succinct lecture "[f]or those who might not have read the foregoing Commentary but whose eye is caught by captions, we offer the above caption and this brief statement: read the foregoing Commentary." *Id.*

105. 693 F.2d 803 (8th Cir. 1982).

106. *See id.*; *see also* Kent Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 VA. L. REV. 1183 (1987) (discussing *Sieg v. Karnes* and federal service of process requirements).

107. *See Sieg*, 693 F.2d at 804.

108. *See id.* at 806.

109. *See id.* at 806-07; *accord* Chizmadia v. Smiley's Point Clinic, 726 F. Supp. 249, 252 (D. Minn. 1989) (addressing how in a diversity action, state law controls when an action is commenced) (citing *Sieg*, 693 F.2d at 804-05).

Similarly, the Eighth Circuit dismissed a state law claim based on the allegedly negligent design and manufacturer of a hydraulic crane in *Fischer v. Iowa Mold Tooling Co.*[110] The injured plaintiff's suit was filed in federal district court within three days of the time allotted by South Dakota's applicable three-year statute of limitation.[111] However, the plaintiff's attorney followed local customary practice and mailed the summons to a sheriff in the defendant's home state of Iowa for service.[112] The sheriff apparently did not receive and serve the summons until eleven days later, or eight days too late to satisfy South Dakota's commencement requirements for statute of limitation purposes.[113] The court dismissed the claim as time-barred despite the "lamentable" facts, declaring "*Walker v. Armco Steel* has laid to rest the notion that Rule 3 can ever be used to toll a state statute of limitations in a diversity case arising under state law."[114]

Based in part on the *Walker* reasoning, the federal court in *Brown v. Rinehart*[115] dismissed a state negligence claim as time-barred.[116] In *Brown*, a plaintiff filed a claim relating to an automobile accident on the last day of the period allotted by the applicable Arkansas statute of limitation, pursuant to the federal court's diversity jurisdiction.[117] However, the defendant was not served for more than five months after the filing date.[118] Since Arkansas required service of process within sixty days of filing for commencement purposes, the court dismissed the claim for failure to toll the state limitation statute.[119]

*Rogers v. Furlow*[120] is another example of an otherwise poten-

110. 690 F.2d 155 (8th Cir. 1982).
111. *See id.* at 156.
112. *See id.*
113. *See id.*
114. *Id.* at 157-58 (footnote omitted). In the process of relying on *Walker*, the court overruled its 1973 decision in *Prashar v. Volkswagen of America, Inc.*, 480 F.2d 947 (8th Cir. 1973), *cert. denied*, 415 U.S. 994 (1974), which held that compliance with Rule 3 of the Federal Rules of Civil Procedure constituted commencement of an action for purposes of tolling the South Dakota statute of limitation. *See Fischer* 690 F.2d at 157; *Prashar*, 480 F.2d at 948. The court in *Fischer* commented that *Walker* "must control," and that "the supposed distinction [between the state statutes in *Prashar* and *Walker*] . . . is of no real moment." *Fischer*, 690 F.2d at 157.
115. 105 F.R.D. 532 (E.D. Ark. 1985).
116. *See id.* at 533-34.
117. *See id.* at 533.
118. *See id.*
119. *See id.* at 533-34.
120. 729 F. Supp. 657 (D. Minn. 1989).

tially valid claim being dismissed within the Eighth Circuit because the plaintiff did not comply with state commencement requirements for statute of limitation purposes in a diversity context.[121] The plaintiff in *Rogers* filed a state medical malpractice claim against the Mayo Clinic and two doctors for their allegedly negligent care in relation to a surgically implanted inflatable penile prosthetic device.[122] Although the claim was filed with the federal district court a few weeks before the applicable Minnesota statute of limitation would have barred the action, service was delayed for nearly two months.[123] Judge Doty succinctly dismissed the case, ordering that "[i]n a diversity case Minnesota state law determines when an action is commenced for statute of limitations purposes."[124]

