OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1839

TITLE RONALD A. SCHIAVONE, GENARO LIQUORI AND JOSEPH A. DiCAROLIS, Petitioners V. FORTUNE, aka TIME, INCORPORATE

PLACE Washington, D. C.

DATE February 26, 1986

PAGES 1 thru 38

ALDERSON REPORTING

(202) 628-9300

IN THE SUPREME COURT OF THE UNITED STATES

- -:

RONALD A. SCHIAVONE, GENARO :

LIQUORI AND JOSEPH A. DiCAROLIS, :

Petitioners, :

v. : No. 84-1839

FORTUNE, aka TIME, INCORPORATED :

- -:

Washington, D.C.

Wednesday, February 26, 1986

The above-entitled matter came on for oral argument before the the Supreme Court of the United States at 10:10 o'clock a.m.

APPEARANCES:

MORRIS M. SCHNITZER, ESQ., Newark, New Jersey

On behalf of the Petitioners

PETER G. BANTA, ESQ., Hackensack, New Jersey

On behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning is Schiavone against Fortune and Time.

Mr. Schnitzer, you may proceed whenever you are ready.

ORAL ARGUMENT OF MORRIS M. SCHNITZER, ESQ.

ON BEHALF OF THE PETITIONERS

MR. SCHNITZER: Mr. Chief Justice, and may it it please the Court:

My clients, the plaintiffs and the petitioners in this Court, sued over a libel against them which was published in Fortune magazine. The complaint was filed only days before the one-year defamation limitation statute in New Jersey which dates from publication.

The defendant was described meticucusly in the complaint. It was a foreign corporation and the publisher of Fortune magazine. In all the world only one sueable entity fitted that description and that happened to be, turned out to be, Time Inc.

The difficulty was that the plaintiff used Fortune as the name applied to and appropriately described defendant. The summons and complaint went out unerringly, arriving at the registered agent in New Jersey for Time Inc. and the registered agent fulfilled its duty appropriately and delivered the summons and

complaint to the executive suite at Time Inc., and there in fairly -- I would think instantaneously self-recognition took over and it was understood at once that the plaintiff had made some kind of an error.

At that point, with hindsight, I think it also clear that the decision warned in the executive suite, and that is not to get entangled with the merits, and instead to prevail on the law, that is, the law of procedure.

What happened was that as the plaintiff understood the error and learned and confirmed, I might add, that the papers arrived at Time headquarters about four days, certainly no longer, after the last hour of the statute of limitations period. The plaintiff undertook to amend, to install Time Inc. as the defendant in the action, and at that stage the defendant implemented its resolve to concentrate on the procedure and moved for a summary judgment.

The defendant prevailed twice, once in the district court and again in the court of appeals. At issue is Rule 15-C, the second summons. I mention the second summons because it focuses so squarely on party amendments, of pleadings that must be taken to be the rule that governs, and it was certainly the one on which the courts below concentrated.

That rule, adopted in 1966, has these characteristics. It begins by saying that it governs an amendment changing the party, and I underscore both "changing" and "the." It then goes on to lay down the requirements first, that the person to be brought in, the defendant to be brought in, must have had notice of the pending action, secondly that the overall circumstances are such that no prejudice would be entailed by allowing the amendment, and thirdly, that it must be clear to the person eventually brought in that but for some adversary, he would have been the one originally named.

Now, unquestionably Time Inc. fitted these requirements pretty much as a hand might fit a glove. The overriding requirement also in the rule is the following, that this awareness must come home to the party to be brought in, quote, "within the period provided by law for commencing the action against him."

Now, almost from the inscription, this provision in the Federal Civil Rules, two schools emerged. One, and I think it historically to be the first in the Fifth Circuit, was to say that this ought to be given a reading infused with its purpose, i.e. with its history and if so, what would happen is that the period for awareness or notice to the party to be

brought in would be no shorter than that which would normally come to that very same party if originally and correctly identified.

Now, in the latter case, a complaint can be filed the last hour of a limitations period and then promptly and within a reasonably short time, not instantaneously, the summons and complaint go out and can be served.

QUESTION: Mr. Schnitzer.

MR. SCHNITZER: Yes, Your Honor.

QUESTION: Was your complaint filed in the district court within the statute of limitations period?

