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**RULE 4(j) OF THE FEDERAL RULES OF CIVIL PROCEDURE
AND THE FORTHWITH SERVICE REQUIREMENT
OF THE SUITS IN ADMIRALTY ACT**

INTRODUCTION

With the advent of World War I, the United States became actively involved in the merchant shipping business. In response, Congress created the United States Shipping Board in 1916.¹ Because it felt that the government's liability in this field should equal that of private participants, Congress provided that vessels purchased, chartered or leased from the Board, while employed solely as merchant vessels, would be subject to all laws, regulations and liabilities governing merchant vessels.² This generous, though limited, waiver of the federal government's sovereign immunity soon proved troublesome, however. Private litigants began to use in rem actions to arrest government merchant vessels.³

In response,⁴ Congress passed the Suits in Admiralty Act (SAA),⁵ which explicitly exempted from arrest or seizure by judicial process vessels or cargo belonging to the government.⁶ Instead, Congress specifically provided that in personam actions could be brought against the United States.⁷ Thus, Congress solved the irksome problem of seizure without retracting its waiver of sovereign immunity.

The SAA provides that an action shall be commenced by filing the complaint in district court.⁸ Congress addressed service of process in section 2 of the Act:⁹

The libelant shall *forthwith* serve a copy of his libel on the United States Attorney for [the proper] district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mail-

1. Shipping Act of 1916, ch. 451, 39 Stat. 728 (codified as amended at 46 U.S.C. §§ 801-842 (1982)).

2. See Shipping Act of 1916, ch. 451, § 9, 39 Stat. 728, 730-31.

3. See *Canadian Aviator Ltd. v. United States*, 324 U.S. 215, 219 (1945); *The Lake Monroe*, 250 U.S. 246, 253 (1919); 3A M. Norris, *Benedict on Admiralty* § 197, at 15-2 (1983).

4. See *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 219 (1945); *Nahmeh v. United States*, 267 U.S. 122, 124 (1925); *Blamberg Bros. v. United States*, 260 U.S. 452, 458 (1923).

5. Ch. 95, 41 Stat. 525 (1920) (codified as amended at 46 U.S.C. §§ 741-752 (1982)).

6. See Ch. 95, § 1, 41 Stat. 525 (1920) (codified as amended at 46 U.S.C. § 741 (1982)).

7. See Ch. 95, § 2, 41 Stat. 525, 525-26 (1920) (codified as amended at 46 U.S.C. § 742 (1982)).

8. See *United Nations Relief & Rehab. Admin. v. The Mormacmail*, 99 F. Supp. 552, 554 (S.D.N.Y. 1951) ("The institution of a suit in admiralty is marked by the filing of the libel."); 3A M. Norris, *supra* note 3, § 198, at 15-5 (suit under the SAA is commenced by filing a complaint in a district court).

9. Ch. 95, § 2, 41 Stat. 525, 525-26 (1920) (codified as amended at 46 U.S.C. § 742 (1982)).

ing shall constitute valid service on the United States¹⁰

In matters of procedure, "forthwith" has been held to allow as little as twenty-four hours to take a required action.¹¹

The legislative history to the SAA does not state a purpose for the forthwith requirement.¹² Judge Boochever, in his concurring opinion in *Kenyon v. United States*,¹³ wrote that the forthwith provision was enacted because of the absence, at the time, of a uniform federal procedure governing service.¹⁴ Although the Act has been amended four times since 1920,¹⁵ Congress has not deleted the forthwith language.

As a consequence of Congress' inaction, the Second and Ninth Circuits have consistently held that failure to satisfy the forthwith requirement under the SAA is a jurisdictional defect requiring dismissal.¹⁶ The Third Circuit has held that the forthwith requirement of the SAA is not jurisdictional but rather procedural in nature.¹⁷ That court reasoned that since the Federal Rules of Civil Procedure applied to actions under the SAA,¹⁸ Rules 4(d)(4)¹⁹ and 4(j)²⁰ were the proper measures of effec-

10. *Id.* (emphasis added).

11. *See Dickerman v. Northern Trust Co.*, 176 U.S. 181, 193 (1900) ("In matters of practice and pleading [forthwith] is usually construed, and sometimes defined by rule of court, as within twenty-four hours"). The Second Circuit in *City of New York v. McAllister Bros.*, 278 F.2d 708 (1960), cited the *Dickerman* definition of forthwith in dismissing an action under the SAA for failing to meet the forthwith requirement. *Id.* at 710.

12. *See* S. Rep. No. 223, 66th Cong. 1st Sess. 1-6.

13. 676 F.2d 1229 (9th Cir. 1981).

14. *Id.* at 1231 (Boochever, J., concurring).

15. *See* Act of Aug. 6, 1981, Pub. L. No. 97-31, § 12(25), 95 Stat. 151, 155 (codified as amended at 46 U.S.C. §§ 743, 747, 749-752 (1982)); Act of Aug. 29, 1972, Pub. L. No. 92-417, § 3, 86 Stat. 654, 656 (codified as amended at 46 U.S.C. § 749 (1982)); Act of Sept. 13, 1960, Pub. L. No. 86-770, § 3, 74 Stat. 912 (codified as amended at 46 U.S.C. § 742 (1982)); Act of December 13, 1950, ch. 1136, 64 Stat. 1112 (codified as amended at 46 U.S.C. § 745 (1982)).

