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or indirect, that the witness was in the employ of the defendant’s insurer. It is questionable whether such knowledge on the part of the plaintiff is relevant to the issue of whether the fact of employment should be admitted as bearing on the witness credibility before the jury.

There is one salient feature in Ellison which is not found in Butcher. In Ellison, the trial judge failed to tender an instruction which would have limited the jury’s consideration of the disclosure of indemnity insurance to the sole purpose of determining possible interest or bias of the witness employed by the defendant’s insurer. In Butcher, the court placed great stress upon the trial court’s instruction. However, since the Ellison opinion did not discuss the merits of that issue it is conceivable that a curative instruction would not have changed the outcome of the case.

In conclusion, the rule prohibiting any mention of insurance at the trial continues to be followed in West Virginia. At the same time various exceptions have been drawn which limit the rule to a moderate extent. However, the strength of the Butcher exception which permitted disclosure of insurance for the limited purpose of showing the interest or bias of a witness appears to have been weakened by the Ellison holding, which flatly denies approval to such disclosure under the facts presented there. Therefore, the state of the law on this point is somewhat in confusion and an attorney would be well advised to study both decisions in detail before endeavoring to reveal a witness’ connection with an insurance company.

Craig R. McKay

Federal Courts—State Laws In Conflict With Federal Procedural Rules

In 1945 the Supreme Court scuttled any hope that simplistic divisions between procedure and substance would mark the distinction between the state law applied under the Erie doctrine and the domain of the then new Federal rules of Civil Procedure. The Court, that year decided Guaranty Trust Co. v. York,1 the first major decision dealing with a conflict between a Federal Rule of Civil Procedure and a state substantive law.2 The federal courts

1 326 U.S. 99 (1945).
2 The earlier decision of Sibbach v. Wilson & Co., 312 U.S. 1 (1941), did not deal with an applicable federal rule in “direct collision” with a substantive state law. See Hanna v. Plumer, 380 U.S. 460, 471 n.13 (1965).
are required by the doctrine of *Erie R.R. v. Tompkins* to apply state substantive law. The *York* Court, attempting to promote uniform results when state and federal courts consider similar questions of state law, held that state law should be applied in diversity actions where a different result would be reached if the federal rule were applied.

The *York* decision caused an uneasiness among federal practitioners that grew to apprehension just four years later. The Court's 1949 decision in *Ragan v. Merchants Transfer & Warehouse Co.* was interpreted as having applied a state statute in lieu of an applicable Federal Rule of Civil Procedure. This created widespread concern among federal practitioners. The *Ragan* decision was characterized as threatening to invalidate all the federal rules. Although this concern was probably unwarranted, it remained prevalent until the Supreme Court decided *Hanna v. Plumer* in 1965.

*Hanna*, like *York* and *Ragan*, perpetuates the apprehension over the relationship between federal rules and state substantive laws—but now the concern runs in a different direction. *Hanna* seems to invite a disregard for state laws under the guise of promoting the internal purity and integrity of the federal procedural rules. The invited disregard for state laws has arisen not so much from the Court's holding in *Hanna* as it has from some of its sweeping language. Specifically, the area of conflict in *Hanna, Ragan, and York* involves the extent of the application in a diversity action of a federal rule conflicting with a state law reflecting a substantive policy decision of a state, but which may not fit neatly into any traditional substantive law category.

**Hanna Defined**

*Hanna* was a diversity action in which the plaintiff, a resident of Ohio, filed a complaint in federal district court in Massachusetts

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3 304 U.S. 64 (1938).
4 337 U.S. 580 (1949).
7 The Advisory Committee which drafted Rule 3 involved in *Ragan* probably never intended that rule to toll state statutes of limitations. See 66 note 27 infra.
against the executor of a deceased Massachusetts resident. The defendant executor was served with process in conformity with Federal Rule of Civil Procedure 4 (d) (1) by leaving a copy of the summons with his wife at his residence. The defendant allowed the period for the statute of limitations to pass, and then he moved the district court to enter summary judgment on the ground that the substituted personal service authorized by Federal Rule 4 (d) (1) had not tolled the running of the state statute of limitation. The defendant's argument was founded on a special Massachusetts statute regulating actions against executors which seemingly required "in hand" service or notice filed in the registry of probate to toll the statute of limitation. Both the federal district court and the circuit court of appeals, after reviewing the Massachusetts decisions, found the Massachusetts statute to be "substantive" state law and thus controlling under the doctrine of *Erie R. R. v. Tompkins*. On appeal the Supreme Court reversed, ruling that the action had been timely commenced, and that the substituted personal service authorized by the federal rule dictated the type of service required.