MR. SCHNITZER: Yes, Your Honor. There's absolutely no dispute about that.

That was one rule, a single standard of notice serves the purpose of the 15-C.

QUESTION: When the notice was first served --

MR. SCHNITZER: Yes, Your Honor.

QUESTION: The first notice was not served, was it refused?

MR. SCHNITZER: The first notice came with the summons and complaint, Your Honor.

QUESTION: Wasn't it refused, r-e-f-u-s-e-d?

MR. SCHNITZER: Yes, Your Honor, buit --

QUESTION: It was refused?

MR. SCHNITZER: Yes, but Your Honor --

QUESTION: Is that noticed?

MR. SCHNITZER: In other words, somebody read this and then as we said about the Englishman who received a tax form from Inland Revenue, declined to subscribe.

QUESTION: But you knew it had been refused, didn't you?

MR. SCHNITZER: Pardon?

QUESTION: You knew it had been refused?

MR. SCHNITZER: Certainly.

QUESTION: What did you then do, and when? What did you then do, and when?

MR. SCHNITZER: I'm not sure I have the exact date, but my recollection is that it was refused in -- on May 23, Your Honor, and I think the Motion to Amend came in June, but by that time not only was Time aware of the action --

QUESTION: How was it aware of it?

MR. SCHNITZER: Your Honor, by reading the summons and complaint.

QUESTION: They didn't read it. They refused it.

MR. SCHNITZER: Are you saying that the record--

QUESTION: No, i'm only saying they refused it.

MR. SCHNITZER: They did, Your Honor, but my understanding is --

QUESTION: How can you say they read it if they say the record was tha they refused it? The whole purpose of accepting it is to show that you read it. If you refuse it, you say you refuse to read it.

MR. SCHNITZER: I have a different impression. I have the impression that they read it and said, this is a vaccinnation that doesn't take with us.

QUESTION: That's right.

MR. SCHNITZER: You are certainly right, Your Honor, in saying that they wouldn't accept it.

QUESTION: And you admit you were wrong?

MR. SCHNITZER: Oh, I'd gladly do that.

QUESTION: So, what do you put the weight on them for? I think the weight's on you.

MR. SCHNITZER: Weight? We have a rule applying to whole, and the question is how should it be read, and if read as three circuits have read it, Time can refuse or accept summonses and complaints just as they choose, but it will be a -- I say a vaccination that takes. It will be a summons and complaint which is neglected at the peril of the party who's doing that, and for that default procedures --

QUESTION: Are you suggesting, Mr. Schnitzer, that they had to read it before they knew whether they would refuse it or accept it?

MR. SCHNITZER: I am -- how shall I say, morally certain that it was read, that a studied decision was made after conferences with counsel who decided that a mistake about the name was something that could be capitalized on.

QUESTION: If they didn't read it they might find themselves having default judgments entered against them in appropriate cases, is that not so?

MR. SCHNITZER: Not only would that happen, but it seems to me that anybody who is accosted by a sheriff who says, I have a summons and complaint for him, says goodbye, I have another appointment, takes the consequences that is, he's chargeable with notice of what he could have read. I think that, in procedure, is fairly basic.

QUESTION: But, Mr. Schnitzer, by the time that Time Inc. received notice under your theory, that was after the statute of limitations?

MR. SCHNITZER: The whole crux of the case is exactly that. For the two lower courts it was as follows, that there is a double standard, i.e. one for a party to be brought in who must learn before the statute

of limitations expires Cinderella-fashion, midnight of the last evening, of the period, and if he doesn't he can spend the rest of his life free from the entanglement of the case, whereas had this very defendant been correctly named and received notice at the instant in time when it got it through the summons and complaint, there couldn't have been the slightest doubt that they would have heaved a sigh and proceeded to address the merits which we --

QUESTION: What excuse do you have for not naming the proper party? What possible excuse do you offer for not naming the original party?

MR. SCHNITZER: An error, Your Honor. I repeat, the admission of error. It was simply an error and it was an avoidable error. It that matters, that too is in the record.

QUESTION: Well, isn't the reason you have rules --

MR. SCHNITZER: Pardon?

QUESTION: You have rules so that people do not make mistakes.

MR. SCHNITZER: Your Honor, let me say it's just the reverse, and I'll tell you why. This --

QUESTION: Well, you don't want the rule, do you? You could come in and say, any rule of this Court

or any other court, I made a mistake so I'm excused. That's what you want the rule to be?