Yet again, a court summarily dismissed a plaintiff's state negligence claim as time-barred in *Walker v. Thielen Motors, Inc.*[125] The plaintiff was a Tennessee resident who was injured in an accident in Tennessee, but the defendants in the case were Minnesota residents.[126] The plaintiff filed her claim in federal district court in Minnesota within the six-year statute of limitation applicable to state personal injury actions.[127] However, defendants were not served until six years and *one day* after the accident.[128] The court applied Minnesota's procedural rules and dismissed the claim as time-barred, noting that "*Walker* [*v. Armco Steel*] clearly dismissed Rule 3 as a 'controlling federal rule' in situations such as this case . . . ."[129]

Practitioner confusion is particularly acute where a plaintiff files a federal claim *and* pendent state claim together in federal court. In *Appletree Square 1, Limited Partnership v. W.R. Grace & Co.*,[130] a building owner brought federal RICO[131] and state law

121. *See id.* at 661.
122. *See id.* at 658.
123. *See id.* at 659 (explaining that service was delayed due in part to the Wisconsin court's refusal to allow the new action, and in part to plaintiff's subsequent failed attempt to bring his new claim in an Illinois court).
124. *Id.* at 661.
125. 916 F.2d 450 (8th Cir. 1990).
126. *See id.* at 450.
127. *See id.*
128. *See id.*
129. *Id.* at 451 (quoting Walker v. Armco Steel Corp., 446 U.S. 740, 750-51 (1980)).
130. 815 F. Supp. 1266 (D. Minn. 1993), *aff'd*, 29 F.3d 1283 (8th Cir. 1994).
131. *See* Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.

products liability, nuisance, and breach of warranty claims against W.R. Grace in federal district court in Minnesota.[132] Sixteen years earlier, W.R. Grace had supplied an asbestos-containing fireproofing product which was sprayed on the building's structural steel during construction.[133] The building owner filed suit on June 29, 1990, within the applicable statute of limitation, but did not serve process until July 3, 1990, a date that fell outside of the applicable Minnesota statute of limitation by two days.[134] The court ruled that the state law claims were all time-barred, since Minnesota law requires service before an action is commenced for purposes of tolling the applicable statute of limitation.[135] The court rejected the plaintiff's argument that state claims, when coupled with federal question claims, should be governed by the Federal Rules regarding commencement for statute of limitation purposes:

> [T]he presence of federal question jurisdiction as to Count X does not command a different [time-bar] result for the state law claims in Counts I through IX . . . the *source* of the cause of action, whether state or federal law, determines whether Fed.R.Civ.P. 3 will toll statutes of limitations. Whatever the rule where a federal law cause of action is pled, state commencement rules control where a state law cause of action is pled [in federal court].[136]

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§§ 1961-68 (1994).

132. *See Appletree*, 815 F. Supp. at 1266.

133. *See id.* at 1269.

134. *See id.* at 1271.

135. *See* MINN. R. CIV. P. 3.01; *Appletree*, 815 F. Supp. at 1280.

136. *Appletree*, 815 F. Supp. at 1272 & n.9; *accord* Alholm v. American Steamship Co., 144 F.3d 1172, 1176 (8th Cir. 1998) (ruling that state limitation and commencement rules apply to pendent state malpractice claims in case where plaintiff invoked federal jurisdiction because of claim brought under federal Jones Act, 46 U.S.C. § 688) (citing Anderson v. Unisys Corp., 47 F.3d 302, 309 (8th Cir. 1995) (holding that the state procedural rule applies where both federal and state claims are alleged)); Appletree Square I, Ltd. Partnership v. W.R. Grace & Co., 29 F.3d 1283, 1286 (8th Cir. 1994). *Appletree* and subsequent Eighth Circuit cases place in doubt the continued veracity of *Kyllo v. Farmers Cooperative Co.*, 723 F. Supp. 1332 (D. Minn. 1989). In *Kyllo*, the plaintiff was fired from her job and filed both federal and state age and gender discrimination suits in federal court. *See id.* at 1333. The plaintiff had forty-five days to "bring" her state action. *See id.* at 1335 & n.4. The plaintiff filed her claim on the forty-fifth day, but did not serve summons until day forty-six. *See id.* at 1334. Still, Judge Diana E. Murphy allowed the state claim to proceed, referencing *Hanna* but paying no mention of *Ragan* or the seminal *Walker* case:

