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When Should Necessary Parties Be Joined As Involuntary Plaintiffs? Not Nearly As Often As You'd Think

by Brenda M. Johnson

Rule 19 of the Ohio Rules of Civil Procedure governs the joinder of parties whose presence in an action is necessary for “just adjudication.” Adopted in 1970, Ohio’s rule deviates from its federal analog only to the extent that it specifies certain categories of parties who are deemed necessary, and further specifies the manner in which the defense of failure to join a necessary party is to be raised.¹ Where the Ohio and the original federal rule do *not* deviate, however, is that they both contain the following sentence:

“If he [the necessary party] should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.”

This directive seems simple enough at first – if a party should be in the case as an additional plaintiff, and the defendant raises the issue in a timely manner, that party should be named as a defendant, unless it is a “proper case,” in which case the party should be joined as an involuntary plaintiff. In other words, that party should be named as a defendant unless the case falls within the exception known as a “proper case.” The rule, however, is frustratingly silent as to two things: What is a “proper case,” and how do you join “an involuntary plaintiff?” Even more frustratingly, this silence has led some of our colleagues to assume that *every* instance in which a necessary party should be in the case as a plaintiff is a “proper case” in which to join them as an “involuntary

plaintiff.” But if that were so, why would the rule begin with what appears to be a presumption that unwilling plaintiffs usually should be named as defendants? As one federal court observed years ago, “[t]he Rule clearly does not mean that *whenever* an absent party is properly alignable as a plaintiff in a lawsuit, he should be brought in under Rule 19(a) as an ‘involuntary plaintiff.’”²

The answer to these questions can be found in the history of the federal rule in which this directive originally appears. In fact, to find the answer, we must go all the way back to the 1937 advisory committee notes to the original federal Rule 19 and to *Independent Wireless Telegraph Co. v. Radio Corp. of America*,³ an opinion arising from a patent infringement case that came before the United States Supreme Court in 1926.

A. *Independent Wireless* – Where It All Began

The 1937 Advisory Committee Note to the original Rule 19 specifically cites *Independent Wireless* as an example of a “proper case for involuntary plaintiff,”⁴ which makes this opinion the perfect (and perhaps only) place to start. In that case, the patent at issue was held by a company known as De Forest Radio Telephone & Telegraph Company, which had licensed the patent to RCA. Another company, Independent Wireless Telephone Company, apparently infringed on the patent, and RCA wanted to enjoin it from doing so. However, under federal

patent law, RCA did not have standing as a mere licensee to seek injunctive relief by itself. Under federal law, the original patent holder (in this case, De Forest) had to be in the case as well. DeForest, however, had refused to join the patent infringement suit, and could not be made a defendant because it was outside the jurisdiction of the trial court. So, when RCA went to court to enjoin Independent Wireless from infringing on the patent, it included the following allegations in its bill in equity:

[T]he De Forest Radio Telephone & Telegraph Company, as hereinbefore alleged, has certain rights in the patents in suit herein; that before filing this bill of complaint, said De Forest Radio Telephone & Telegraph Company, was requested to consent to join, as a co-plaintiff, herein, but declined; that said De Forest Radio Telephone & Telegraph Company is not within the jurisdiction of the Court and therefore can not be made a defendant herein; and that therefore to prevent a failure of justice, and to enable the plaintiff Radio Corporation of America to protect its exclusive rights under the patents in suit, said De Forest Radio Telephone & Telegraph Company, is made a plaintiff herein without its consent.⁵

The issue decided in *Independent Wireless* was whether RCA could actually do what it did in that paragraph – namely, make De Forest a co-plaintiff against its will. The Supreme Court’s answer was yes, but only in the peculiar circumstances presented *in that case*.⁶

As noted above, under the patent law at the time, RCA could not pursue any kind of injunctive relief unless the patent owner (De Forest) joined as a plaintiff, which De Forest had refused to do.⁷ This, as the Supreme Court noted,

would have been an easy problem to solve if De Forest had been subject to personal jurisdiction in the forum and could have been named as a defendant:

If the owner of a patent, **being within the jurisdiction**, refuses or is unable to join an exclusive licensee as a co-plaintiff, **the licensee may make him a party defendant by process and he will be lined up by the court in the party character which he should assume**.⁸

De Forest, however, was beyond the trial court’s jurisdictional reach, and thus could not be compelled to join as a defendant. At the same time, De Forest had a duty (either express or implied) to allow its name to be used by RCA to the extent necessary to protect RCA’s exclusive right to the patent.⁹ And by refusing to join the case voluntarily (and thus lend its name to RCA’s cause), De Forest effectively left RCA with no way to enforce its exclusive right to the patent against infringing third parties.