MR. SCHNITZER: That has not been my experience because I've made my quota of mistakes and what I've found is that this magnificent body of sparsely, sparely worded rules has within it the capability to fulfill what I regard as the first commandment of all procedure described in Rule 1, and that is to use the litigation period as an interval of gestation for the safe delivery of the merits into a final judgment at the other end of the process, unmarred and unblemished by procedures so that mistakes are made and this rule was written to correct mistakes.

If mistakes are made by a wise discipline, the system absorbs it because it's in the nature of the human condition to be frail and occasionally lapsing into mistakes. So, the whole system of procedure, I think has a, in my mind, a beautiful balancing tension between regularity and system without which the process might be most seriously marred, and denying correction within limits.

Now, as I say -- oh, I'm sorry.

QUESTION: May I ask you a question. Do you agree -- I notice your amendment says, "Fortune also known as Time Incorporated." Do you say they are

different parties or the same party?

MR. SCHNITZER: Your Honor, there is only one.

QUESTION: Well, if there is only one, is your amendment an amendment changing the party against whom the claim is asserted within the meaning of the rule?

MR. SCHNITZER: Of course, Your Honor.

QUESTION: So, you don't think the rule applies at all?

MR. SCHNITZER: Your Honor, in words, it does not. There are three kinds of party changes: misnomer, the wrong name for the right party; switching B for A and B and A are two different, distinct parties; C, additions, a brand-new party so that the number enlarges.

This rule for only Class B, switching, changing the party, aiding the party and correcting the name of a party. But in the process of composing it the Commission -- this Court's Rules Commission in proceeding to write the rule narrowly, proceeded t comment on it broadly so by an overreach of comment they said, we are gathering a misnomer -- why they didn't say so is a problem, and we are also gathering in party additions, and once again why they didn't say so is a comment.

But the courts have generally taken this attitude: we will work within the over-broad comment

about a more narrowly worded rule but also, in my view the Commission was quite unmistakeable in its -- how shall I put it, in its expressed intention to make sure that this very scenario, this very scenario, would never happen again.

QUESTION: Are you saying that the same rule applies to a case in which you served Time Inc. when you mean to serve Time Incorporated, as if you had served Time when you meant to serve Newsweek, say? Is it the same rule, and then you would later change it to correct it?

MR. SCHNITZER: Yes, if you will be consistent and say that if the rule is given an over-broad interpretation, let it also be infused with the Commission's purpose which by definition reads the magic words, "within the period provided by law for commencing the action against" to include a period for timely service after the expiration of the period.

What is timely service? The period that it would have been timely for summons and complaint to reach a correctly named party in the first instance.

Now, my answer to you, Justice Stevens, then is sure, it applies to all three categories despite the fact that it doesn't say so, if you will also take the same source, information source, for the intended

interpretation of this limiting summons for two reasons, one, four cases have been decided within a very short period of time in which --

QUESTION: Mr. Schnitzer, it would help if you would stay in front of the microphone. It's a little hard for us to hear on this side.

MR. SCHNITZER: Within the period of a year four cases have been decided in district courts dismissing appeals from Social Security decisions, and in one of them we do have the scenario in detail. The others probably fit the same thing, filed within 60 days, named a government officer but not the right one, all dismissed when amendments were sought and failed.

In one of them, the Sandwich case, the scenario is exactly this case, a last-hour filing of the complaint. A summons and complaint went out to a government officer, not the right one, of course, and then a motion to amend. The Court dismissed in all four.

Professor Bise wrote an article in which he barely suppressed the acerbity of his criticism as professors sometimes do with court decisions, and insisted on a rule change, giving up on the hope that the courts would arrive at that result by rule interpretations.

This rule emerged with the express object of

overcoming Sandwich, the facts of this very case. So, I'm on pretty good ground, I think, when I say that if the rule should be fulfilled in its outreach, i.e., it's applied to a misnomer, then let it be fulfilled in every nook and cranny of the comment, and that would be --

QUESTION: Were all of those cases you mentioned explainable mistakes? For example, you named the wrong officer -- I still am unable to understand that you'd have an explainable defense. You just made a mistake. You could have called up the New York Times information service and --

MR. SCHNITZER: I accept everything Your Honor says because it's very definitely true. The mistake could have been prevented, and of course should have been presented. But the question is, given the mistake, how is the system guilty?

