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PROCEDURAL DEFENSES AVAILABLE TO THE NEW-PARTY DEFENDANT: THE NECESSITY OF OBTAINING LEAVE TO AMEND AND RELATION BACK

by

F. THOMAS VICKERS*

I. INTRODUCTION

A MYRIAD OF circumstances frequently arise during the course of civil actions¹ where a person, not made a party defendant in the original complaint, is attempted to be brought into the case as a new-party defendant. The plaintiff may have inadvertently named the wrong defendant, or sued the correct person but in an improper capacity. The plaintiff may have described one whom he believes to be a correct defendant but, not knowing the defendant's name, advertently misidentified him using a fictitious name. Finally, plaintiff may wish to assert a new claim directly against a third-party defendant. As a result, a change in the defendants originally named is desired, or even crucial to the maintenance of the action. This is accomplished through the amendment process.

The application of the Rules of Civil Procedure to these various situations has been the subject of much judicial attention.² In this regard, two issues have provoked the greatest amount of controversy, to wit: (1) whether leave of court is required prior to amendment of the complaint to add a new-party defendant, and (2) when and under what circumstances may a new-party defendant be brought into a civil action after the statute of limitations applicable to the claim asserted against him has expired. It is upon these questions that this paper is primarily focused.

Before addressing these issues it is necessary to distinguish several related

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¹The Ohio Rules of Civil Procedure generally do not apply to special statutory proceedings. OHIO R. CIV. P. 1(C). The Rules have, however, occasionally been expressly extended to such proceedings by statute, such as in the case of will contest actions. *State ex rel. Smith v. Court of Common Pleas, Probate Div.*, 70 Ohio St. 2d 213, 216 n.4, 436 N.E.2d 1005, 1008 n.4 (1982).

²Although this paper is directed to a discussion of how Ohio state courts have applied the Ohio Rules of Civil Procedure in the context of defenses assertable by a new-party defendant, it has been held that "Ohio courts will readily utilize federal judicial applications of the Federal Rules of Civil Procedure as a guide for interpreting the Ohio rules when there is no Ohio case on point and the Ohio rule is substantially identical to the federal rule on which it is patterned." *Reese v. Proppe*, 3 Ohio App. 3d 103, 105 n.3, 443 N.E.2d 992, 996 n.3 (Cuyahoga County, 1981). *See also State ex rel. Evans v. Bainbridge Twp. Trustees*, 5 Ohio St. 3d 41, 45 n.11, 448 N.E.2d 1159, 1163 n.11 (1983) (citing with approval federal case law construing FED. R. CIV. P. 15(b) which, as the court noted, "is virtually identical to OHIO R. CIV. P. 15(B)").

matters of interest.³ A discussion of Ohio Civil Rules 19, 19.1 and 20,⁴ which govern the joinder of permissive, necessary and indispensable parties, is beyond the scope of this paper. Nor is this paper directed to situations where the plaintiff, after initiation of the lawsuit, attempts to substitute a new-party defendant for an existing defendant who dies,⁵ is adjudged incompetent,⁶ transfers his interest⁷ or ceases to hold public office.⁸

Similarly, although this paper will tangentially consider Ohio Rule 14(A)⁹ as it relates to the proper method by which a plaintiff may assert a claim directly against a third-party defendant, the general rules of third-party practice are not otherwise considered. The technical requirements of Ohio Rule 15(D),¹⁰ which deal with a plaintiff's advertent misnomer of a party, i.e., by designating a party in a pleading as a "John Doe" defendant when the name of such defendant is unknown, are only addressed in connection with attempted amendments to add the "John Doe" defendant after the applicable statute of limitations has run.¹¹ Lastly, this paper is concerned only with amendments to the complaint which seek to add defendants as new parties and not the addition of new plaintiffs.¹²

³Since this paper is concerned only with procedural defenses available to a new-party defendant who is attempted to be brought into the action by virtue of an amendment to the complaint, a discussion of the applicability of OHIO R. CIV. P. 15(E), which permits a party "to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented," is omitted.

⁴OHIO R. CIV. P. 19 and 20.

⁵OHIO R. CIV. P. 25(A).

⁶OHIO R. CIV. P. 25(B).

⁷OHIO R. CIV. P. 25(C). See *PP Inc. v. McGuire*, 509 F. Supp. 1079, 1083 (D.N.J. 1981) (holding that "when an interest has been transferred, the action may properly continue under the name of the transferor without any effect upon the outcome" or "a court may, in its discretion, enter an order substituting or adding a new party").

⁸One court has held that an amendment to substitute a successor in public office for the party named in the complaint is governed by the federal counterpart to OHIO R. CIV. P. 25(D) rather than OHIO R. CIV. P. 15(A), since the former "specific rule should control over the general" provisions of OHIO R. CIV. P. 15(A). *Hirsch v. Green*, 382 F. Supp. 187, 189 (D. Md. 1974).

⁹OHIO R. CIV. P. 14(A).

¹⁰OHIO R. CIV. P. 15(D).

¹¹See *Vocke v. Dayton*, 36 Ohio App. 2d 139, 303 N.E.2d 892 (Montgomery County, 1973) (strictly interpreting the technical requirements of OHIO R. CIV. P. 15(D)). The joining of "John Doe defendants," although normally disfavored in the federal system, has been allowed despite the absence of an applicable rule of procedure. *Feller v. Nat'l Enquirer*, 555 F. Supp. 1114, 1118-19 (N.D. Ohio 1982). See also 7 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE*, § 1659 (1972).

¹²The Ohio Rules of Civil Procedure make no specific reference to the addition of new plaintiffs. If, however, the new plaintiff is a "real party in interest," OHIO R. CIV. P. 17(A) provides that an amendment joining or substituting such person "shall have the same effect as if the action had been commenced in the name of the real party in interest," indicating that an intervening running of the statute of limitations would not bar the action. *West Clermont Educ. Ass'n. v. West Clermont Local Bd. of Educ.*, 67 Ohio App. 2d 160, 426 N.E.2d 512, 514 (Clermont County, 1980). *Accord*, *Hess v. Eddy*, 689 F.2d 977, 981 (11th Cir. 1982). See 6 C. WRIGHT & A. MILLER, *supra* note 11, at §§ 1501, 1541 and 1555; 3A J. MOORE, W. TAGGART & J. WICKER, *MOORE'S FEDERAL PRACTICE*, ¶ 17.09 and ¶ 17.15 (2d ed. 1982). The same result was achieved as to parties who would not qualify as real parties in interest in *Bill Gates Custom Towing, Inc. v. Branch Motor Express Co.*, 1 Ohio App. 3d 149, 440 N.E.2d 61 (Franklin County, 1981), where the court held that "[i]n regard to the addition of plaintiffs, Civ. R. 15(C) allows the amended pleading reflecting the new plaintiffs to relate back to the date of the original pleading as long as the claim that