The Purpose of the Hanna Doctrine

To appreciate the complexities involved in *Hanna*, it is necessary to distinguish between the holding in *Hanna* and the doctrine of *Hanna*. The holding was seemingly narrow and predictable. As Professor Wright stated: "The precise holding of that case was that substituted service on an executor by leaving process at his usual place of abode, as authorized by Rule 4 (d) (1), is sufficient even where a state statute requires in hand service on an executor within a specified period." Despite its narrow holding Professor McCoid has suggested that *Hanna* may be broadly interpreted to espouse the doctrine "that state substantive purpose embodied in a

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10 FED. R. CIV. P. 4 (d) provides in part: "Service shall be made as follows: (1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age. . . ."

11 See text accompanying note 45 infra.


14 78 HARV. L. REV. 673 (1965). Of the circuit court's decision the commentator stated: "[R]ecognizing the importance of procedural certainty, the best approach would have been to place a heavy burden on the party seeking to subordinate a federal rule to a conflicting state procedure. Under this approach, the present case seems incorrectly decided. *Id.* at 676 (footnote omitted)."

procedural rule cannot be given effect when the procedural directive conflicts with one of the federal rules." If this is a proper statement of the Hanna doctrine, it is obvious that the difficult question of what is substantive law and what is procedural law becomes of primary importance.

The initial problem of the characterization of substance and procedure in diversity cases, raised in Hanna, was not created by the adoption of the federal rules but by the noted decision of Erie R. R. v. Tompkins. Basically, the so-called "Erie doctrine" is that in federal diversity actions, "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." Erie has subsequently been interpreted as requiring federal courts in diversity actions to apply state substantive law and federal procedural law. The principal justification for the Erie holding was to curtail the widespread forum shopping which had developed as an outgrowth of the Court's earlier decision in Swift v. Tyson. Justice Brandeis in Erie indicated that requiring federal courts sitting in diversity actions to apply the law of the forum state would decrease the inequitable administration of the law. Concern for the federal courts' policy of promoting uniformity of result between state courts and federal courts in diversity actions dominated opinions in federal diversity actions for a time.

The Hanna Court not only recognized that the Erie doctrine commanded federal courts to apply state substantive law and federal procedural law, but also recognized that this command was identical to that of the Federal Rules Enabling Act. However, the Court was prompt to point out that although the mandate of the federal act and the Erie rule were identical, it did not necessarily follow that identical tests would be used to distinguish sub-

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17 304 U.S. 64 (1938).
13 C. Wright, FEDERAL COURTS § 55, at 228 (2d ed. 1970). "Lawyers commonly refer to 'the Erie doctrine,' and this practice will be followed in the present work. It is clear, however, that the doctrine today is not what was announced in 1938." Id.
21 304 U.S. 64, 73 (1938).
22 304 U.S. 1 (16 Pet.) (1842).
23 304 U.S. 64, 75 (1938).
stantive law from procedural law. It must be recalled that since Erie was decided prior to the promulgation of the federal rules, the Erie opinion did not consider what effect the federal rules would have in determining whether a law was substantive or procedural. The limited choice in the Erie case was between state substantive law and a federal procedure which at that time was of subordinate interest to the federal judiciary. Consequently, the Court in Hanna saw the seemingly simple choice presented by Erie complicated by the addition of a uniform system of federal procedure. Chief Justice Warren, writing for the majority, indicated in two key passages the impact the federal rules had on Erie-type situations:

When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided Erie choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

The Chief Justice went on to point out:

Erie and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules.

Implicit in the language of the Chief Justice quoted above is a disregard of the policy of federal-state uniformity which since Erie had been a primary consideration in federal diversity actions. The Court appears to value uniform interpretation of the federal

26 Id. at 469-70.
27 See note 4 to Rule 3 of the April 1937 Draft made by the Advisory Committee on the Federal Rules found in 2 J. Moore, Federal Practice § 3.07 n.3 (2d ed. 1970). Note 4 to Rule 3 provided in part: "When a federal or state statute of limitations is pleaded as a defense, a question may arise under this rule whether the mere filing of the complaint stops the running of the statute or whether any further step is required, such as service of the summons and complaint or their delivery to the marshall for service." Id.
28 The Conformity Act of 1872, Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197, required the federal courts to look to the state procedure in law actions. The act provided in part that "the practice, pleadings, and forms and modes of proceeding in civil causes, other than, equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held..." 29 380 U.S. at 471 (footnote omitted).
30 Id. at 473.
rules in federal courts above uniformity between state and federal forums in diversity actions. The *Hanna* opinion fails to acknowledge the delicate balance between the state and federal systems that has been noted in the other cases. In the wake of *Hanna* federal courts are confronted with the problem of determining how far to go in disregarding state laws in following the Court's guideline of adherence to their own housekeeping rules.