QUESTION: And we wouldn't have to worry with it.

MR. SCHNITZER: That's so, Your Honor.

Now, as I said there are two rules -- two sets of approaches. One, the Second Circuit, it came early but it climaxed in an opinion by then Chief Judge Kleinberg in Ingram v. Kumar, and no exposition on my part will improve on what I regard as the pinnacle of insight about the correct application of the -- the

Second Circuit simply held that a double standard notice designed to contain prejudice and become a rule of thumb for assessing prejudice, that a double standard of notice not only is anomalous but inherently incompatible with the fair administration of a rule of this Court for which the intention need not be sought in other publications but for which the Court has only to look into it, as this Court carries the responsibility for the consequences of how its rules work in practice, i.e. by the standard of whether the merits can be addressed and fulfilled or whether they're blocked out by some error which the Court has the means to correct.

In my view there are five strong reasons why the Court below should be reversed. First, that as applied in the Third Circuit as compared with the second, it achieves a double standard of notice for which there is no laches, no reason of police. As a matter of fact Judge Seitz Sykes in this very case said, in point of policy our view, the view for which I contend this morning, is, quote, "appealing," and he arrived at the other result because he felt himself, or rather the Court, to be within a straitjacket, inept terminology in Rule 15-C.

Now, it is some commentary on a rule of law that a judge squirms visibly in the process of applying

it and that's quite true about every application of the point of view which the Third Circuit adopted in this case because asked for its comment on it, the most that they could say is the rule is too plain not to read literally, but no policy, no other reason or justification for that result whereas those who favor the point of view for which I argue, among courts, have this to say, that they find it appealing, a member of this Court said that, that as a policy matter it's quite persuasive, that was Judge Sykes, that the other point of view is anomalous, Judge Feinberg, that the construction for which I contend is permissible and desirable, again Judge Feinberg.

The Sixth Circuit, they were stronger. They said about the other rule that it was narrow, formalistic, and Professor Bise capped it all by saying it was niggly.

In any case, an outcome, not to be rested on adjectives or adverbs, but it said something when in point of policy every court which comments on it says the right road is this direction and somehow I am compelled to take the other one.

Well, I submit that that is not a penultimate compulsion for as this Court wrote the rule, it can read the rule and the reading of the rule can match its

purpose and its purpose at least was unmistakeable in 1966.

There are -- there is another reason. Justice Stevens by his question noted that this case belongs with misnomers. Now, there is no state system of procedure I know that is today so primitive that it would labor, much less gag, over the correction of misnomer.

Now, I think there's something more than anomalous if in 1986 in this Court a standard application, correction of misnomer as distinguished from other party changes is when measured by procedural developments throughout the country, regressive. And yet that's what it would be, at least by comparison.

I have already said that in my outlook any rule, any rule in this this book which applies in such a way as to blemish, deform, much less screen out the merits over procedural errors which are correctable without prejudice --

QUESTION: Mr. Schnitzer, one of the purposes of the rules is to require thing to be done in a particular period of time. You have to have some time limits.

MR. SCHNITZER: Of course, and I advocate it, Your Honor. I advocate it exactly as defined by the

Committee's comment in my reading, and by Judge Feinberg in his reading of that, and to other circuits as well, i.e. the very same period of time and not any longer than would be appropriate to bring notice home to this very same party had this very same party been correctly named in the first place, no double standard, no endless stretchout. All things must end including litigation and stages of litigation, but no double standard.

QUESTION: Well, of course the reason the Third Circuit said the double standard was because your case is different than that of the kind you say it should be analogized to.

MR. SCHNITZER: On the contrary, Your Honor. The Third Circuit merely shrugged and sighed and said, the rule is too literally written to allow us to infuse it with some higher purpose, and I say that no rule in this book is written in that fashion.

QUESTION: Well, the higher purpose is to let in people who make mistakes?

MR. SCHNITZER: Well, of course, Your Honor, because it is part of a system of procedure to involve and to cope with frailties, not only of the litigants which gives rise to the meritorious claims, but even lawyers who sometimes fall below the standard of perfection, as I'm sure I do and have, and I remember

some of those episodes.