16. *See Amella v. United States*, 732 F.2d 711, 713 (9th Cir. 1984); *Kenyon v. United States*, 676 F.2d 1229, 1231 (9th Cir. 1981) (per curiam); *Battaglia v. United States*, 303 F.2d 683, 686 (2d Cir.), cert. dismissed, 371 U.S. 907 (1962); *City of N.Y. v. McAllister Bros.*, 278 F.2d 708, 710 (2d Cir. 1960).

17. *See Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc.*, 772 F.2d 62, 66 (3d Cir. 1985); *see also Kenyon v. United States*, 676 F.2d 1229, 1231-32 (9th Cir. 1981) (Boochever, J., concurring); *Battaglia v. United States*, 303 F.2d 683, 686-87 (2d Cir. 1962) (Friendly, J., concurring).

18. Actions brought under the SAA are based in admiralty. In 1966, the Supreme Court unified admiralty procedure with the Federal Rules of Civil Procedure (FRCP). *See* Amendments to Rules of Civil Procedure for the United States District Courts, 383 U.S. 1029, 1031-32 (1966).

19. Fed. R. Civ. P. 4(d)(4) governs service of process on the United States. In relevant part it states that "[t]he plaintiff shall . . . [deliver] a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States . . ." *Id.* A proposed change to Rule 4(d)(4) is being considered by the Judicial Conference Standing Committee on Rules of Practice and Procedure. The change would allow a plaintiff to serve the United States Attorney or his designate by registered or certified mail in lieu of in-hand service as the present rule requires.

20. Fed. R. Civ. P. 4(j) was added to the FRCP in 1983. Under the Rule "[i]f a

tive service on the United States and the forthwith requirement had been superseded.²¹

Whether the SAA service provision is considered jurisdictional or procedural raises important issues about the interaction of the Federal Rules of Civil Procedure with federal statutes. In the context of the SAA and the forthwith requirement, this Note will propose an analysis to be used when a Federal Rule of Civil Procedure (FRCP or Rule) and a federal statute collide. Part I considers whether the forthwith requirement of the SAA is an integral part of the waiver of immunity or whether it is merely a procedural device, and concludes that it is procedural. Part II shows that a Federal Rule of Civil Procedure supersedes inconsistent federal procedural statutes by applying *Hanna v. Plumer*. This Note concludes that a valid FRCP preempts an inconsistent federal statute that regulates only procedure. Accordingly, Rules 4(d)(4) and 4(j) supersede the forthwith service provision of the SAA.

I. FORTHWITH: JURISDICTIONAL CONDITION PRECEDENT OR PROCEDURAL DEVICE?

Following the position that waivers of immunity must be construed strictly,²² some courts have held the forthwith provision of the SAA to be part of the substantive waiver of immunity.²³ No evidence is cited to support this position. It is based solely on the obsolete policy of limiting waivers of sovereign immunity. Although this analysis has been criticized,²⁴ courts seem to adopt it because of the ease of its mechanical

service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint . . . the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion." *Id.*

21. See *Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc.*, 772 F.2d 62, 66 (3d Cir. 1985).

22. See *Dieckmann v. United States*, 550 F.2d 622, 624 (10th Cir. 1977); *Commonwealth ex rel. Hancock v. Ruckelshaus*, 497 F.2d 1172, 1176 (6th Cir. 1974), *aff'd sub nom. Hancock v. Train*, 426 U.S. 167 (1976); *Place v. Weinberger*, 497 F.2d 412, 414 (6th Cir.), *cert. denied*, 419 U.S. 1040 (1974); *Sprouse v. Federal Prison Indus.*, 480 F.2d 1, 3-4 (5th Cir.), *cert. denied*, 414 U.S. 1095 (1973).

Although support for construing waivers strictly might seem persuasive, the Supreme Court has made it clear that courts should not interpret waivers so strictly as to bar actions when Congress has seen fit to allow suit against the government. See *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955). See *infra* notes 28-29 and accompanying text.

23. See, e.g., *Amella v. United States*, 732 F.2d 711, 713 (9th Cir. 1984); *Kenyon v. United States*, 676 F.2d 1229, 1231 (9th Cir. 1981) (*per curiam*); *Barrie v. United States*, 615 F.2d 829, 830 (9th Cir. 1980) (*per curiam*); *City of N.Y. v. McAllister Bros.*, 278 F.2d 708, 710 (2d Cir. 1960).

24. See *Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc.*, 772 F.2d 62, 65-66 (3d Cir. 1985); *Battaglia v. United States*, 303 F.2d 683, 686-87 (2d Cir.) (Friendly, J., concurring), *cert. dismissed*, 371 U.S. 907 (1962); see also *Kenyon v. United States*, 676 F.2d 1229, 1232 (9th Cir. 1981) (Boochever, J., concurring) ("[I]f freed from the bounds of stare decisis, I would hold that the service provision of Section 742 does not constitute an integral part of the substantive waiver of sovereign immunity, but is a mere procedural

approach.²⁵ However, interpreting the forthwith requirement as a jurisdictional prerequisite²⁶ is an unnecessarily strict reading of the SAA that defeats the congressional intent to waive the federal government's immunity to admiralty suits.²⁷

Although at one time judicial protection of sovereign immunity was carried out with the blessing of Congress, this is no longer true.²⁸ Courts now recognize that when Congress has seen fit to open the United States to liability the judiciary should not apply an unnecessarily strict reading of the statute.²⁹ Instead, congressional intent should be the prime consideration in interpreting a waiver of immunity.³⁰ Since 1940, Congress

provision necessary at the time of the statute's enactment, to effectuate that waiver. As such it was superseded by the Federal Rules.").