II. THE NECESSITY OF OBTAINING LEAVE OF COURT PRIOR TO ADDING A NEW-PARTY DEFENDANT BY AMENDMENT TO THE COMPLAINT

The Ohio Rules of Civil Procedure often come into conflict with one another. One such inconsistency involves the interrelationship of Rule 21,¹³ which indicates that party defendants may only be added "by order of court," and Rule 15(A),¹⁴ which allows the amendment of a pleading once¹⁵ "as a matter of course" at any time before a responsive pleading is served.¹⁶ The question presented by this seemingly irreconcilable overlap is whether leave of court must be obtained before a new-party defendant may be brought into the action via amendment to the original complaint when a responsive pleading has not yet been served by an existing defendant.¹⁷

is asserted by the new plaintiffs ' . . . a rose out of the conduct, transaction, or occurrence set forth . . . in the original pleading . . . ' " *Id.* at 150, 440 N.E.2d at 62-63. See generally Annot., 12 A.L.R. FED. 233 (1972).

¹³OHIO R. CIV. P. 21.

¹⁴OHIO R. CIV. P. 15(A).

¹⁵The ability to amend a complaint as of right where one or more of the original defendants has not served a responsive pleading is extinguished where the plaintiff has already amended the complaint once. *Glaros v. Perse*, 628 F.2d 679, 686 (1st Cir. 1980).

¹⁶Pre-answer motions, such as motions to dismiss or motions for summary judgment, are not "responsive pleadings" under OHIO R. CIV. P. 7(A), and thus have been held not to cut off a plaintiff's right to amend as a matter of course. See, e.g., *Williams v. Wilkerson*, 90 F.R.D. 168, 170 (E.D. Va. 1981); *Move Organization v. City of Philadelphia*, 89 F.R.D. 521, 523 (E.D. Pa. 1981).

¹⁷After a responsive pleading has been served by an existing defendant, both OHIO R. CIV. P. 21 and OHIO R. CIV. P. 15(A) require the plaintiff to obtain leave of court before the complaint can be amended. The decision to allow or disallow a litigant to add a new party rests within the sound discretion of the trial court. *Bill Gates Custom Towing, Inc.*, 1 Ohio App. 3d at 150, 440 N.E.2d at 62 (addition of new plaintiff). See also *Syme v. Rowton*, 555 F. Supp. 33 (D. Mont. 1982); *Hawkins v. Fulton City*, 95 F.R.D. 88, 90 (N.D. Ga. 1982). By what standard should the court's discretion be measured? OHIO R. CIV. P. 15(A) mandates that leave "shall be freely given when justice so requires." *Peterson v. Teodosio*, 34 Ohio St. 2d 161, 175, 297 N.E.2d 113, 122 (1973). See also *Halet v. Wend Inv. Co.*, 672 F.2d 1305 (9th Cir. 1982) (finding that the district court abused its discretion in dismissing the complaint without leave to amend). Under this liberal standard, which is not found in OHIO R. CIV. P. 21, see *Syme v. Rowton*, 555 F. Supp. 33, 35 (D. Mont. 1982) (implying that FED. R. CIV. P. 15(a) may be more permissive than FED. R. CIV. P. 21), the judicial discretion is regularly exercised upon consideration of many factors, frequently including undue delay, bad faith or dilatory motive on the part of the movant, futility of the amendment and the degree to which prejudice is undue to the opposing parties. *Fomen v. Davis*, 371 U.S. 178, 182 (1962). See also *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1163 (5th Cir. 1982); *Rhodes v. Amarillo Hospital Dist.*, 654 F.2d 1148, 1153 (5th Cir. 1981); *Gregory v. Mitchell*, 634 F.2d 199, 203 (5th Cir. 1981); *Meyers v. Ace Hardware, Inc.*, 95 F.R.D. 145, 148 (N.D. Ohio 1982). Prejudice to the opposing party has been regarded by some courts as the most crucial factor. See *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1324 (9th Cir. 1982); *Madison Fund, Inc. v. Denison Mines, Ltd.*, 90 F.R.D. 89 (D.C.N.Y. 1981). It has been noted that delay alone does not constitute prejudice sufficient to justify the denial of a motion to amend. *Manufacturers Hanover Trust Co. v. Gene R. Brockmayer & Co.*, 4 Ohio App. 3d 125, 446 N.E.2d 829 (Franklin County, 1982). See also *Roberts v. Arizona Bd. of Regents*, 661 F.2d 796, 798 (9th Cir. 1981); *Estes v. Kentucky Utilities Co.*, 636 F.2d 1131, 1134 (6th Cir. 1980). Some of these factors, for example futility of the proposed amendment, have been utilized as grounds for denying motions for leave to add parties under FED. R. CIV. P. 21. See *Economov v. Butz*, 84 F.R.D. 678 (D.C.N.Y. 1979), as well as motions for leave under FED. R. CIV. P. 15(a). See *Addington v. Farmer's Elevator Mut. Ins. Co.*, 650 F.2d 663 (5th Cir. 1981). Indeed, most courts have accorded the same spirit of liberality of FED. R. CIV. P. 15(a) to amendments under FED. R. CIV. P. 21. See Annot., 31 A.L.R. FED. 752 (1977). Two Ohio Appellate courts have reached a similar conclusion. See *Grogan Chrysler-Plymouth, Inc. v. Gottfried*, 59 Ohio App. 2d 91, 93, 392 N.E.2d 1283, 1285 (Lucas County, 1978) (permitting the addition of a new plaintiff at the outset of trial under OHIO R. CIV. P. 21); *Bill Gates Custom Towing, Inc.*, 1 Ohio App. 3d at 150, 440 N.E.2d at 63 (holding, in connection with a motion to add two new plaintiffs, that OHIO R. CIV. P. 21 is intended to permit the addition of a new party whose presence is "necessary or desirable" where such addition "would not present any significant prejudicial

The significance of the answer to this question cannot be emphasized too greatly. Under Rule 7(B)(1),¹⁸ an application to the court for an order may be made only by a written motion, except where the motion is made during a hearing or a trial. Furthermore, it is well-established under Ohio law that a court may speak only through its journal.¹⁹ Consequently, if the provisions of Rule 21 govern over those of Rule 15(A), and either the plaintiff fails to move the court for leave to amend the complaint to add a new-party defendant or the court fails to journalize an entry granting such leave to amend, the amendment will be "illegally on file" and the purported new-party defendant will have "no duty to proceed by way of answer."²⁰

There are several recent Ohio decisions which indicate, but due to a lack of focused discussion do not firmly establish, that the provisions of Rule 21 prevail over those of Rule 15(A).²¹ The majority of district courts construing identical federal rules have held that leave of court is required under Federal Rule 21 prior to the addition of new-party defendants, even though the amend-

factors against the defendants or create any undue delay or other problem in the conduct of the trial, nor . . . create any additional liability in defendants"). The intermeshing of the standard in OHIO R. CIV. P. 15(A) with the requirement that leave be obtained under OHIO R. CIV. P. 21 conforms to a general rule of construction that overlapping Rules should be read together. See *Foodtown v. Sigma Marketing Systems, Inc.*, 518 F. Supp. 485, 494 n.3 (D.N.J. 1980).