Faced with this conundrum, the Supreme Court determined that principles of equity permitted De Forest to be joined as a plaintiff, even though it was not subject to personal jurisdiction (and thus could not be compelled to join as a defendant), and even though it had not consented to be a party to the action. The Court’s holding, however, was extremely restricted in its scope. For one, the Court clearly stated that such joinder is a last resort and is available **only** when the refusing entity is beyond the court’s jurisdiction, but has a clear obligation to aid an exclusive licensee in protecting its rights: “We . . . do hold that, **if there is no other way** of securing justice to the exclusive licensee, the latter may make the owner without the jurisdiction a co-plaintiff without his consent in the bill against the infringer.”¹⁰

Since any judgment would have to be binding on the non-consenting plaintiff

in order to be meaningful, the Court also placed a notice requirement on such joinder, along with a requirement that the non-consenting plaintiff actually refuse to join the suit after having been given notice and an opportunity to do so:

The [patent] owner beyond the reach of process may be made co-plaintiff by the licensee, but **not until after** he has been requested to become such voluntarily. If he declines to take any part in the case, though he knows of its imminent pendency and of his obligation to join, he will be bound by the decree which follows. We think this result follows from the general principles of *res judicata*.¹¹

Thus, the singular example of a “proper case” cited in the Advisory Committee Note to the original Rule 19 presents an extremely unusual scenario – namely, a situation in which a party whose presence in the suit is necessary in order to allow the plaintiff’s claims to go forward refuses to join, but cannot be compelled to do so because the party is beyond the court’s jurisdiction.

B. Joinder As An “Involuntary Plaintiff” Is A Very Narrow Exception To The Rule, Which Is That Necessary Parties Who Should Join As Plaintiffs Should Normally Be Named As Defendants, Then Realigned If Appropriate

Ohio case law is silent as to the proper use of “involuntary plaintiff” joinder under Rule 19. Since Rule 19 has a federal counterpart, however, federal case law on the issue is a highly relevant source of guidance on this issue.¹² And, following *Independent Wireless*, federal courts have long held that such joinder is a procedure that should be used only when the party at issue is outside the jurisdiction of the trial court and has

refused to join voluntarily after having been asked to do so, and should generally *only* be used when the absent party has some obligation to allow its name to be used in the action.

An example of how the rule is framed by federal courts is set forth in *Dublin Water Co. v. Delaware River Basin Comm.*:¹³

It is well settled that the “proper case” provision of Fed. R. Civ. P. 19(a) may only be invoked where the party sought to be joined as an involuntary plaintiff is beyond the jurisdiction of the Court and is notified of the action but refuses to join, and where the party seeking such joinder is entitled to use the non-party’s name to prosecute the action. **If the non-party is within the jurisdiction of the Court, he must be served with process and made a defendant.**¹⁴

Conversely, where a necessary party should be joined and is subject to the jurisdiction of the court, normal federal practice has been to require that party to be served with process and added as a defendant.¹⁵ Ohio’s civil rules strongly support a similar approach – and not just because of the manner in which federal courts have interpreted Rule 19. Ohio has no procedural mechanism for serving a potential party that has been denominated an “involuntary plaintiff” with a summons and complaint and bringing it into an ongoing action. Civil Rule 4, which governs the issuance of process and summons, provides that “[u]pon the filing of the complaint the clerk shall forthwith issue a summons for service upon each defendant listed in the caption.”¹⁶ Rule 4(B) provides that the summons “shall . . . be directed at the defendant . . .”¹⁷ There is no provision in the rule for issuing a summons for service on an “involuntary plaintiff,” which strongly supports the proposition

that “involuntary plaintiff” joinder can and should be reserved for those instances in which the party who refuses to join is beyond the court’s jurisdiction, and cannot be compelled to join through service of process.