25. In holding that the forthwith requirement is part of the substantive waiver of immunity, courts have been able to dismiss, for lack of subject matter jurisdiction, actions in which the plaintiff has failed to serve forthwith. This defense of sovereign immunity can be raised at any time in the proceedings and cannot be waived. *See Battaglia v. United States*, 303 F.2d 683, 686 (2d Cir.) (United States Attorney has no power to waive conditions or limitations imposed by SAA), *cert. dismissed*, 371 U.S. 907 (1962); *City of N.Y. v. McAllister Bros.*, 177 F. Supp. 679, 681-82 (S.D.N.Y. 1959) (libel dismissed even though government was not prejudiced by delay in service), *aff'd*, 278 F.2d 708 (2d Cir. 1960).

26. *See Amella v. United States*, 732 F.2d 711, 713 (9th Cir. 1984); *Kenyon v. United States*, 676 F.2d 1229, 1230-31 (9th Cir. 1981) (per curiam); *Battaglia v. United States*, 303 F.2d 683, 686 (2d Cir.), *cert. dismissed*, 371 U.S. 907 (1962); *City of N.Y. v. McAllister Bros.*, 278 F.2d 708, 710 (2d Cir. 1960).

27. *See Roberts v. United States*, 498 F.2d 520, 525-26 (9th Cir.) (the SAA in its amended form was intended by Congress to cover all maritime torts committed by the United States), *cert. denied*, 419 U.S. 1070 (1974); *see also DeBardeleben Marine Corp. v. United States*, 451 F.2d 140, 145 (5th Cir. 1971) (court rejects restrictive reading of SAA).

28. *See United States v. Yellow Cab Co.*, 340 U.S. 543, 550 n.8 (1951) (tracing decline of sovereign immunity in United States); *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140, 146 (5th Cir. 1971) ("The tide of history is running clearly against the concept of sovereign immunity. The disfavor into which the doctrine has fallen was observed as far back as . . . 1939 . . . Any doubts as to [the government's] waiver therefore are to be resolved against the sovereign.") (citation omitted).

29. In *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), the Court stated: "when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." *Id.* at 69. Although waivers are construed narrowly, courts have held that a strict reading should not violate Congress' intent to waive the government's immunity under the SAA. *See Cohen v. United States*, 195 F.2d 1019, 1021 (2d Cir. 1952) ("the overriding consideration is that the intent of Congress [in passing the SAA], where that can be determined, must be given effect"); *see also Weiss v. United States*, 168 F. Supp. 300, 301 (D.N.J. 1958) (doctrine of strict construction "does not mean that there must be a niggling and obnubilative adherence to the narrowest meaning of the words of the Act" when the intent is to waive immunity.).

30. *Roelofs v. United States*, 501 F.2d 87, 92 (5th Cir. 1974) (FTCA is to be "given a broad interpretation to effectuate the legislative aim of putting citizen and national sovereign in tort claim suits on a footing of equality . . ."), *cert. denied*, 423 U.S. 830 (1975); *Cohen v. United States*, 195 F.2d 1019, 1021 (2d Cir. 1952) (since the intent of amendment to SAA was to give a remedy against the government, the statute should be given that effect).

has frequently broadened the scope of governmental tort liability to private litigants.³¹ Congress has thus demonstrated its desire to hold the United States accountable for most torts committed by the government.³²

The SAA's purpose was to make governmental liability in merchant shipping coextensive with that of private litigants.³³ Imposing the forthwith requirement on those bringing suit under the SAA would impose an often fatal hurdle not otherwise faced by those suing in admiralty.³⁴ As such, it frustrates Congress' intent that governmental liability equal that of private parties under the Act.

In 1960, Congress amended the SAA³⁵ for two reasons. Confusion by litigants over which statute—the SAA, the Public Vessels Act (PVA),³⁶ or the Federal Tort Claims Act (FTCA)³⁷—to use against the United States had led to numerous dismissals.³⁸ Congress amended the acts to allow transfer of cases brought under the wrong statute.³⁹ Congress also

31. The SAA has been amended four times since 1940. See *supra* note 60. Congress' major waiver of federal immunity was contained in the Federal Tort Claims Act (FTCA). Ch. 753, 60 Stat. 842 (1946) (current version at 28 U.S.C. §§ 1346(b), 2671-2680 (1982)). The FTCA waived the government's immunity to most tort actions. 28 U.S.C. §§ 2671-2680 (1982).

32. See 28 U.S.C. § 2674 (1982); see also *Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1955) ("The broad and just purpose which the [FTCA] was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable . . .").

33. See *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 228 (1945) (Court applied standard of governmental liability of SAA to PVA); *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140, 143 (5th Cir. 1971); *United States v. The Australia Star*, 172 F.2d 472, 477 (2d Cir.), *cert. denied*, 338 U.S. 823 (1949).

34. Ordinarily, private litigants in suing federal courts on the basis of admiralty jurisdiction must serve the process within 120 days after filing the complaint. Fed. R. Civ. P. 4(j). Under the forthwith requirement of the SAA, if a litigant fails to serve forthwith, the action can be dismissed without prejudice. See *Amella v. United States*, 732 F.2d 711, 713-14 (9th Cir. 1984). The danger is that a litigant may not realize he has failed to meet the service provision until faced with dismissal. Often, the statute of limitations has run in the meantime, and the dismissal thus becomes final. Private litigants are more apt to know of Rule 4(j) and comply with it. See e.g., *Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc.*, 772 F.2d 62, 63-64 (3d Cir. 1985).