¹⁸OHIO R. CIV. P. 7(B)(1).

¹⁹State ex rel. Industrial Comm'n v. Day, 136 Ohio St. 477, 26 N.E.2d 1014 (1940); Reese v. Proppe, 3 Ohio App. 3d 103, 108, 443 N.E.2d 992, 998 (Cuyahoga County, 1981) (stating that "any purported 'order' of the court not properly filed and journalized is not binding upon the parties . . . [and] . . . is not an order of the Court the disobedience of which may be applied against a party"); Carter v. Johnson, 55 Ohio App. 2d 157, 380 N.E.2d 758 (Cuyahoga County, 1978).

²⁰Westmoreland v. Valley Homes Mut. Housing Corp., 42 Ohio St. 2d 291, 293-94, 328 N.E.2d 406, 409 (1975) (holding that a default judgment entered against a defendant for failure to plead or otherwise defend under OHIO R. CIV. P. 55(A) is "void" and must be vacated where an amended complaint has not been properly filed). Cf. *Straub v. Desa Indus., Inc.*, 88 F.R.D. 6, 8 (M.D. Pa. 1980) (noting that although an amended complaint served absent permission of the court is generally "without legal effect," such amended pleading "may be considered as properly introduced when leave to amend would have been granted had it been sought, and when it does not appear that any of the parties will be prejudiced by allowing the change" under the liberal amendment policy of FED. R. CIV. P. 15(a)). Under OHIO R. CIV. P. 21, the court may add a party "of its own initiative." *Ohio Fair Plan Underwriting Ass'n. v. Goldstein*, 2 Ohio App. 3d 313, 316 n.5, 441 N.E.2d 1146, 1150 n.5 (Cuyahoga County, 1982). Even in this circumstance, the amendment would be "illegally on file" without a journalized entry to that effect.

²¹See *State ex rel. Bennet v. Lime*, 55 Ohio St. 2d 62, 63, 378 N.E.2d 152, 153 (1978); *Ohio Fair Plan Underwriting Ass'n.*, 2 Ohio App. 3d at 316 n.5, 441 N.E.2d at 1150 n.5; *Bill Gates Custom Towing, Inc.*, 1 Ohio App. 3d at 150, 440 N.E.2d at 62; *Grogan Chrysler-Plymouth, Inc.*, 59 Ohio App. 2d at 93, 392 N.E.2d at 1285. Two less recent cases, however, counsel a contrary conclusion. *Beverly v. Beverly*, 33 Ohio App. 2d 199, 214, 293 N.E.2d 562, 572 (Erie County, 1973) (permitting a plaintiff to formally add the same defendant in a different capacity by amendment under the liberal standard set forth in OHIO R. CIV. P. 15(A)); *Bell v. Coen*, 48 Ohio App. 2d 325, 328, 357 N.E.2d 392, 395 (Summit County, 1975). In *Bell*, the trial court granted defendants' motions to dismiss a wrongful death action on the grounds that it was not brought by a personal representative of the decedent. Before the court's ruling was journalized, plaintiffs filed an amended complaint without leave of court, adding a plaintiff who originally had been named only in an individual capacity, as the administrator of decedent's estate. The court found that such amendment was filed before a responsive pleading had been served and that the addition of the administrator "does not invoke Civ. R. 21 requiring leave of court." Rather, the court held that OHIO R. CIV. P. 21 contemplates adding a party to the complaint "as originally filed" whereas OHIO R. CIV. P. 15(A) "concerns the amendment of a complaint by a new pleading adding a nominal party." *Id.* at 328, 357 N.E.2d at 395 (emphasis supplied). Accordingly, it is arguable that the *Bell* decision stands for the proposition that leave is required under OHIO R. CIV. P. 21 prior to the amendment of the original

ment is filed before a responsive pleading is served.²² Many of these courts have reasoned that Federal Rule 21 should be controlling since it specifically deals with the addition of parties, whereas Federal Rule 15(a) refers in general terms to the broad subject of amendment procedure.²³ This general rule of construction has been recognized in Ohio in connection with the applicability of Ohio Rule 15(A).²⁴

One leading commentator has suggested, however, that the specific-general distinction is unsatisfactory since the provisions of Federal Rule 15(a) are arguably more specific than those of Federal Rule 21. This commentator notes that the former Rule "sets forth a particular means by which a party may attempt to drop or add parties by an amendment to his pleadings," whereas the latter deals only in "broad terms."²⁵ In addition, Rule 15(A) is tailored to a specific time frame, i.e., the stage in the litigation before a responsive pleading is served. Accordingly, a growing number of federal courts have adopted this position and have held that leave of court is not required.²⁶ However, there are other considerations, and, as one court has stated, the question of whether parties should be added or not "presents problems of judicial administration over which the court, rather than the parties and their counsel, should maintain control."²⁷

III. RELATION BACK

As a general rule, a person may not be brought into a civil action by amendment as a new-party defendant when the cause of action as to him is barred by the applicable statute of limitations.²⁸ Limited exceptions to this general rule had been carved out by the courts prior to the adoption of the Civil Rules.²⁹ Rule 15(C) represents not only a partial codification of these cases but also

²²FED. R. CIV. P. 21. See Annot., 31 A.L.R. FED. 752 (1977); 3A J. MOORE, W. TAGGART & J. WICKER, *supra* note 12, § 21.02, at 21-23 n.2.

²³FED. R. CIV. P. 15(A) and 21. *E.g.*, Thorp v. Petrola, 81 F.R.D. 513, 514 (D. W.Va. 1979).

²⁴Fulton v. Aszman, 4 Ohio App. 3d 64, 75, 446 N.E.2d 803, 815 (Clermont County, 1982) (holding that OHIO R. CIV. P. 54(C) is controlling with respect to the amendment of a prayer for damages since "Civ. R. 15(A) deals with amendments generally, while Civ. R. 54(C) is applicable only to amendments to the money demand for relief"). It should also be noted that neither OHIO R. CIV. P. 15(A) nor the Staff Notes thereto indicate that the provisions of OHIO R. CIV. P. 15(A) constitute an exception to the specific language of OHIO R. CIV. P. 21.