> Jurisdiction is based here upon alleged violations of federal law, with

Here then, state law claims that may or may not have had independent worth were procedurally time-barred.[137] A plaintiff's attorney failed to heed the warnings of *Ragan* and *Walker* and waited a few days after filing the claim before serving the defendant, in turn failing to comply with the applicable state statute of limitation.[138] *Appletree* extended the *Walker* doctrine to pendent state claims in federal court, explicitly ruling that *both* pendent state claims *and* state claims filed under diversity jurisdiction were subject to state statute of limitation and commencement requirements.[139] The Eighth Circuit later affirmed *Appletree*.[140]

Despite all the earlier precedent, practitioners in the Eighth Circuit continued to ignore the *Walker* mandate that state law governs commencement and statute of limitation rules in diversity cases.[141] The same year as the lower court's determination in *Appletree*, the Eighth Circuit affirmed two similar decisions.[142] In *Concordia College Corp. v. W.R. Grace & Co.*,[143] a college sued W.R. Grace for asbestos removal abatement costs pursuant to state law.[144] Grace manufactured the asbestos-containing building materials used in some of Concordia's college buildings.[145] Concordia filed the suit on June 29, 1990, but did not serve Grace until July 24, 1990.[146] The applicable statute of limitation and accompanying revival stat-

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> pendent state claims. The action was filed and remains in federal court . . . . An action is commenced in federal court by filing the complaint with the court. . . . Plaintiff therefore timely brought her action by filing her summons and complaint within 45 days.

*Id.* at 1335-36. In view of the Eighth Circuit's subsequent pronouncements, *Kyllo* is undoubtedly bad precedent, although it was not appealed.

137. *See Appletree*, 815 F. Supp. at 1280.

138. *See id.* at 1271.

139. *See id.* at 1272.

140. Appletree Square I, Ltd. Partnership v. W.R. Grace & Co., 29 F.3d 1283, 1286 (8th Cir. 1994).

141. *See, e.g.*, Concordia College Corp. v. W.R. Grace & Co., 999 F.2d 326, 330 (8th Cir. 1993) (holding that the plaintiff's claims were time-barred under Minnesota law); Metropolitan Fed. Bank v. W.R. Grace & Co., 999 F.2d 1257, 1262 (8th Cir. 1993) (affirming *Concordia* and similarly barring plaintiff's claims under Minnesota law).

142. *See Concordia College Corp.*, 999 F.2d at 326; *Metropolitan Fed. Bank*, 999 F.2d at 1257.

143. 999 F.2d 326 (8th Cir. 1993).

144. *See id.* at 328.

145. *See id.* at 328.

146. *See id.*

ute required commencement of the action by July 1, 1990, as in *Appletree*.[147] Finding the claims time-barred under the analysis outlined by the Supreme Court in *Walker*, the Eighth Circuit affirmed the lower court's summary judgment in favor of Grace.[148]

W.R. Grace again benefited from a plaintiff's failure to obey the *Walker* and *Ragan* decisions in *Metropolitan Federal Bank of Iowa v. W.R. Grace & Co.*[149] *Metropolitan* also involved a building owner suing Grace to recover abatement costs relating to asbestos-containing building materials.[150] The court referenced the *Concordia* decision and affirmed the district court order dismissing the claims, finding that the claims were *filed* before the applicable limitation period but that service did not occur until after the applicable statute of limitation expired.[151] The state claims in *Metropolitan*, like those in *Appletree* and *Concordia* before it, were governed by Minnesota's statute of limitation, which required service before an action was legally commenced for purposes of tolling the limitation period.[152]

Finally, this vintage procedural error occurred again in the 1995 decision *Anderson v. Unisys Corp.*[153] Most of the previous Eighth Circuit case law dealt exclusively with state claims in a federal court acting under diversity jurisdiction, but *Appletree* extended the *Walker* doctrine to those state claims that were pendent in federal question cases.[154] Still, the plaintiff's mistake in *Appletree* was repeated in *Unisys*.[155] Unisys laid off Anderson from the company's software engineering division, and Anderson filed a series of state and federal anti-discrimination complaints.[156] The district court dismissed the pendent state claims as time-barred, since Anderson filed his complaint just within the applicable Minnesota statute of limitation but failed to serve Unisys for months thereafter.[157] The