35. See Act of Sept. 13, 1960, Pub. L. No. 86-770, § 3, 74 Stat. 912 (codified at 46 U.S.C. § 742 (1982)).

36. Act of March 3, 1925, ch. 428, 43 Stat. 1112-13 (current version at 46 U.S.C. §§ 781-790 (1982)). The Public Vessels Act allows in personam actions to be brought against the United States.

37. 28 U.S.C. §§ 1346(b), 2671-2680 (1982).

38. See S. Rep. No. 1894, 86th Cong., 2d Sess. 3-5, *reprinted in* 1960 U.S. Code Cong. & Ad. News 3583, 3584-86 [hereinafter cited as Senate Report]; see also *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140, 144 (5th Cir. 1971). The *De Bardeleben* court, noting the confusion surrounding the interaction of the differing waivers, stated:

Like the land-locked lawyer of yesteryear who found his cause lost for failing to distinguish trover and replevin, the most skilled admiralty proctor often did not know when he opened the courthouse door whether the lady or the tiger would emerge, or whether indeed, the courtroom was open at all.

Id. at 144 (footnote omitted).

39. See Senate Report, *supra* note 38, at 2, *reprinted in* 1960 U.S. Code Cong. & Ad. News 3583, 3583.

broadened the SAA to encompass all admiralty actions brought against the United States.⁴⁰ Both changes demonstrate Congress' intent that the SAA effectively waive sovereign immunity. The waiver should not be defeated in the name of procedure.⁴¹

Congress waived federal sovereign immunity to certain tort actions by passing the Federal Tort Claims Act.⁴² The Act specifically excludes from coverage any tort actions allowed under the SAA or PVA.⁴³ Thus, jurisdiction under the FTCA, SAA and the PVA is mutually exclusive.⁴⁴ When Congress broadened the SAA in 1960 to include all admiralty actions brought against the United States,⁴⁵ the SAA and PVA covered all applicable admiralty actions and the FTCA most other allowable non-admiralty tort claims.⁴⁶ Congress showed no desire to distinguish between the SAA and the FTCA, granting seafaring citizens less access to judicial relief than land-locked parties.

Since Congress intended the SAA, PVA and the FTCA together to cover the spectrum of tort actions brought against the government,⁴⁷ the statutes should be interpreted in *pari materia*.⁴⁸ The purpose of the

40. See *Roberts v. United States*, 498 F.2d 520, 525 (9th Cir.) (1960 amendment to the SAA viewed as "legislative attempt to bring all maritime torts asserted against the United States within the purview of the [SAA]"), *cert. denied*, 419 U.S. 1070 (1974); *National Union Fire Ins. Co. v. United States*, 436 F. Supp. 1078, 1080 (M.D. Tenn. 1977) (Congress intended by the addition of phrase "or if a private person or property were involved" to extend SAA's waiver of immunity "to all suits sounding in admiralty, not just those involving vessels or cargo") (emphasis in original).

41. Senate Report, *supra* note 38, at 4-5, *reprinted in* 1960 U.S. Code Cong. & Ad. News 3583, 3585 ("[T]he decisive question in a lawsuit should, as far as possible, be its merits and not esoteric, technical problems of procedure.").

42. *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951); see Act of Aug. 2, 1946, ch. 753, §§ 401-424, 60 Stat. 842 (current version at 28 U.S.C. §§ 1346(b), 2671-2680 (1982)).

43. See 28 U.S.C. § 2680(d) (1982).

44. *Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc.*, 772 F.2d 62, 64-65 (3d Cir. 1985); *Roberts v. United States*, 498 F.2d 520, 525 (9th Cir.), *cert. denied*, 419 U.S. 1070 (1974).

45. See *supra* note 40.

46. See *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951) ("[FTCA] waives the Government's immunity from suit in sweeping language") (footnote omitted).

47. The SAA and the PVA together govern all admiralty actions brought against the government. See *supra* notes 36-40 and accompanying text. The FTCA is the major waiver of governmental sovereign immunity. See *United States v. Yellow Cab Co.*, 340 U.S. 543, 547, 550 (1951). See generally Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 Geo. L.J. 1 (1946) (a general overview of the workings and purpose of FTCA). Since jurisdiction under these three acts is mutually exclusive, see *supra* note 225 and accompanying text, Congress has intended the acts together to cover most tort actions brought against the government.

48. In *Kokoszka v. Belford*, 417 U.S. 642 (1974), the Supreme Court, quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1857), explained that courts must interpret statutes on similar subjects with reference to each other. *Kokoszka*, 417 U.S. at 650. The District of Columbia Circuit, in *Canadian Transp. Co. v. United States*, 663 F.2d 1081 (D.C. Cir. 1980), held that since the FTCA and SAA both contained similar language, they should be construed in *pari materia*. *Id.* at 1089. Construing the SAA and the FTCA in *pari materia* will lead courts to recognize that since Congress has intended these

FTCA was to relieve Congress from the pressure of the use of private bills to settle claims against the government.⁴⁹ Thus, courts interpreting the FTCA take care not to "whittle down" the scope of the Act by refinement.⁵⁰ Reducing the number of private bills before Congress was a primary consideration in passing the SAA as well.⁵¹ In construing the FTCA, courts have given full effect to the government's relinquishment of its historic immunity from suit.⁵² Likewise, because Congress had similar "humanitarian objectives" in passing the SAA,⁵³ it should be given the same broad interpretation as that given the FTCA.