²⁵6 C. WRIGHT & A. MILLER, *supra* note 11, § 1479, at 401.

²⁶McLellan v. Mississippi Power & Light Co., 526 F.2d 870, 873 (5th Cir. 1976), *vacated in part*, 545 F.2d 919 (5th Cir. 1977). Texas Energy Reserve Corp. v. Department of Energy, 535 F. Supp. 615, 620 (D. Del. 1982); United States v. Montchanin Mills, Inc., 512 F. Supp. 1192 (D. Del. 1981); Ahmad v. Independent Order of Foresters, 81 F.R.D. 722, 727-28 (E.D. Pa. 1979).

²⁷Gordan v. Lipoff, 320 F. Supp. 905, 923 (W.D. Mo. 1970).

²⁸Likover v. City of Cleveland, 60 Ohio App. 2d 154, 157, 396 N.E.2d 491, 493 (Cuyahoga County, 1978), *citing* the pre-Rule case of Beach v. Union Gas & Electric Co., 130 Ohio St. 280, 199 N.E. 181 (1935).

²⁹See, e.g., *Likover*, 60 Ohio App. 2d at 157, 396 N.E.2d at 493. Stauffer v. Isaly Dairy Co., 4 Ohio App. 2d 15, 211 N.E.2d 72 (Mahoning County, 1965) (allowing an amendment correcting a mistake in the name of a corporate defendant).

adds several new exceptions.³⁰ The rule provides in pertinent part:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.³¹

The express purpose of Rule 15(C) is to “ameliorate the effect of the statute of limitations in certain situations.”³² What are these situations?

In order to fully analyze this question, the provisions of Rule 15(C) must be broken down into seven component parts. In particular, Rule 15(C) provides that there will be no relation back unless each of the following conditions are met:

- (1) The amendment must “change the party” against whom the claim is asserted;
- (2) The claim asserted in the amended complaint must have “(arisen) out of the conduct, transaction, or occurrence” which had been set forth or . . .
- (3) . . . “attempted to be set forth” in the original complaint;
- (4) The new-party defendant must have received “notice of the institution of the action” . . .
- (5) . . . “within the period provided by law for commencing the action against him” . . .
- (6) . . . such that he “will not be prejudiced in maintaining his defense on the merits”; and he must have . . .
- (7) . . . known or “should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.”³³

³⁰See Staff Note to OHIO R. CIV. P. 15(C) noting that “the doctrine of relation back has been applied through case law.” *Id.*

³¹OHIO R. CIV. P. 15(C).

³²*Williams v. Jerry L. Kaltenbach Enter.*, 2 Ohio App. 3d 113, 113, 440 N.E.2d 1219, 1220 (Hamilton County, 1981); *Bill Gates Custom Towing, Inc.*, 1 Ohio App. 3d at 150, 440 N.E.2d at 62 (quoting the Staff Note to OHIO R. CIV. P. 15(C) which states that “. . . an amendment concerning parties to an action is not affected by an intervening statute of limitations provided that the conditions . . . [stated in Civ. R.] 15(C) are met”).

³³OHIO R. CIV. P. 15(C).

A. Changing the Party

In regard to the requirement that the amendment must “change the party” against whom the claim is asserted, the provisions of Rule 15(C)³⁴ apply when an “amendment”³⁵ seeks merely to correct an inadvertent misnomer; that is, where a defendant has been properly served with process, but in the wrong name, and the amendment simply seeks to correct the error even though no “change” has technically taken place.³⁶ This encompasses amendments which purport to change the status³⁷ as well as the capacity³⁸ in which a defendant is named.³⁹

The “misnomer theory,” as it has come to be called, has been applied much more broadly than is indicated in the foregoing examples. In *Baker v. McKnight*,⁴⁰ for instance, the Supreme Court of Ohio held, under the “misnomer theory,” that a complaint could be amended subsequent to the running of the statute of limitations, to substitute the administrator of the estate of the named defendant who had died *before* the complaint was filed, provided that the remaining provisions of Rule 15(C) had been met.⁴¹

³⁴For a discussion of whether a federal court, sitting in diversity, may be required under *Erie* to apply the state relation back rule, see *Ringrose v. Engelberg Huller Co.*, 692 F.2d 403 (6th Cir. 1982) (Jones, C.J., concurring); *Curry v. Johns-Manville Corp.* 93 F.R.D. 623 (E.D. Pa. 1982); *Anastasio v. Holiday Inns, Inc.*, 93 F.R.D. 560 (D.N.J. 1982); *American Banker's Ins. Co. of Fla. v. Colorado Flying Academy, Inc.*, 93 F.R.D. 135 (D. Colo. 1982).

³⁵OHIO R. CIV. P. 15(C) applies only to “amendments” to the original complaint and does not encompass the situation where the original complaint is dismissed and a new complaint is thereafter refiled. In re Adoption of Salisbury, 5 Ohio App. 3d 65, 68, 449 N.E.2d 519, 523 (Franklin County, 1982). In such circumstances, the “savings statute,” OHIO REV. CODE ANN. § 2305.19 (Page 1981), will permit a plaintiff to refile a complaint which “fails otherwise than upon the merits” if the applicable limitations period has expired at the date of such “failure.” The statute, however, has no application to the attempt to add new-party defendants in the refiled pleading.

³⁶Staff Note to OHIO R. CIV. P. 15(C); *Hardesty v. Cabotage*, 1 Ohio St. 3d 114, 438 N.E.2d 431 (1982) (amendment changing name of defendant from “The Board of Trustees Blanchard Valley Hospital” to “Blanchard Valley Hospital Assoc., Inc.” related back where service had been obtained upon “C. Miller” on both occasions); *Clark v. Southern Ry. Co.*, 87 F.R.D. 356 (N.D. Ill. 1980). See generally Annot., 124 A.L.R. 86 (1940).

³⁷*Howard v. Penn Central Transfer Co.*, 87 F.R.D. 342, 344 (N.D. Ohio 1980) (amendment changing name from “Penn Central Transportation Company dba Consolidated Rail Corporation” to correctly name two separate entities held to involve “a misnomer or misdescription because plaintiff has inaccurately characterized the legal status of Conrail”); *Sarne v. Fiesta Motel*, 79 F.R.D. 567, 570 (E.D. Pa. 1978) (amendment adding the words “a partnership” after the defendant motel’s name). See also *Kerney v. Fort Griffin Fandangle Ass’n., Inc.*, 624 F.2d 717, 721 (5th Cir. 1980) (amendment changing status of individual defendants to class representative related back).