147. *See id.* at 328; Appletree Square I, Ltd. Partnership v. W.R. Grace & Co., 815 F. Supp. 1266, 1271 (D. Minn. 1993).
148. *See Concordia College Corp.*, 999 F.2d at 328.
149. 999 F.2d 1257 (8th Cir. 1993).
150. *See id.* at 1258.
151. *See id.* at 1261-62.
152. *See id.* at 1262; *see also Concordia College Corp.*, 999 F.2d at 328; *Appletree*, 29 F.3d at 1273.
153. 47 F.3d 302 (8th Cir. 1995).
154. *See Appletree*, 29 F.3d at 1286.
155. *See Unisys Corp.*, 47 F.3d at 304-05.
156. *See id.* at 304.
157. *See id.* at 302-03, 305.

Eighth Circuit affirmed.[158]

This egregious pattern of procedural errors continues, even in pure diversity cases.[159] In the unreported decision of *Kramer v. Tokos Medical Corp.*, a plaintiff's state law sexual harassment claim was dismissed from a federal district court acting under diversity jurisdiction, because the plaintiff filed the claim properly but failed to serve the defendant within the applicable Minnesota statute of limitation.[160] Despite the relative clarity of *Ragan, Walker* and subsequent case law developments, yet another plaintiff's state law claim was dismissed from federal court within the Eighth Circuit for failure to comply with state rules requiring service of process to commence an action for statute of limitation purposes.[161]

## VI. SUGGESTIONS FOR SAFE SWIMMING

Again and again, plaintiffs in the Eighth Circuit see their state law diversity claims or pendent state claims dismissed from federal court for failure to comply with state statute of limitation and commencement rules. How can practitioners avoid this problem? The answer is simple. In diversity cases, the Supreme Court has definitively demanded respect for state statute of limitation requirements. A plaintiff filing a state claim in federal court pursuant to diversity jurisdiction must follow the applicable state procedural rules regarding commencement and timeliness of claims.[162]

Although the applicability of state commencement and statute of limitation rules to pendent state claims in federal questions may be undecided on the national level, the Eighth Circuit is clear that pendent state claims will also be governed by state timeliness rules. A plaintiff filing a federal question claim coupled with pendent state claims must abide by the applicable state commencement and statute of limitation rules, to ensure that the state claims are not dismissed as time-barred. It may seem strange that federal causes of action, normally governed by federal civil procedure rules, must abide by default to more demanding state rules because of their

158. *See id.* at 309.

159. *See* Kramer v. Tokos Med. Corp., No. 3-93-346, slip op. at 6-7 (D. Minn. Feb. 22, 1995).

160. *See id.* at 7.

161. *See id.*

162. *See* ARK. R. CIV. P. 4; IOWA. R. CIV. P. 48; MINN. R. CIV. P. 3.01; MO. R. CIV. P. 53.01; NEB. REV. STAT. § 25-217 (1995); N.D. R. CIV. P. 3; S.D. CODIFIED LAWS § 15-2-30 (Smith 1984).

coupling with pendent state claims in federal question cases. However, the only alternative is to file the federal and state claims separately.

In view of the case law, these solutions seem obvious. However, some practitioners in the Eighth Circuit remain unfamiliar with the Supreme Court's ruminations in *Walker v. Armco Steel*[163] and subsequent expansions in federal case law. One other word of advice is applicable here. A consistent theme in the aforementioned case law is that plaintiffs are filing claims at the last minute, albeit true that the *filing* occurs within the applicable statute of limitation. Because of the pure mechanics, service often occurs a few days or weeks later than filing, and that lag becomes dispositive of claims that may have been otherwise valid. Clearly, if the claims were filed even a month earlier, there would have been enough time in many of these cases to allow service within the applicable state statute of limitation.

The world of litigation is competitive, aggressive and unforgiving. When swimming in rough waters, it is best to remember the old adage that one is better safe than sorry.

163. 446 U.S. 740 (1980).