The Tucker Act,⁵⁴ the contract law predecessor of the FTCA, was a partial waiver of sovereign immunity.⁵⁵ In 1938, the original Federal Rules of Civil Procedure became effective, superseding all inconsistent federal procedural law.⁵⁶ At that time the Tucker Act contained service provisions differing from those under the new Rules.⁵⁷ The service provisions were among those modified by the FRCP⁵⁸ because they were considered procedural, not jurisdictional.⁵⁹ If the service provisions of the Tucker Act were considered procedural and therefore properly superseded by the Federal Rules, the service provisions of the SAA, also a waiver of immunity, should be superseded.

In 1966, the Supreme Court's Admiralty Rules, which had been in

waivers to be interpreted liberally, courts should not regard the forthwith provision of the SAA as a jurisdictional precedent but rather a procedural device.

49. *United States v. Muniz*, 374 U.S. 150, 154 (1963) (FTCA's purpose was not only to allow claims against government but also to eliminate burden on Congress of passing private bills for those seeking compensation); *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955) (same).

50. *United States v. Yellow Cab Co.*, 340 U.S. 543, 550 (1951).

51. *See Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 219 (1945) (burden of passing private bills led to Shipping Act of 1916); 3A M. Norris, *supra* note 3, § 197, at 15-2 n.4 (burden of private bills was a factor influencing passage of SAA).

52. *Panella v. United States*, 216 F.2d 622, 624 (2d Cir. 1954); *see Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1955) (FTCA's purpose was to compensate victims of governmental negligence); *Roelofs v. United States*, 501 F.2d 87, 92 (5th Cir. 1974) (legislative aim of FTCA was to put private parties and the government on "a footing of equality"), *cert. denied*, 423 U.S. 830 (1975).

53. *Malgren v. United States*, 390 F. Supp. 154, 156 (W.D. Mich. 1975); *see Beeler v. United States*, 256 F. Supp. 771, 776 (W.D. Pa. 1966) (SAA and FTCA require virtually equal duty of the United States).

54. Ch. 359, 24 Stat. 505 (1887) (current version at 28 U.S.C. § 1346(a) (1982) and other scattered sections of 28 U.S.C.).

55. *International Eng'g Co. v. Richardson*, 512 F.2d 573, 577 (D.C. Cir. 1975) (Congress, through passage of the Tucker Act, has consented to be sued in certain contract actions), *cert. denied*, 423 U.S. 1048 (1976).

56. *See* 28 U.S.C. § 2072 (1982).

57. Former sections 28 U.S.C. §§ 762 and 763 of the Tucker Act had previously controlled service against the government. *See United States v. American Sur. Co.*, 25 F. Supp. 700, 702 (E.D.N.Y. 1938).

58. *See* Fed. R. Civ. P. 4 1937 advisory committee note.

59. *United States v. American Sur. Co.*, 25 F. Supp. 700, 702 (E.D.N.Y. 1938) ("It is to be presumed that the Supreme Court considered the problem of whether or not Sections 762 and 763 of 28 U.S.C.A. were procedural or substantive and concluded that the procedure outlined therein could be altered by the new rules.").

existence since 1845, were unified with the FRCP and the traditional maritime remedies were reenacted as the Supplemental Rules (A-E).⁶⁰ Because the FRCP did not govern procedures in admiralty suits before 1966, no conflict existed between the Federal Rules and the forthwith service provision of the SAA. The precedents relied on to support the position that the forthwith requirement is jurisdictional were decided prior to the application of the FRCP to the SAA.⁶¹

The forthwith service requirement of the SAA should not be considered a jurisdictional time bar as section 5 of the SAA⁶² already contains a separate and independent two-year statute of limitations.⁶³ This limitation is jurisdictional and when raised as a defense deprives a court of the power to entertain the action.⁶⁴ Filing the complaint with the district court is the only method of satisfying the limitations period.⁶⁵ Since the service provision of the Act does not affect the limitations period, it should not be construed as jurisdictional.

The clear logic that recognizes the distinction between the jurisdictional and the procedural provisions of the Act should be accepted. Congressional intent requires that the SAA be given full effect, and not be limited by overly restrictive interpretations. The forthwith requirement is procedural. However, as a procedural rule it conflicts with FRCP 4(d)(4) and 4(j), and must be reconciled or superseded.

II. RECONCILING FEDERAL RULES OF CIVIL PROCEDURE AND FEDERAL STATUTES

Since the promulgation of the Federal Rules of Civil Procedure, the Supreme Court has often been called on to interpret the proper place the

60. See Amendments to Rules of Civil Procedure for the United States District Courts, 383 U.S. 1029 (1966).

61. See *Battaglia v. United States*, 303 F.2d 683, 686 (2d Cir.), *cert. dismissed*, 371 U.S. 907 (1962); *City of N.Y. v. McAllister Bros., Inc.*, 278 F.2d 708, 710 (2d Cir. 1960). These cases are the precedents most relied on by the courts holding that forthwith service is a jurisdictional requirement. See *Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc.*, 772 F.2d 62, 65 (3d Cir. 1985).