³⁸*Beverly*, 33 Ohio App. 2d at 214, 293 N.E.2d at 572 (holding that “even though the addition of the word ‘executrix’ after the name ‘Sarah Beverly’ did not, in the precise wording of the rule, ‘change the party against whom a claim is asserted,’ the addition actually made comes within the spirit of this Rule 15(C)”). See also *D’Iorio v. Adonizio*, 554 F. Supp. 222, 232 (M.D. Pa. 1982) (stating that where the personal representative of an estate had been properly served, an error in naming the estate rather than the personal representative as a party defendant can be cured by amendment).

³⁹See generally Annot., 8 A.L.R.2d 6 (1949).

⁴⁰4 Ohio St. 3d 125, 446 N.E.2d 829 (1983).

⁴¹The *Baker* case overruled *Barnhart v. Schultz*, 53 Ohio St. 2d 59, 372 N.E.2d 589 (1978), which held that since a suit brought against a dead person is a “nullity,” OHIO R. CIV. P. 15(C) could not be applied because “there was no complaint against an existing party for the amended complaint to relate back to.” *Id.* at 61-62, 373 N.E.2d at 591. See also *Gentile v. Carr*, 4 Ohio App. 3d 55, 446 N.E.2d 477 (Jefferson County, 1981) (attempting to distinguish *Barnhart*). Whether *Baker* will be extended beyond its facts is

When a person or entity is “changed” the rule generally contemplates a substitution, rather than a correction of merely an inadvertent misnomer, and the provisions of Rule 15(C) must be met.⁴² In this connection, one question which arises is whether the substitution of a defendant originally designated as a “John Doe” constitutes a “changing” of parties. The Staff Note to Rule 15(D) states that:

Although Rule 15(C) covers amendments concerning *inadvertent* misnomer of parties, the rule may not cover *advertent* misnomer of a party at the commencement of the action.⁴³

Nevertheless, the court in *Williams v. Jerry L. Kaltenbach Enter.*,⁴⁴ stated, without discussion, that a second amended complaint eliminating a “John Doe” designation and naming a Massachusetts-based corporation for the first time, after the expiration of the statute of limitations, sought only to “change the party” against whom the claim was asserted.⁴⁵

The Federal Rules of Civil Procedure contain no counterpart to Ohio Rule 15(D) concerning amendments where the name of a defendant is unknown. This procedure, although disfavored, has nonetheless generally been permitted in the federal system,⁴⁶ and the substitution by amendment of the proper name of the defendant for the “John Doe” designation has been held to constitute a “change of parties” which relates back if the conditions set forth in Federal Rule 15(c) are satisfied.⁴⁷

Another frequently-encountered situation is where a plaintiff seeks to amend the complaint to assert a claim directly against a third-party defendant under Ohio Rule 14(A) after the limitations period has run.⁴⁸ Does Rule 15(C)

unclear. *See* State ex. rel. Cleveland Municipal Court v. Cleveland City Council, 34 Ohio St. 2d 120, 122, 296 N.E.2d 544, 547 (1973) (holding that a named defendant that is not *sui juris* cannot be sued); Council of the City of Whitehall v. Rogers, 69 Ohio App. 2d 124, 432 N.E.2d 216 (Franklin County, 1980).

⁴²*Hughes v. United States*, 701 F.2d 56, 58 (7th Cir. 1982).

⁴³OHIO R. CIV. P. 15(D) Staff Note.

⁴⁴2 Ohio App. 3d 113, 440 N.E.2d 1219 (Hamilton County, 1981).

⁴⁵*Id.* at 114, 440 N.E.2d at 1220-21.

⁴⁶*See, e.g.*, *Gillespie v. Civiletti*, 629 F.2d 637 (9th Cir. 1980); *Swartz v. Gold Dust Casino, Inc.*, 91 F.R.D. 543, 546 (D. Nev. 1981).

⁴⁷*Sassi v. Breier*, 584 F.2d 234 (7th Cir. 1978) (notice requirements not met); *Varlack v. SWC Caribbean, Inc.*, 550 F.2d 171 (3d Cir. 1977) (amendment replacing “John Doe” related back); *Campbell v. Bergeron*, 486 F. Supp. 1246 (M.D. La. 1980) (notice requirement satisfied). *See generally*, Annots., 85 A.L.R.3d 13 (1978); 11 A.L.R. FED. 269 (1972); 6 C. WRIGHT & A. MILLER, *supra* note 11, § 1498m, at 505 n.82. *See also supra* note 11 and accompanying text.

⁴⁸In this regard, the Notes of the Advisory Committee to the 1946 Amendment of FED. R. CIV. P. 14 state that the plaintiff may assert such claim directly against the third party defendant “either by amendment or by a new pleading.” This provision has led some federal courts to permit a plaintiff to file a separate complaint against the new-party defendant. *E.g.*, *Republic Steel Corp. v. The Home Ins. Co.*, No. C82-1134 (N.D. Ohio May 9, 1983) (Manos, J.). This proposition was rejected in *Straub v. Desa Industries, Inc.*, 88 F.R.D. 6, 8 (M.D. Pa. 1980). *See also* *Monarch Ind'l Corp. v. American Motorists Ins. Co.*, 276 F. Supp. 972, 981 (S.D.N.Y. 1967) (holding that plaintiff can bring a direct action against a third-party defendant only by an amendment to his complaint). The Staff Notes to OHIO R. CIV. P. 14(A) do not contain a similar position referring to the use of a “new pleading.”

apply to such an amendment? Most cases that have dealt with the question have sustained the third-party defendants' statute of limitations defense.⁴⁹ Even if Rule 15(C) does apply, the amendment will almost never relate back since it does not attempt to "change a party" and the claim against the third-party defendant is not a *substitute* for the claim against the original defendant because of a "mistake concerning the identity of the proper party."⁵⁰

In conclusion, the word "changing" has been liberally construed by the courts. Consequently, amendments which actually add new parties, as well as amendments that correct inadvertent and advertent misnomers or substitute one defendant for another, have been held to constitute a "changing of parties" falling within the ambit of Rule 15(C).⁵¹

B. *Conduct, Transaction, or Occurrence Set Forth in the Original Pleading or Attempted to Be Set Forth*

This requirement is a rather obvious one which can easily be taken for granted. Although some courts have looked to whether the legal theory or cause of action asserted against the original defendant is substantially the same as that brought against the new-party defendant,⁵² the trend is to place emphasis upon the adequacy of notice about the claim raised by the amended pleading.⁵³

The "attempted to be set forth" requirement of Rule 15(C) simply anticipates the situation in which an original complaint is "dismissed" or stricken from the files for some reason pursuant to motion. If the operative grounds "attempted to be set forth" in the original pleading are sufficient to give the new-party defendant notice of the claim asserted in the amended complaint, the amendment will relate back to the date of the original, notwithstanding the fact that a motion to dismiss the original had been granted.⁵⁴

⁴⁹See 6 C. WRIGHT & A. MILLER, *supra* note 11, § 1498, at 512 n.97. These commentators believe that "the better practice, however, is to determine the propriety of the amendment in light of the Rule 15(c) notice requirements" *Id.* See *infra* notes 55-72 and accompanying text.