Now, the rules have flexibility. They were written to have a little give so that the elbows are not constrained or tied to the frame. They were meant not to be loose, heaven forbid, but they were meant to move slightly, particularly in the three classic instances which are so familiar to any practitioner, and that is, you do have misnomer, there is the oversight of forgetting to tag one additional party, and then there are the occasions when you aim the arrow at A, only to learn later on B.

Now, no system except a narrow interpretation of 15-C bars that, has ever barred that, by the way, past what our former Chief Justice Vanderbilt used to call the special pleading which Baron Park made so well known.

So, our system, our system, the federal civil practice system, is quite capable of dealing with mistakes and 15-C was designed exactly to do that, and the question is, will it work.

Your Honor, if any time is left I reserve it for rebuttal.

CHIEF JUSTICE BURGER: Mr. Banta.

ORAL ARGUMENT OF PETER G. BANTA, ESQ.

ON BEHALF OF RESPONDENT

MR. BANTA: Mr. Chief Justice, and may it please the Court, petitioners would have this Court, in the guise of doing justice in their particular cases, engage in a radical enterprise, namely amending a federal rule in the guise of construing it, and establishing a principle which I think is novel in the Federal Rules, that the clear language of the Rules may be disregarded and new language implied into the rule when the Court might prefer the result so obtained in a particular case.

QUESTION: Are you suggesting that any judges or any courts who disagree with your view are radicals?

MR. BANTA: I think the Second Circuit has disagreed with it, and other circuits who have implied the period of reasonable service as an additional time. I think that is what they have done.

QUESTION: As often happens in criminal cases, if the complaint here had described Fortune a.k.a., also known as Time Incorporated, would that have satisfied the rule?

MR. BANTA: Well, I think we would have had to ask Judge Sarakin that. We probably would have contested it.

When the complaint was amended that was the way it was stated because the plaintiffs then and

petitioners now were trying to gloss over the fact that they had initially named the party which lacked capacity and were trying really to say they had just misnamed a proper party and were trying to bring it within a misnomer rather than a change of party rule.

QUESTION: Does this record show whether the person to whom the complaint was presented made a Xerox or other copy of it before they refused the service?

MR. BANTA: Let me clarify that. The service was made by a mailing, I think it was made by certified mail to one of the corporation trust companies which was the registered again, so addressed for Time Incorporated.

It was sent under the relatively new procedure under Rule 4 with a form of acknowledgement of service so that it might be acknowledged by the person being served, and that constitutes the consummation of service in lieu of the old procedure of sending a marshal out.

So that, what happened when this was received, as Mr. Schnitzer indicates, it was transmitted to Time which made the judgment which was later expressed to Mr. Schnitzer's co-counsel, that the entity named was not Time. It was not an entity capable of being sued.

Therefore Time Incorporated took the position that it was not a proper party. It was not named in the suit. And therefore it refused to sign that

acknowledgement of service. And this was duly and promptly communicated to Mr. Geiser, Mr. Schnitzer's colleague, so that there wa no doubt that Time had access to and made a copy of the complaint after it was received, within a few days after it was received and transmitted to them.

The refusal which I think Mr. Schnitzer was relating to was the refusal to acknowledge proper service in satisfaction of Rule 4, and I think that's just to clarify.

QUESTION: Your position is, I take it, or Time's position was that there wasn't any party at all named in the complaint?

MR. BANTA: That is correct, and we raised that issue.

QUESTION: And hence the amendment for the first time named a party?

MR. BANTA: That is correct, and Judge Sarakin so found because in his order he is referring to the history that Fortune is a service mark and is a publication and says, "As such, defendants contend that Fortune lacks capacity to be sued."

QUESTION: But had Time been named as a party the service would have been good and the statute of limitations would not have barred the suit?

MR. BANTA: If Time under its proper name had been named, yes. But Time was not named. In fact, I just want to finish, it says, "Plaintiffs do not urge that Fortune has the capacity to be sued." At the district court level the plaintiffs acknowledged and Judge Sarakin found that they had named an entity not capable of being sued. They had named in effect a product, like suing Crest Toothpaste instead of Colgate Palmolive or suing Chevrolet instead of --

QUESTION: Would you agree, Mr. Banta, that the service would have been proper if the complaint had said -- had not mentioned Time at all but just said "Publisher of Fortune" instead of "Fortune"?