62. Ch. 1136, 64 Stat. 1112, 1112 (1950) (current version at 46 U.S.C. § 745 (1982)).

63. "Suits as authorized by this chapter may be brought only within two years after the cause of action arises . . ." *Id.*

64. *States Marine Corp. v. United States*, 283 F.2d 776, 778 (2d Cir. 1960) (two-year time bar of the SAA is different from ordinary statute of limitation in that a court has no jurisdiction to hear a case brought after limitation has expired); *Osbourne v. United States*, 164 F.2d 767, 768 (2d Cir. 1947) (same). The reason for the difference is that the SAA is a waiver of sovereign immunity. See *Fitzgerald v. United States Civil Serv. Comm'n*, 554 F.2d 1186, 1189 (D.C. Cir. 1977) (court's jurisdiction to entertain a suit against the United States is defined by the terms of the waiver of immunity). The two-year statute of limitations is a substantive part of the SAA and is therefore jurisdictional. See *Roberts v. United States*, 498 F.2d 520, 526-27 (9th Cir.), *cert. denied*, 419 U.S. 1070 (1974).

65. *Battaglia v. United States*, 303 F.2d 683, 685 (2d Cir. 1962) (quoting *United Nations Relief & Rehab. Admin. v. The Mormacmail*, 99 F. Supp. 552, 554 (S.D.N.Y. 1951)); *cf. Bates Mfg. Co. v. United States*, 303 U.S. 567, 572 (1938) (holding similarly under Tucker Act).

Rules should take among federal⁶⁶ and state statutes.⁶⁷ The Supreme Court has interpreted the Rules Enabling Act⁶⁸ as an "authorization of a comprehensive system of court rules."⁶⁹ The Court stated that Congress intended "that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth."⁷⁰

Most disputes concerning the FRCP stem from the seemingly inconsistent commands of the Enabling Act. Although the Act declares that the "rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant,"⁷¹ it also states that ". . . all laws in conflict therewith shall be of no further force or effect."⁷² The question is what effect does a FRCP have on a seemingly inconsistent federal procedural statute.

Rule 4(j) of the FRCP directs that if a summons and complaint is not served on the defendant within 120 days of filing the complaint, the action will be dismissed.⁷³ Thus, Rule 4(j) seems to conflict with the "forthwith" provision of the SAA. The effect of a Federal Rule on an inconsistent federal procedural statute, such as the forthwith provision of the SAA, is an issue of legislative intent.

A. Rules Enabling Act

The Rules Enabling Act of 1934, the culmination of a reform movement to pass a uniform federal procedure bill,⁷⁴ was partially drafted more than twenty years prior to its passage.⁷⁵ The Enabling Act was

66. See *Synder v. Harris*, 394 U.S. 332 (1969) (Rule 23 and 28 U.S.C. § 1332 (1982)); *Schlagenhauf v. Holder*, 379 U.S. 104 (1964) (Rule 35 as applied to a defendant and Rules Enabling Act); *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946) (Rule 4(f) and Rules Enabling Act); *Cold Metal Process Co. v. United Eng'g & Foundry Co.*, 351 U.S. 445 (1956) (Rule 54(b) and Rules Enabling Act); *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) (Rule 35 as applied to plaintiff and Rules Enabling Act).

67. See *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) (Rule 3 and Okla. Stat. tit. 12, § 97 (1971)); *Hanna v. Plumer*, 380 U.S. 460 (1965) (Rule 4(d)(1) and Mass. Gen. Laws Ann., ch. 197, § 9 (1958)); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949) (Rule 3 and Kan. Stat. Ann. § 60-308 (1935)); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (Rule 23(b) and 1945 N.J. Laws ch. 131)).

68. Ch. 651, §§ 1-2, 48 Stat. 1064 (1934) (current version at 28 U.S.C. § 2072 (1982)).

69. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941); see *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 445 (1946).

70. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941); cf. *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 445 (1946) (Court recognized that rights of litigants would be affected by the Federal Rules).

71. 28 U.S.C. § 2072 (1982).

72. *Id.*

73. See *Coleman v. Greyhound Lines*, 100 F.R.D. 476, 477 (N.D. Ill. 1984) (dismissal will be without prejudice and a new action can be instituted unless the statute of limitations has run); *Sanders v. Marshall*, 100 F.R.D. 480, 482-83 (W.D. Pa. 1984) (same).

74. For an exhaustive study of the legislative history of the Rules, see Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015 (1982).

75. See Burbank, *supra* note 74, at 1054 & n.166.

based on the Clayton Bill,⁷⁶ first introduced in the House of Representatives in 1912.⁷⁷ The Clayton Bill was based on Congress' grant of authority to the Supreme Court to promulgate Equity Rules⁷⁸ under section 917 of the Revised Statutes.⁷⁹ Section 917 had specific language making the rules promulgated under them inferior to existing federal statutes.⁸⁰ The Clayton Bill was initially silent as to the power of the proposed rules.⁸¹

In 1914, a House committee recommended the Clayton Bill's passage with an amendment.⁸² In its report, the committee concluded that an express statutory repeal of inconsistent existing statutes was not only desirable but necessary.⁸³ Only by giving the Enabling Act superseding effect could the goal of instituting uniform federal procedure be achieved.⁸⁴ The Clayton Bill was therefore amended to provide that any law that conflicted with a rule promulgated under the Act would be superseded.⁸⁵ This provision remained unchanged in the following years and was enacted in its entirety in the Rules Enabling Act of 1934.⁸⁶

In amending the Clayton Bill to give it superseding effect, the committee sought to make it clear that any superseding effect of the rules would be derived from the authorizing statute, not the rules themselves.⁸⁷ The general language of superseding effect contained in the bill was adopted because it would be impractical to list all procedural statutes superseded by the rules.⁸⁸ From this brief review of congressional history of the Rules Enabling Act, it is clear that Congress intended a valid Federal

76. See H.R. 26,462, 62d Cong., 3d Sess. (1912), reprinted in 38 A.B.A. Rep. 542 (1913).

77. See *id.* reprinted in 38 A.B.A. Rep. 542 (1913); Burbank, *supra* note 74, at 1050 n.154.

78. See Burbank, *supra* note 74, at 1052-53 n.161.

79. Ch. 18, tit. XIII, (Rev. Stat. § 917 (1878)).

80. Ch. 18, tit. XIII, (Rev. Stat. § 917 (1878)) ("[t]he Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process . . . and generally to regulate the whole practice, to be used, in suits in equity or admiralty by the circuit and district courts") (emphasis added).