⁵⁰Curry v. Johns-Manville Corp., 93 F.R.D. 623, 626-27 (E.D. Pa. 1982). The "mistake in identity" requirement is explored, *infra* notes 83-89 and accompanying text.

⁵¹See 6 C. WRIGHT & A. MILLER, *supra* note 11, § 1498, at 511 n.93.

⁵²Williams v. Dana Corp., 54 F.R.D. 473 (E.D. Mich. 1971). Plaintiff's motion to amend complaint after expiration of applicable limitations period to add a union as new-party defendant and assert a breach of duty of fair representation against it was denied where the claim asserted against the original defendant employer was for violation of a collective bargaining agreement, since the claim against the union was a "separate, independent cause of action" from that made against the employer. *Id.* at 474.

⁵³Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1259 n.29 (9th Cir. 1982) (finding that a claim of fraud related back to the filing of a complaint alleging antitrust violations since both involved defendants' protests to the ICC and "the original complaint put defendants on notice that their conduct involving the protest was being challenged in court"). See also Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301, 1314 (9th Cir. 1982). Although noting that whether the opposing party has been put on notice is the "basic inquiry," the Ninth Circuit affirmed the district court's ruling that amended claims against an underwriter of misrepresentations and omissions in a prospectus did not relate back to an initial cross-claim describing a scheme to manipulate the market in certain stock. 3 J. MOORE, W. TAGGART & J. WICKER, *supra* note 12, ¶ 15.15[3], at 15-194; 6 C. WRIGHT & A. MILLER, *supra* note 11, § 1496.

⁵⁴See Bell v. Coen, 48 Ohio App. 2d 325, 328, 357 N.E.2d 392, 395 (Summit County, 1975); Dent v. United States Postal Service, 538 F. Supp. 1079, 1081 (S.D. Ohio 1982) (both cases applying the phrase "attempted to be set forth" where an original complaint had been dismissed).

C. Notice of the Institution of the Action

The most heavily litigated questions concerning notice involve (1) whether actual notice of the filing of the original action is required; (2) the degree of formality which must be attendant to such notice; and (3) what constitutes a sufficient receipt of notice by the new-party defendant. With respect to the first issue presented, most courts have held that the term "action" refers to the filing of the original lawsuit and that an amendment will not relate back where the new-party defendant has notice of the incidents giving rise to the action but does not have notice of the actual filing of the lawsuit.⁵⁵ The Georgia courts have noted that a contrary finding would deprive the new party of his right to invoke the statute of limitations defense and that such deprivation might raise a question of procedural due process.⁵⁶

On the other hand, a leading commentator has suggested that although the conclusion that the requirement of "notice of the institution of the action" means actual notice of the filing of the particular lawsuit may be technically correct, such conclusion is an "overly literal reading" of the rule, at least where "the new defendant has knowledge of an incident that could have produced a number of claims by different parties, and . . . has conducted an investigation at the site with an eye toward a formal hearing on any one of these claims."⁵⁷ Thus, the suggestion is that prejudice to the new-party defendant should be the touchstone, and it is only "when the facts relevant to one possible claimant do require a substantially different and more burdensome investigatory effort or when the initial action is not sufficiently serious to warrant a full-fledged investigation" that the new-party defendant should be able to rely on the statute of limitations defense.⁵⁸

How formal must the notice of the institution of the action be? The Notes of the Advisory Committee to the 1966 Amendment of Federal Rule 15(c) expressly state that "the notice need not be formal," and this has come to be a principle generally recognized by the federal courts.⁵⁹ Although the Staff Notes

⁵⁵Craig v. United States, 413 F.2d 854 (9th Cir. 1969) (new-party defendant had actually investigated the facts relevant to the lawsuit but had no notice of its institution); Tretter v. Johns-Manville Corp., 88 F.R.D. 329 (E.D. Mo. 1980); Stephens v. Balkamp, Inc., 70 F.R.D. 49 (D. Tenn. 1975); Francis v. Pan American Trinidad Oil Co., 392 F. Supp. 1252 (D. Del. 1975); Slack v. Treadway Inn of Lake Harmony, Inc., 388 F. Supp. 15 (M.D. Pa. 1974). See Hughes v. United States, 701 F.2d 56, 58 (7th Cir. 1982) (emphasizing that *actual* notice must be received within the period of limitations). See also Smith v. Brush-Moore Newspapers, Inc., 27 Ohio St. 2d 111, 271 N.E.2d 846 (1971) (permitting an amendment substituting a wholly-owned subsidiary for its parent but emphasizing that service had been made upon the statutory agent of the parent who was also a director and assistant treasurer of the subsidiary).

⁵⁶Sims v. American Gas. Co., 131 Ga. App. 461, 206 S.E.2d 121 (1974), *aff'd*, 232 Ga. 787, 209 S.E.2d 61 (1975); Thomas v. Home Credit Co., 133 Ga. App. 602, 211 S.E.2d 626 (1974).

⁵⁷6 C. WRIGHT & A. MILLER, *supra* note 11, § 1498, at 510-11.

⁵⁸*Id.*

⁵⁹FED. R. CIV. P. 15 Staff Note. See, e.g., Swartz v. Gold Dust Casino, Inc., 91 F.R.D. 543 (D. Nev. 1981). "If a person who receives notice of the legal action within the limitations period should know from the information received that he may be liable to the plaintiff by reason of the claim for relief asserted against another, he has received notice required by the Rule." *Id.* at 547.

to the Ohio Rule do not contain a similar provision, there is no reason to believe that informal notice will not suffice so long as such notice is of the *filing* of the lawsuit and the new-party defendant should have known that, but for a mistake in identity, the action would have been brought against him.