**The Scope of the Hanna Doctrine**

Federal practitioners face a difficult task in attempting to ascertain the limits of the *Hanna* doctrine. The statement in *Hanna* that Congress has power "to prescribe housekeeping rules for the federal courts even though some of those rules will inevitably differ from comparable state rules," coupled with the Court's interest in promoting uniform procedure among the federal courts may indicate that the Court will now give first priority to uniform federal procedure. Although *Hanna* can be viewed as a victory for the federal rules, caution should be exercised not to interpret *Hanna* as permitting the abridgment of state substantive law by the Federal Rules of Civil Procedure,—such an interpretation is something Congress expressly did not intend and the Constitution may not permit.

**Justification for a narrow interpretation of**

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32 In *Hanna* the Chief Justice quoting from a Fifth Circuit decision states: "One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules." 380 U.S. at 473, quoting from *Lumberman's Mut. Cas. Co. v. Wright*, 322 F.2d 759, 764 (5th Cir. 1963).

33 However, in his concurring opinion Mr. Justice Harlan declared: "I think the Court has misconceived the constitutional premises of Erie . . . . I have always regarded that decision as one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems." 380 U.S. at 474.


36 380 U.S. at 473.

37 See note 32, supra.

38 28 U.S.C. § 2072 (1948), (Rules Enabling Act) provides, in pertinent part: "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions. Such rules shall not abridge, enlarge or modify any substantive right. . . ."

39 Few legal issues have created as much division among scholarly writers as the question of the constitutional basis of the *Erie* doctrine. Most earlier commentators were critical of any constitutional foundation for the *Erie* doctrine; however, more recent commentators have defended the constitutional basis of *Erie*. See generally, Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 427 (1959); Friendly, *In Praise of Erie—And the New Federal*
the Hanna doctrine can be found in the Court's persistent use of restrictive language in Hanna and its refusal to expressly overturn Ragan v. Merchants Transfer & Warehouse Co.\textsuperscript{40}

Ragan was the principal case on which the lower federal courts in Hanna had relied in concluding the Massachusetts requirements of “in hand service” to be substantive state law, and thus controlling under the Erie doctrine. In his concurring opinion in Hanna, Justice Harlan stated that if Ragan was still good law, (and the Court's opinion seems to indicate that it is), then the lower federal courts' rulings on the facts in Hanna should be affirmed.\textsuperscript{41} However, Justice Harlan pointed out that he could concur in the final disposition of Hanna since he believed Ragan had been incorrectly decided.\textsuperscript{42} Undoubtedly there is difficulty in reconciling Hanna with Ragan, but if a reconciliation can be made as the majority implied, then perhaps the limits of the Hanna doctrine will be clarified, and the proper approach to cases involving conflicts between state law and the federal rules can be ascertained.

Ragan Distinguished

Ragan, a diversity action, involved a Kansas statute of limitation which provides “[a]n action shall be deemed commenced . . . as to each defendant, at the date of the summons which is served on him. . . .”\textsuperscript{43} However, Federal Rule of Civil Procedure 3 provides that “[a] civil action is commenced by filing a complaint with the court.” The facts were such that the applicable statute of limitation ended on a date after the filing of the complaint but before service had been made on the defendant. The question in Ragan was whether the running of the statute of limitation had been tolled by mere filing in accordance with the federal rule although the state statute of limitation declared that actions were not commenced until the summons had been served. The Supreme Court ruled that the state statute of limitation had not been tolled by filing in compliance with the federal rule. The Ragan Court viewed the period of the statute of limitation as a matter of state sub-

\textsuperscript{40} 337 U.S. 530 (1949).
\textsuperscript{41} 380 U.S. at 476.
\textsuperscript{42} Id. at 477.
stantive law which, under the rule of *Erie R.R. v. Tompkins*, could not be varied by a federal rule of procedure.