MR. BANTA: I don't think so. I think that's a misdescription and under Rule 15-C and the Advisory Committee notes, misdescriptions are included within the definition of a change of parties.

QUESTION: So, that would not be a valid service. Supposing they said "Time Inc." instead of "Time Incorporated"?

MR. BANTA: I was asked the same question at the Third Circuit. There's a point that's so close that where I think it's clear that they have named --

QUESTION: How do you differentiate between those that are so close and -- is it a question of

whether you understand who is being sued?

MR. BANTA: I think it's purely typographical. I think an abbreviation is de minimis. I don't know of any cases dealing with it.

QUESTION: What if it said, the corporation who publishes the magazine "Fortune," whose name I don't at the moment know?

MR. BANTA: That's really a John Doe complaint, and the federal system has not really sanctioned John Doe complaints.

QUESTION: How did the person to whom the complaint was first mailed know enough to give it to Time?

MR. BANTA: This is in the record. In the transmittal letter that accompanied the complaint which was sent by Mr. Schnitzer's associates, they said, this is sent to you -- I am paraphrasing now -- in your capacity as registered agent for Time Incorporated who are the publishers of Fortune, the named defendant.

So, that is why the registered agent knew to do it.

QUESTION: That letter was, I suppose, transmitted to Time also with the complaint?

MR. BANTA: That is correct, yes. That letter was written --

QUESTION: So, Time at that point knew that the intention was to sue Time Incorporated?

MR. BANTA: I think that's a fair inference.

QUESTION: So, no one was misled?

MR. BANTA: That is correct.

QUESTION: But they did not know it within the period of the statute of limitations?

MR. BANTA: That is absolutely correct. The statute was ruled to have expired no later than May 19th, 1983, and that was as close as Judge Sarakin had to call it. The mailing of the notice to the registered agent took place on the 28th. It was received on the 23rd. There is no question that the initiation of process did not occur until the expiration of the statute and that's not in.

QUESTION: Would it be irrational in your view as distinguished from the mistake, or a correct application of the rule, would it be irrational for a court to conclude that the cover letter was part of the pleadings?

MR. BANTA: I think it would be irrational, I think partly because it was never filed with the court. I think that -- there have been cases and I don't want to press it but --

QUESTION: Well, is it in the record? Is the

letter in the record?

MR. BANTA: I believe so, without being able to assure --

QUESTION: That's all right.

MR. BANTA: My recollection is that the letter is in the record. But I think one of the things that emerges is that these -- you will very seldom ever see a case where there are fewer equities on the side of the plaintiff. At the same time as this case was initiated, this is in the record, another case involving many of the same plaintiffs, same defendants, same defendant's counsel, plaintiff's counsel, involving Mr. Schiavone and Time Incorporated, was pending in the United States District Court and the Third Circuit Court of Appeals, the same players in a slightly different game on a slightly different ball field.

So that, there is no question, that complaint properly named the defendant, Time Incorporated, happened to be publishing Time magazine instead of Fortune magazine.

There is no question that they knew -- but so that --

QUESTION: Let me just be sure that I have one thing understood.

MR. BANTA: Yes, sir.

QUESTION: You do agree, though, this rule applies to misnomers as well as to true changes of parties?

MR. BANTA: Yes, it does. The Advisory Committee made that very clear in their statement, and I think what they were trying to do was keep the district court from having to go through a very difficult analysis in each case as to whether a particular amendment really involved a misnomer or misdescription on the one hand, or a change of party on the other with a different outcome of rule.

I think the record, or the inference from what the Advisory Committee did, is to say, we're going to lump these all together and the same rule applies to them all, and avoid that determination.

QUESTION: But is it not true that under the prior law of misnomer, there were lots of cases with very, very trivial such as the difference between Time Incorporated and Time Inc., which were treated as misnomers and the misnomer rule applied to those cases?

MR. BANTA: Well, I think the misnomer cases, there was a problem and that is that it was the second corporation with the name of the misnamed corporation.

QUESTION: It would seem to me, and I don't really understand what your answer to this is, if they

had sued Time Inc. insted of Time Incorporated, I don't know why you couldn't make precisely the same argument and you should prevail, it seems to me, if you're right in this case.