Intimately connected with the two issues already discussed is the question of what constitutes sufficient receipt of notice by the person or entity sought to be added by amendment. In this regard, one Ohio appellate court has recently given implicit approval of the "identity of interests" theory, under which a presumption of knowledge of the institution of the action arises where the new-party defendant has a "close relationship" with the originally named defendant. The court in *Williams v. Jerry L. Kaltenbach Enter.*,⁶⁰ summarized the "identity of interests" concept as follows:

This "identity of interest concept" provides that notice to the individual defendant serves as constructive notice to a party substituted after the limitations period has expired when the original and substituted parties are so closely related in business or other activities that it is fair to presume the added party learned of the institution of the action shortly after it was commenced.⁶¹

The court held, however, that where there is no evidence of any relationship between the originally named defendant and the substituted defendant, notice to the first is not constructive notice to the second.

Constructive notice has been found to exist under the "identity of interest" concept with respect to a variety of relationships, including agent-principal,⁶² brother-sister entity⁶³ and successor-in-interest⁶⁴ contexts. Some controversy has developed as to the application of the concept to other relationships. In *Williams* for example, the plaintiff argued that notice of the instigation of the lawsuit within the statute of limitations to a claims adjuster for the carrier insuring both the originally named defendant and a new-party defendant initially designated as "John Doe" should be constructively imputed to the latter. Although the court found that it was not necessary to decide the question of whether a sufficient connection between the new-party defendant and its insurance company existed such that the Rule 15(C) notice requirement would

⁶⁰2 Ohio App. 3d 113, 440 N.E.2d 1219 (Hamilton County, 1981). See also *Beverly*, 33 Ohio App. 2d at 214, 293 N.E.2d at 570 (notice to person in individual capacity constitutes notice in representative capacity).

⁶¹*Id.* at 114, 440 N.E.2d at 1221.

⁶²*Kirk v. Cronvich*, 629 F.2d 404 (5th Cir. 1980) (service on a deputy sheriff constitutes adequate notice to sheriff); *Williams v. Ward*, 553 F. Supp. 1024, 1026 (W.D.N.Y. 1983) ("knowledge can be imputed to a new defendant through his attorney who also represented the party or parties originally sued"); *Wong v. Calvin*, 87 F.R.D. 145, 150 (N.D. Fla. 1980) (same agents or attorneys); *Ames v. Varrek*, 356 F. Supp. 931, 942 (D. Minn. 1973) (same attorney).

⁶³*Spiker v. Hoogboom*, 628 P.2d 177 (Colo. App. 1981) (service made on substituted partner in his position as president of the originally-named corporation).

⁶⁴*Howard v. Penn Central Transp. Co.*, 87 F.R.D. 342 (N.D. Ohio 1980) (action against bankrupt railroad and served on railroad's successor in interest).

be satisfied, the court apparently *leaned* against it,⁶⁵ citing its own prior unreported determination that notice to a father does not automatically constitute notice to his son.⁶⁶ The Supreme Court of Ohio has recently manifested a contrary inclination, stating that:

The misnomer theory . . . has much to commend itself in cases where the real party in interest, the deceased defendant's insurer, has timely notice of the claim prior to the expiration of the statute of limitations, and no prejudice inures to the new, nominal defendant, a personal representative of the deceased defendant.⁶⁷

In the case of notice to a corporation vertically related to another, the decisions have turned on their particular facts and circumstances.⁶⁸ Notice was constructively imposed upon an originally unnamed subsidiary, which shared with the named parent not only its office address but its corporate management, and the person served with process for the parent would also have received process for the wholly-owned subsidiary.⁶⁹ On the other hand, it was held in *Naxon Telesign Corp. v. GTE Information Systems*⁷⁰ that: “[the] notice requirement is not satisfied merely because the proper party and the party for which it is substituted are related corporations, so long as they are distinct corporate entities and circumstances do not justify piercing the corporate veil.”⁷¹

With respect to unrelated corporations, the “identity of interests” concept has not been extended in products liability suits, where corporations are related only to the extent that the named defendant is a manufacturer of a product and the new-party defendant is a manufacturer of a component part of that product.⁷²

D. *Within the Period Provided By Law for Commencing the Action*

Most courts have held that the language “within the period provided by

⁶⁵The Court also included the following footnote:

A federal case has held that under FED. R. CIV. P. 15(c) notice to an insurance company of the instigation of a lawsuit constitutes notice to its insured.

Williams, 2 Ohio App. 3d at 114 n.2, 440 N.E.2d at 1221 n.2 (citations omitted). *But see* Rogatz v. Hospital General San Carlos, Inc., 89 F.R.D. 298 (D. Puerto Rico 1980).

⁶⁶*Williams*, at 114, 440 N.E.2d at 1221, *citing* Kirtley v. Pennington, No. C-780425 (Clermont County, July 11, 1979).

⁶⁷*Baker v. McKnight*, 4 Ohio St. 3d 125, 447 N.E.2d 104 (1983).

⁶⁸It should also be noted at this juncture that an originally-named parent corporation who files an answer but does not plead the defense of improper party until after the running of the statute of limitations may constitute an estoppel when the plaintiff attempts to add its wholly-owned subsidiary as a defendant, at least where the subsidiary had actual notice of the suit. *Smith v. Bursh-Moore Newspapers, Inc.*, 27 Ohio St. 2d 111, 271 N.E.2d 846 (1971). *Compare* syllabus with emphasis at page 116 of the fact that the subsidiary had actual notice since the statutory agent of the parent was also a director and treasurer of the subsidiary.

⁶⁹*Horwitz v. Longines Wittnauer Co.*, 388 F. Supp. 1257 (S.D.N.Y. 1975).

⁷⁰89 F.R.D. 333, 388 (N.D. Ill. 1980).

⁷¹*Id.*

⁷²*Norton v. Int'l Harvester Co.*, 627 F.2d 18 (7th Cir. 1980). *See Baker v. Ferguson Research, Inc.*, 61 F.R.D. 637 (D. Mont. 1974).

law for commencing the action” refers to the applicable statute of limitations and that notice must be received by the new-party defendant before the statute has run.⁷³ Some courts have, however, found that the Federal Rule 15(c) requirement that notice be received “within the period provided by law for commencing the action” also includes “any reasonable time for service allowed by federal or local law.”⁷⁴

This poses a problem unique to Ohio law since Rule 3(A) provides that “[a] civil action is commenced by filing a complaint with the court, *if service is obtained within one year from such filing.*”⁷⁵ Thus, the plaintiff in *Williams* was able to argue that since the new-party defendant had received notice within one year from the filing of the original complaint, the amendment should relate back under Rule 15(C) as notice had been received “within the period provided by law for commencing the action” against him. Although the appellate court refused to consider this argument since the plaintiff had failed to raise it in the court below, it noted in dicta that it had previously rejected a similar contention in an earlier unreported opinion.⁷⁶