Despite the seeming inconsistency between *Ragan* and *Hanna*, Chief Justice Warren, writing for the Court in *Hanna*, found a distinguishing factor between the two cases. The Chief Justice was able to divide the applicable Massachusetts statute into two parts.\(^{44}\) The statute provides in part:

Except as provided in this chapter, an executor or administrator shall not be held to answer to an action by a creditor of the deceased which is not commenced within one year from the time of his giving bond for the performance of his trust, or to such an action which is commenced within said year unless before the expiration thereof the writ in such action has been served by delivery in hand upon such executor or administrator. . . .\(^ {45}\)

\(^{44}\) 380 U.S. at 462 n.1. This footnote provides in part: "Section 9 is in part a statute of limitations . . . . This part of the statute . . . is not involved in this case. . . . "Section 9 also provides for the manner of service. . . . The purpose of this part of the statute is involved here . . ." (emphasis by the Court).

\(^{45}\) Id. at 462.

\(^{46}\) Id. at 465 n.1.
limitations provision. It would appear that the rule of *Ragan* declaring a state statute of limitation to be substantive when the time period and the method of commencing the action are inseparable, continues in force.

By not overruling *Ragan*, *Hanna* seems to declare that when the method of starting an action is made an inseparable part of a statute of limitation, Federal Rule 4 (d) cannot infringe upon the state's substantive statute of limitations; therefore, the state's method of commencement governs, not because the state can dictate how an action is begun in the federal courts, but because the state's method of commencement may be made a part of the state's substantive law which is not to be altered, abridged, or modified by any federal rule.\(^47\) On the other hand, where commencement of an action is separable from a state statute of limitations, commencement in federal diversity actions is governed by Federal Rule 4 (d) although the running and tolling of such a statute may be governed by state law.

**Hanna's Cautions Language**

Not all the potential for defining the limits of the *Hanna* doctrine lies in the distinction the Court found between the respective statutes involved in *Hanna* and *Ragan*. How far the Court will go in displacing state law with federal procedure in order to promote federal rule uniformity should to a large extent depend upon the nature, language, and purpose of both the state law and the particular federal rule, as well as the degree of conflict between the two.

Although the Court recognized that *Erie*-type problems were not to be solved by reference to any traditional or common-sense substance-procedure distinction,\(^48\) there is an indication in the Court's opinion that such a substance-procedure distinction will be one of the first tests applied when examining *Hanna*-type problems. Such a cursory determination of the nature of the different laws involved is indicated by the Court's observation that the federal rules are *prima facie* procedural.\(^49\) To declare that a Federal Rule of Civil Procedure is *prima facie* procedural is certainly based on a common sense observation. On the other hand, a cursory examination of the conflicting state law will probably not so readily reveal


\(^{48}\) 380 U.S. at 465-66.

\(^{49}\) See text accompanying note 29 *supra*. 
a *prima facie* characterization. Perhaps the best one can settle for on initial observation is that if the state law conflicts with the federal rule a further examination of the scope and purpose of both the federal rule and the state law is necessary. It must be emphasized that once a conflict is established a further examination must then be conducted. A failure to make such an examination would imply that the mere presence of a federal rule determines its application.

Once a conflict between a state law and a federal rule is presented, in order for the question of displacement of the state law to arise, there must be a *direct* conflict between the laws of the two sovereigns. In *Hanna* the Court noted that the clash involved was "unavoidable," and furthermore, that this was the first case before the Court "where the applicable Federal Rule was in direct collision with the law of the relevant state." The Court's observation that *Hanna* was the first case involving a "direct collision" seems to indicate the Court's reluctance to give a broad interpretation to the federal rules if such an interpretation would result in displacement of a state right which at least is arguably substantive. Nevertheless, in future cases a court should first declare that it has determined that there is such a direct collision before ruling on whether the state law should be displaced.

Although the Court has demonstrated reluctance to broaden the scope of a federal rule when it conflicts with a state substantive law, this should not be construed to mean that the language of the state law must directly conflict with one of the federal rules before the state law will be superseded. The language of the Massachusetts statute involved in *Hanna* did not explicitly conflict with that of Federal Rule 4 (d); however, the Court found a direct conflict of "unmistakeable clarity" which warranted displacement of the state law. Furthermore, the language of the state

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50 380 U.S. at 472.
51 Id. at 470.
52 Id. at 472.
53 Some may disagree with this statement. However, the tenor of the Court's opinion in *Hanna* is one of reluctance; reluctance to displace a state law as is evidenced by such words as "unavoidable," "unmistakeable" and "direct collision." Although the Court seems reluctant to seek out conflicting state laws, this does not mean it will be reluctant to displace state laws when they are in "direct collision" with a federal rule.
54 See Hardy v. Green, 277 F. Supp. 958 (D. Mass. 1967). There initially appears to be a "direct collision" in *Hardy*, but Judge Julian declares "there is thus no conflict here between differing methods of service under the Federal Rules and state law and no necessity for applying a Federal Rule in lieu of a conflicting state rule." Id. at 960.
55 380 U.S. at 470.
law involved, particularly if it is statutory, may be of significance as was demonstrated in the examination of the Court's intricate distinction between the Massachusetts statute involved in *Hanna* and the Kansas statute involved in *Ragan*.