MR. BANTA: I think this --

QUESTION: A misnomer, they got the wrong name.

MR. BANTA: There might be other questions, if Time had used Time Inc. in various publications --

QUESTION: No, the reason it comes to mind is because Mr. Schnitzer, I'm sure in good faith, kept referring to you as Time Inc. in his argument and you are not Time Inc. He is talking about somebody that's not even here.

MR. BANTA: I think one of the problems with Time Inc. is, I think Time Inc. has used its name in both forms and fashions and there would be at least an estoppel involved in that misnomer, and I think an estoppel --

QUESTION: But surely the question of service can't depend on whether the corporation has made that mistake itself.

MR. BANTA: Well, I think that the courts have looked to defendant's conduct as misleading plaintiffs, and where that has been a material issue they have felt that they have the power --

QUESTION: Well, putting misleading conduct to one side, entirely one side, and assume you have been very regular in the use of the name and always used "Time Incorporated," then your argument would be available to someone who made the mistake of suing you as "Time Inc."

MR. BANTA: I think this issue -- well, the Third Circuit said it didn't have to pass on the issue.

QUESTION: But logically, if we can't look at equities or anything, if we just follow the plain language, it covers that case.

MR. BANTA: Certainly, literally applied it does, an ampersand instead of an "and," something that's even pronounced the same.

Our position is that the effect of Rule 15-C the way it is construed by us and the way it has been adopted, is to do two things. It is to say to plaintiffs, in effect, there are two ways you can perfect your claim against the defendant. The first is properly to name the defendant in its proper corporate name or individual name, spelled right, whatever, and to file this complaint with the Court within the period of the statute of limitations.

Or, there is an alternate way of perfecting the claim and this is the way that 15-C provides, and

that is to file this complaint, possibly misnaming the original -- the proper party, so called, to be served, spelling it, to file this complaint but within the period of before the expiration of the statute of limitations, to give actual notice of the lawsuit, in effect to the proper party to be served and then your amendment to correct will relate back.

And, 15-C really provides additional alternate ways for plaintiffs to perfect their belief, their complaint. It does not go so far as Mr. Schnitzer says, and that's why we're here today, but it is not a double standard in the language he says. It is an alternate way for plaintiffs who have misnamed defendants, who have named the wrong party and many of these cases involve the naming of a wrong party, a subsidiary of a parent, a brother-sister corporation situation.

It is a way for plaintiffs to cure that. The Advisory Committee was very clear that they felt that this notice should be given within the period of the statute of limitations, and they said in their advisory note, they mean the limitations period.

So that, I think the arguments that Mr. Schnitzer raises are good legislative arguments to be addressed to a rulemaking body, to the Advisory Committee, to the Judicial Conference, and they

certainly have some appeal there and might be grounds for consideration of any amendment, but to imply this reasonable period of service test into the clear language and in the face of the Advisory Committee report, appears to cause a very serious problem, that the rule does not longer mean what it says.

Then, you still have the same problem of whether service was timely made within whatever reasonable period of service is made, and you're going to have determinations for district judges as to whether service was timely. Even in the Ingram v. Kumar case which was referred to, the service was not within 120 days at the time, and so you still have district judges passing on the adequacy of service down the road.

So, I think that the plaintiffs now under Rule 4, allowing for the initiation of process by mailing, have it within their power to get a summons cut promptly. They are not at the mercy of the marshal not serving. They now have control over the timing of service so they are not at the mercy of the marshal's negligence depriving them of the benefit of 15-C by failing to serve in time.

So, that benefit and that opportunity was given. I'm not contending that our refusal to acknowledge would defeat 15-C if that were the case. I

think that service probably for 15-C purposes would be good if it were timely because it furnishes actual notice. Whether it's acknowledgement for Rule 4 purposes is one matter, but it certainly is actual notice for purposes of 15-C.

The policies of the statute of limitations section have not really been touched on. They are definitely in the back of the consideration and statutes of limitations frustrate decisions on the merits. They serve another policy, and any plaintiffs who tiptoe right up to the edge of the statute of limitations before they take their actions run the risk of running afoul of the statute of limitations and unfortunately it happens all the time, and I am afraid will probably continue to happen.

The results may sometimes be different from what state law provides, but we are in a federal system, we have federal rules, federal causes of action and so that, I think there is no -- and this Court has already ruled that in procedural rules, in Hanna versus Plummer, there is no necessity that the outcomes be the same as in the state courts.