81. See H.R. 26,462, 62d Cong., 3d Sess. (1912), reprinted in 38 A.B.A. Rep. 542 (1913).

82. See H.R. Rep. No. 462, 63d Cong., 2d Sess. 1 (1914) [hereinafter cited as 1914 House Report].

83. See *id.* at 16.

84. If the new rules did not have superseding effect, contrary state and federal procedures would continue to be employed in the federal courts. See *Lumbermen's Mut. Casualty Co. v. Wright*, 322 F.2d 759, 764 (5th Cir. 1963).

85. See 1914 House Report, *supra* note 82, at 1 (The Committee amended the Clayton Bill to read: "When and as the rules of the court herein authorized shall be promulgated, all laws in conflict therewith shall be and become of no further force and effect").

86. See ch. 651, § 1, 48 Stat. 1064 (1934) (current version at 28 U.S.C. § 2072 (1982)); Burbank, *supra* note 74, at 1054 n.166.

87. See Hearings on ABA Bills Before the House Comm. on the Judiciary, 63d Cong., 2d Sess. 22 (1914).

88. See 1914 House Report, *supra* note 82, at 16; Burbank, *supra* note 74, at 1052-53 & n.161.

Rule to supersede an inconsistent federal statutory provision. Although this basic idea is a foundation of the FRCP, it is still misunderstood by some courts.⁸⁹ The legislative history of the Rules Enabling Act demonstrates that a valid Federal Rule preempts conflicting federal procedural statutes. Because the forthwith requirement of the SAA is procedural, the next inquiry becomes whether Rule 4(j) is a valid Federal Rule and whether it conflicts with the forthwith provision.

B. *Applying Hanna v. Plumer*

In *Hanna v. Plumer*,⁹⁰ the Supreme Court created a test for issues concerning the scope of the Federal Rules and the Enabling Act. The *Hanna* analysis is a two-step test. First, the conflicting rules must be examined. If they have the same purpose, then one must be given preference over the other.⁹¹ The second inquiry is whether the Federal Rule is within the Supreme Court's authority under the Rules Enabling Act. If so then it is a valid Rule that supersedes the conflicting rule.⁹² The *Hanna* analysis is relevant to the dispute at hand because it provides a method for reconciling a Federal Rule with an inconsistent statute.

Under the first prong the "forthwith" requirement of the SAA and Rule 4(j)⁹³ directly collide, because by allowing 120 days for service

89. The Ninth Circuit in *Amella v. United States*, 732 F.2d 711 (1984), thought it a "dubious assumption that the Federal Rules of Civil Procedure can amend an act of Congress" *Id.* at 713.

90. 380 U.S. 460 (1965). In *Hanna*, Rule 4(d)(1) conflicted with a Massachusetts statute requiring "in hand" service. Although this Note deals with a conflict between a federal statute and a Federal Rule, *Hanna* is applicable because it is the Supreme Court's most thorough analysis of the proper effect of Federal Rules.

91. *See id.* at 470; *see also* *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 (1980). The *Walker* Court in explaining *Hanna* stated: "The first question must therefore be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court." *Walker*, 446 U.S. at 749-50. Simplified, a "direct collision" must exist between the competing statutes. *Hanna*, 380 U.S. at 472. For example, in *Hanna* the Court held that the clash between the Federal Rule and the state statute was unavoidable. *See id.* at 470. In *Walker* the Court followed *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), holding that Fed. R. Civ. P. 3 and a state statute holding that service tolls a state statute of limitations do not collide because they do not share the same purpose. *See Walker*, 446 U.S. at 750-51. The Court stated that Fed. R. Civ. P. 3 was not intended to toll a state statute of limitations. *See id.* at 750.

92. In *Hanna*, the Court held that

when a situation is covered by one of the Federal Rules [if a Federal Rule and competing statute share the same purpose] 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.

Hanna, 380 U.S. at 471; *see also* *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941) ("we have a rule which, if within the power delegated to this court, has the force of a federal statute").

93. The 1982 amendments to the Rules were contained in an act of Congress. *See* Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, §§ 2-6, 96 Stat. 2527. Although the issue has not been decided by the courts, one commentator

before dismissal, 4(j) treats as timely, service that would be untimely under a forthwith sevice requirement. Prior to 1982, the burden of serving the defendant was put on the federal marshals.⁹⁴ Thus, the issue of timely service often did not arise. Instead, there was a heavy presumption of validity of service by the marshals.⁹⁵ In 1983, Rule 4 was amended to include a 120-day time limit for service of process (Rule 4(j))⁹⁶ to prevent undue delay by litigants.⁹⁷ Since Rule 4(j) and the forthwith provision both are designed to set a time limit for service, they do in fact collide.⁹⁸