A final factor to be considered is the purpose of both the state law and the federal rule. In *Hanna* the purpose of the "in hand service" portion of the relevant statute was to insure that executors would receive actual notice of claims against the estate so they would not be subjected later to personal liability. In any traditional or common sense analysis this seems to be a "substantive" purpose.

The basically substantive purpose of the Massachusetts statute was never disputed by Chief Justice Warren, who believed that the statute's purpose—be it substantive or procedural—could be sufficiently achieved by use of Federal Rule 4(d)(1). The use of the federal rule's method of service in lieu of the state's method is in effect only a substitution of the mode of achieving the state's substantive purpose rather than a frustration of the purpose itself. Consequently, the holding in *Hanna* limits displacement of the state's method of attaining its substantive purpose to instances where that purpose is not an integral part of the mode of its enforcement. The determination of whether the state law's purpose is inseparably linked with its mode of enforcement is primarily dependant on whether the law's purpose can be attained through a federal procedure at variance with the state mode of enforcement. To the extent that *Hanna* directs federal courts to apply their procedure to achieve state purposes, it is "old wine in new wineskin."

Unfortunately, the narrow holding of *Hanna* is overshadowed by some of its rather sweeping language. The statement that Congress can "prescribe housekeeping rules for federal courts," when coupled with the *prima facie* procedural characteristic attached to the federal rules, makes their integrity appear absolute. The

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58 Id. at 462 n.1.
59 Id.
60 Byrd v. Blue Ridge Rural Elec. Co-op., Inc., 356 U.S. 525 (1958). "[T]he requirement appears to be nearly a form and mode of enforcing the immunity. . . . and not a rule intended to be bound up with the definition of the rights and obligations of the parties." Id. at 536 (emphasis added).
61 Guaranty Trust Co. v. York, 326 U.S. 99 (1945). "When . . . a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may at times . . . vary . . . But . . . a federal court cannot afford recovery if the right to recover is made unavailable by the State . . . ." Id. at 108-09 (emphasis added).
threatened effect of such language is that the lower federal courts will seize upon it when a federal rule regates not only the state mode of enforcing a state-created right but also the right itself, and view the displacement of the state right as a natural consequence of its improvident interference with federal housekeeping.

The limited holding of Hanna is also overshadowed by what Justice Harlan terms the Court's "misconceived . . . constitutional premises of Erie . . . ." The Court considers the "importance of a state rule"—which is to say the purpose of the state law—to be of limited relevance.

The importance of a state rule is indeed relevant, but only in the context of asking whether application of the rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum State, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court.

The relevance of the state law's purpose is thus limited to its effect on what the Chief Justice denotes as "the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." By so limiting the relevance of the "importance" or "purpose" of the state law, there is a substantial threat in federal courts of an abrogation of various private rights. It is for this reason that Justice Harlan decries the Court's language suggesting that a federal rule should "apply no matter how seriously it frustrated a State's substantive regulation of the primary conduct and affairs of its citizens" as long as the application of the federal rule would not thwart the "twin aims of Erie."

The marked tendency of the Court to freely frustrate various state policies by implementing a mechanistic rule creates a definite imbalance in favor of the federal rules. A more rational approach, as suggested by Justice Harlan, would be to balance the state policy against the federal policy in cases where the federal rule could not merely obtain the state's purpose by a different means. Generally, the federal interest involved will be promotion of a uniform and

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50 380 U.S. at 474.
51 Id. at 468 n.9.
52 Id. at 476.
certain system of federal procedure, whereas the state interest will probably vary with each law that comes into conflict with a federal rule. Rather than apply the Court's mechanistic rule, the federal courts should attempt to balance the interests of each sovereign in order to determine which policy should be implemented. Total disregard of the state policy or purpose involved will only serve to inflame the rivalry between the state and federal judiciaries. It must be emphasized that if the federal rule can achieve the policy behind the state law by merely altering the mode of effecting that policy, then the federal courts will only be substituting federal procedure for state procedure. On the other hand, when a state procedural mode of enforcing a state-created right is bound up with the right itself, and thus falls into the uncertain area between substance and procedure, then the federal courts should make a determined effort to ascertain which of the two conflicting policies should prevail.