Even back on the history, the impetus, I think is clear, came from Professor Bise's article referring to the four suits. Those were suits against the

government, and that's a very thorny, difficult area. It's not one our case is specifically concerned with.

I know this Court has -- the Cooper case ame up, seeking certification within the year. Other cases may come along, short statutes of limitation, some confusion probably among practitioners as to who the proper party is to be sued.

It's a difficult area. Rule 15-C has special rules to deal with that which help to ease that particular question. They provide that the service in this limitations period can be accomplished by mailing. All you have to do is mail within the limitations period and the government is bound, which is somewhat broader. And it also provides that you serve the Attorney General or the U.S. Attorney. Even if the substantive cause of action requires both, even service on one would be sufficient.

It also provides that service on a proper agent for service counts if he would have been an agent for the defendant properly named. If you name the United States Postal Service and serve the U.S. Attorney, he cannot come in and say, well, that's improper service and the proper party was the United States of America, and while I could be served on behalf of the United States of America I was served in a

different capacity for the Postal Service and that is invalid.

That issue in fact was raised in the Edwards case cited in our brief and was rejected. So there is definitely much relief for litigants in the context of federal causes of action.

QUESTION: Mr. Banta, it is still true, is it not, that apart from the service problem if you had the same kind of fact scenario that you have here, you named the United States when you should have named the United States Postal Service, didn't correct it until after the statute ran, you'd be out of luck?

MR. BANTA: Absolutely. There is no question.

QUESTION: So that, the same rule applies to the government as to private parties?

MR. BANTA: The timeliness of the notice to the government is absolutely crucial, and that is in our briefs. It goes right back to the beginning of Rule 15-C and the amendments, and Professor Rise even comments in his article on, that the government received notice within the limitation period.

So that, he was concerned about the technicalities of naming the wrong party, but if you serve the right party he was willing to feel that there should be a rule overlooking the technicalities of

naming the Secretary who just left office rather than the incumbent, or something along those lines.

So that, our position is that Rule 15-C is workable. It's very important that it be applied as it reads. The implication that's asked for Mr. Schnitzer, namely the additional period of service, the Ingram rule, is really grafting a whole additional concept onto the rule which is appropriate to be done -- I'm not saying it is -- would have to be done in a legislative context.

The rulemaking process, the rule's enabling Act, that process comments -- this rule was submitted to the bar 20 years ago with a whole year for comment prior to its adoption. The issue that we're now in litigation on was raised in the Martz case while the rule was pending, yet no changes were made in the rule at the time.

So, the issue is one that we can hardly say came up and caught everyone by surprise. So, for these reasons we feel that the should confirm the judgments below and find in favor of our client, Time Incorporated.

MR. SCHNITZER: Your Honor, may I respond briefly.

ORAL ARGUMENT OF MORRIS M. SCHNITZER
ON BEHALF OF THE RESPONDENT -- REBUTTAL

MR. SCHNITZER: Page 33-A of the Joint Appendix is the letter of transmittal to Corporation Press Company, the registered agent, and states on May 20th, only hours after the statute of limitations had run out, not even a full day, "You will find enclosed herewith the summonses and complaints in the above matter directed to Fortune. As you know, Fortune is a publication of Time Incorporated and it is for that reason that we are serving you, the New Jersey registered agent for Time Incorporated."

So, Time Incorporated knew what its registered agent knew and at the same time, not a full day had elapsed after the statute had run out, and knew that it was intended. Secondly Professor Kaplan who was then chairman of the Advisory Commission wrote an article in 81 Harvard Law Review referring to the case which gave a narrow interpretion to the time for notice to the party would be brought in and said politely it was wrongly decided.

Thirdly, one of the four cases to which Professor Rise addressed himself in the seminal article that gave rise to Rule 15-C is exactly this scenario. The facts are spelled out in the opinion. It says a complaint was filed the last day and it follows that the first notice to the government came afterward. That was

the result to be reversed by 15.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:00 o'clock a.m., the case in the above entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-1839 - RONALD A. SCHIAVONE, GENARO LIQUORI AND JOSEPH A. DiCAROLIS, Petitioners V.

FORTUNE, aka TIME, INCORPORATED

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)