Under the second *Hanna* inquiry, Rule 4(j) will not apply only if it exceeds the authority of the Enabling Act⁹⁹ or is unconstitutional.¹⁰⁰ As discussed earlier, rules properly promulgated under the Rules Enabling

suggests that these new Rules have the effect on prior law of a subsequent federal statute. See Walker, *The 1983 Amendments to Federal Rule of Civil Procedure 4—Process, Jurisdiction, and Erie Principles Revisited*, 19 Wake Forest L. Rev. 957, 977 (1983). If they possessed such force there would be no need to determine if they were within the bounds of the Enabling Act. As an equal federal statute, these Rules would only have to survive constitutional challenge. See *id.* at 977. Rule 4(j) would then clearly preempt the forthwith provision of the SAA. Although such an analysis is logical, it seems unlikely that courts would employ it. The legislative history of the 1982 Amendments contains no evidence to suggest that Congress intended these new Rules to have an effect different from prior Rules. See *Changes in Federal Summons Service Under Amended Rule 4 of the Federal Rules of Civil Procedure*, 96 F.R.D. 81 (1983) for a comprehensive account of the legislative history. In addition, even though the 1982 Amendments were contained in an act of Congress, they were passed under the framework laid out in the Rules Enabling Act. On April 28, 1982, the Supreme Court sent Congress several proposed amendments that would have taken effect on August 1, 1982 pursuant to 28 U.S.C. § 2072 (1982). See *Amendments to the Federal Rules of Civil Procedure*, 93 F.R.D. 255 (1982). Objections by Congress led to a postponement of the effective date to Oct. 1, 1983. See Act of Aug. 2, 1982, Pub. L. No. 97-227, 96 Stat. 246. Congress then passed its own rules. See Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527 (1982). Section 5 of that act provides that the Supreme Court's promulgation "shall not take effect". See *id.* at 2530. Rule 4(j) should therefore be treated as any other federal rule promulgated by the Supreme Court and not as a federal statute.

94. See Fed. R. Civ. P. 4(c) (1982) (superseded by 1982 amendments); Siegal, *Practice Commentary on Amendment of Federal Rule 4*, 96 F.R.D. 88, 94 (1983).

95. See Siegal, *supra* note 94, 96 F.R.D. at 109.

96. Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, § 2, 96 Stat. 2527, 2528. Rule 4(j) reads:

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint . . . the action shall be dismissed as to that defendant without prejudice . . . Fed. R. Civ. P. 4(j).

97. See Fed. R. Civ. P. 4(j) advisory committee note ("As long as service was performed by marshals such a restriction was not necessary. However, the proposed gradual elimination of marshal service raises new concerns about timeliness.").

98. In *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980), the Court made it clear that in determining if rules are in conflict, the Federal Rules should be given their "plain meaning". Since the purpose of Fed. R. Civ. P. 4(d)(4) and 4(j) are together to provide a uniform procedure for serving process against the United States, giving these rules their "plain meaning" results in a conflict with the forthwith requirement of the SAA.

99. *Hanna v. Plumer*, 380 U.S. 460, 470-71 (1965); see *Schlagenhauf v. Holder*, 379 U.S. 104, 113 (1964) (a rule must regulate procedure, not substantive rights, to be within the scope of the Enabling Act).

100. *Hanna*, 380 U.S. at 471.

Act displace prior federal statutes.¹⁰¹ Because Congress has the inherent power to repeal prior acts by new statutes, this statutory scheme is constitutional.

Rule 4(j) falls within the Supreme Court's power under the Enabling Act because it does not affect the substantive rights of any litigant.¹⁰² The legislative history of Rule 4 does not indicate that the method proposed for service was thought to transgress the Enabling Act's restriction to rules of procedure.¹⁰³ All this evidence, coupled with the heavy presumption of validity the Rules possess,¹⁰⁴ demonstrates that Rule 4(j) is within the bounds of the Enabling Act. Since Part I of this Note establishes that the forthwith requirement of the SAA is procedural, Rule 4(j) as a valid Federal Rule properly supersedes the provision.

CONCLUSION

The forthwith provision of the SAA is not an integral part of the waiver of immunity but rather a procedural device enacted in the absence of a uniform requirement. The SAA's purpose is to subject the government to suits in admiralty. Interpreting the forthwith requirement as jurisdictional sometimes defeats this policy without justification.

The Federal Rules of Civil Procedure apply to actions in admiralty. Their purpose, uniformity of federal actions in which federal law furnishes the rules of decision, should be given effect. By applying the forthwith provision, courts are not only misinterpreting the proper role of the FRCP in the federal statutory scheme, they are undermining the congressional intent of uniform procedure. Because the Supreme Court has recognized that the Federal Rules preempt inconsistent federal statutes, courts should apply the 120-day restriction of Rule 4(j) in place of the forthwith provision of the SAA.

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101. See *supra* Part II.A. See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941); *Burbank*, *supra* note 74, at 1161.

102. Service provisions normally do not affect the substantive rights of litigants. See *Hanna v. Plumer*, 380 U.S. 460, 468-69 (1965); *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 445 (1946).

103. Report accompanying P.L. 97-462 (96 Stat. 2527), reprinted in 96 F.R.D. 81, 119; see 1982 Fed. R. Civ. P. 4(j) advisory committee note.

104. See *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). The *Hanna* test creates this presumption. To effectively challenge a Federal Rule, a litigant must demonstrate that the Supreme Court, Congress and the Advisory Committee misinterpreted either the Enabling Act or the constitutional restrictions on the Court's rulemaking authority. *Id.*