E. *Prejudice in Maintaining A Defense on the Merits*

The term “prejudice” has generally been construed to refer to the imposition of “[u]nique difficulty in defending the lawsuit by reason of the passage of time.”⁷⁷ The ability to cure such prejudice by the granting of a continuance should therefore be a primary consideration.⁷⁸ The courts have not been uniform as to whether the abrogation of the statute of limitations defense will constitute “prejudice.” In the very recent case of *Hughes v. United States*,⁷⁹ the court held that “[t]o apply Rule 15(c) to the government in the absence of timely notice would result in prejudice by eliminating the statute of limitations defense.”⁸⁰ On the other hand, it has been stated that the unavailability of the statute of limitations defense does not by itself constitute prejudice.⁸¹ It should be noted that some courts had found that if plaintiff’s own inexcusable neglect was responsible for the failure to name the correct party, an amend-

⁷³*Stewart v. United States*, 655 F.2d 741 (7th Cir. 1981); *Robbins v. Marine Transport Lines, Inc.*, 531 F. Supp. 14 (D.N.J. 1981); *Tretter v. Johns-Manville Corp.*, 88 F.R.D. 329 (E.D. Mo. 1980).

⁷⁴*Swann Oil Inc. v. m/s Vassilis*, 91 F.R.D. 267, 270 (E.D.N.C. 1981); *accord*, *Hunt v. Boce Constr., Inc.*, 674 F.2d 834, 836 (10th Cir. 1982) (applying the state definition of “commencement” to determine the “period provided by law for commencing the action” under FED. R. CIV. P. 15(c)); *Ingram v. Kumar*, 585 F.2d 566, 571 (2d Cir. 1978), *cert. denied*, 440 U.S. 940 (1979); *Clark v. Southern Ry. Co.*, 87 F.R.D. 356, 358 (N.D. Ill. 1980); *contra Hughes v. United States*, 701 F.2d 56, 58-59 (7th Cir. 1982).

⁷⁵OHIO R. CIV. P. 3(A).

⁷⁶Ohio App. 3d at 114 n.1, 440 N.E.2d at 1221 n.1, citing *Kirtley v. Pennington*, No. C-780425 (Clermont County, July 11, 1979).

⁷⁷*Swartz v. Gold Dust Casino, Inc.*, 91 F.R.D. 543, 548 (D. Nev. 1981). *See also Curry v. Johns-Manville Corp.*, 93 F.R.D. 623 (E.D. Pa. 1982). Prejudice is “that suffered by one who, for lack of timely notice that a suit has been instituted, must set about assembling evidence when the case is stale.” *Id.* at 626.

⁷⁸*See Annot.*, 67 A.L.R.2d 477 (1959).

⁷⁹701 F.2d 56 (7th Cir. 1982).

⁸⁰*Id.* at 59.

⁸¹*Swartz*, 91 F.R.D. at 548.

ment substituting the proper party, will be denied.⁸²

F. *Knew or Should Have Known of the Mistake in Identity*

As noted earlier, the question of relation back of amendments will most frequently turn on the last requirement of Rule 15(C). If the plaintiff fails to show that the new-party defendant knew or should have known that the plaintiff was mistaken as to the identity of the proper defendant and that but for such mistake the action would have been brought against him, the amendment will not relate back.⁸³

In determining whether a new-party defendant "should have known" that he was the one intended to be sued, the court will probably apply something akin to a "reasonable man" test.⁸⁴ In this regard, it has been stated that appraisal of the mistake can be derived from a host of sources, such as through plaintiff's initial pleadings⁸⁵ or interviews with an insurance company and counsel for defendants after initiation of the suit.⁸⁶ Further, there must be evidence that the plaintiff actually made a mistake and named the wrong defendant. In *Guitierrez v. Raymond Int'l Inc.*,⁸⁷ for example, plaintiff brought a wrongful death action seeking to recover damages for the disappearance of an individual from a drilling platform. After the statute of limitations had expired plaintiff amended the complaint to add a defendant owning an interest in the platform. The district court held that the amendment did not relate back since the plaintiff knew the identity of the proper parties but intended initially to proceed using an alter ego theory.⁸⁸

An example of a true mistake in identity can be found in *Busch v. Sumitomo Bank & Trust*,⁸⁹ where a longshoreman sued to recover damages for injuries caused by a defective crane. The court in *Busch* permitted relation back where a ship owner, brought in by amendment, knew or should have known that but for plaintiff's mistake in naming the charterer's agent as the owner, the action would have been brought against him.

IV. CONCLUSION

During the course of a civil action a plaintiff desiring to change the defendants originally named in the complaint must be cognizant of the requirements

⁸²*Leachman v. Beech Aircraft Corp.*, 694 F.2d 1301, 1310 n.7 (D.C. Cir. 1982).

⁸³*Williams*, 2 Ohio App. 3d at 115, 440 N.E.2d at 1221. See also *Brown v. Int'l Union*, 85 F.R.D. 328 (W.D. Mich. 1980); *Slack v. Treadway Inn of Lake Harmony, Inc.*, 388 F. Supp. 15 (M.D. Pa. 1974).

⁸⁴*Swann Oil, Inc. v. m/s Vassilis*, 91 F.R.D. 267, 269 (E.D.N.C. 1981); *King & King Enter. v. Champlin Petroleum Co.*, 446 F. Supp. 906, 910 (D. Okla. 1978).

⁸⁵*Williams v. Avis Transport of Canada*, 57 F.R.D. 53 (D. Nev. 1972) (tire manufacturer should have known of mistake in identity since original complaint specifically alleged defective tires as an actionable fact or conduct).

⁸⁶*Swartzwelder v. Hamilton*, 56 F.R.D. 606 (M.D. Pa. 1972).

⁸⁷86 F.R.D. 684 (S.D. Tex. 1980).

⁸⁸*Id.*

⁸⁹513 F. Supp. 1051 (E.D. Tex. 1981).

set forth in the Ohio Rules of Civil Procedure, especially those contained in Rules 15 and 21.⁹⁰ Although not firmly established in Ohio, the majority of courts have held that leave of court is necessary prior to the addition of a new-party defendant, regardless of whether a responsive pleading has been filed.⁹¹

Secondly, a plaintiff, when seeking to add or change a party-defendant, must be aware of when and under what circumstances the statute of limitations will relate back so as not to bar the action as to the new-party defendant. Ohio Rule 15(C) codifies those circumstances under which the running of the statute of limitations will relate back to the filing of the original complaint.⁹² Although the courts have generally construed these requirements liberally in the interest of justice, it behooves the plaintiff to be familiar with these rules when attempting to add a new-party defendant.

⁹⁰OHIO R. CIV. P. 15 and 21.

⁹¹See *supra* notes 14-27 and accompanying text.

⁹²See *supra* notes 28-33 and accompanying text.