Conclusion

While Rule 19(A) is silent as to what constitutes a “proper case” in which to join a necessary party as an involuntary plaintiff, there is still guidance to be found, both in the history of the rule and in the case law interpreting its federal counterpart. All of the persuasive authority – along with common sense – stands for the proposition that “involuntary plaintiff” joinder is an extremely narrow exception to the general rule, which is that necessary parties who are subject to the court’s jurisdiction should be joined as *defendants*, even if the court later determines that they should be aligned as plaintiffs. Only when the party at issue is beyond the court’s jurisdiction is it appropriate to join them as an “involuntary plaintiff,” and even then, they should be named as such only if (a) they have a clear duty to join; and (b) they have been given notice of the pendency of the case and have refused to join voluntarily. ■

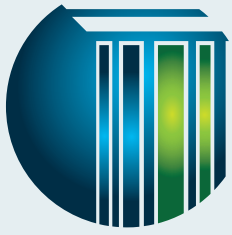
End Notes

- Ohio’s version of Rule 19, as adopted in 1970, is modeled on the federal version of the rule adopted in 1966. See Ohio R. Civ. P. 19 (noting date of adoption). Section (a) of the 1966 version of the federal rule, which is the section relevant here, provided as follows:
(a) Persons to be joined if feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise

inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or in a proper case, an involuntary plaintiff.

- Eikel v. States Marine Lines, Inc.*, 473 F.2d 959, 962 (5th Cir. 1973) (emphasis in original).
- 269 U.S. 459 (1926)
- See Fed. R. Civ. P. 19, Advisory Committee Notes, 1937 Adoption (“For example of a proper case for involuntary plaintiff, see *Independent Wireless Telegraph Co. v. Radio Corp. of America*, 269 U.S. 459, 46 S. Ct. 166, 70 L.Ed. 357 (1926).”).
- Independent Wireless*, 269 U.S. 459 at 462.
- Id.* at 464 (“The question for our consideration then is, Can the Radio Company make the De Forest Company a co-plaintiff against its will under the circumstances of the case?”).
- Id.* at 465-466.
- Id.* at 468 (emphasis added). As the Court noted, this would have been well in line with general equity practice at the time, which allowed (and still allows) beneficiaries of a trust to “make an unwilling trustee a defendant in a suit to protect the subject of the trust.” *Id.* at 469.
- Id.* at 469.
- Id.* at 472 (emphasis added).
- Id.* at 473. As the Court observed, requiring notice and an opportunity to join is necessary in order to allow the patent owner to be bound by a judgment rendered in its absence, and to protect the defendant in the case from the risk of multiple infringement actions: “By a request to the patent-owner to join as co-plaintiff, by notice of the suit after refusal and the making of the owner a co-plaintiff, he is given a full opportunity by taking part in the cause to protect himself against any abuse of the use of his name as plaintiff, while on the other hand the defendant charged with infringement will secure a decree saving him from multiplicity of suits for infringement.” *Id.* at 474.
- As Ohio’s civil rules are modeled on the federal rules, the Ohio Supreme Court has held that “federal law interpreting a federal rule, while not controlling, is persuasive authority in interpreting a similar Ohio rule.” *Stammco, LLC v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, ¶ 18, 994 N.E.2d 408 (citing *Myers v. Toledo*, 110 Ohio St.3d 218, 2005-Ohio-4353, ¶ 18, 852 N.E.2d 1176).
- 443 F. Supp. 310 (E.D. Pa. 1977)

14. *Id.* at 315 (emphasis added; citing, *inter alia*, *Independent Wireless*, supra); see also *Sheldon v. W. Bend Equip. Corp.*, 718 F.2d 603, 606 (3d Cir. 1983); *Eikel v. States Marine Lines, Inc.*, 473 F.2d 959, 962 (5th Cir. 1973); *Carter v. Deutsche Bank Nat'l Trust Co.*, No. 1:15-cv-544, 2016 U.S. Dist. LEXIS 135759 at *14 (S.D. Ohio Sept. 30, 2016); *Moerke v. Altec Indus.*, No. 12-cv-903-bbc, 2013 U.S. Dist. LEXIS 167780, 2013 WL 6185213 (W.D. Wis. Nov. 26, 2013); *Novak v. Active Window Prods.*, No. 01-CV-3566(DLI)(WDW), 2007 U.S. Dist. LEXIS 16065, 2007 WL 749810 (E.D.N.Y. Mar. 7, 2007); *Murray v. Mississippi Farm Bur. Cas. Ins. Co.*, 251 F.R.D. 361, 364 (W.D. Wis. 2008); *Hicks v. Intercontinental Acceptance Corp.*, 154 F.R.D. 134, 135 (E.D.N.C. 1994); *JTG of Nashville, Inc. v. Rhythm Band, Inc.*, 693 F. Supp. 623, 628 (M.D. Tenn. 1988); *Ruppert v. Secy. of the United States HHS*, 671 F. Supp. 151, 173 (E.D.N.Y. 1987); *Cilco, Inc. v. Copeland Intralenses, Inc.*, 614 F. Supp. 431, 433 n. 2 (S.D.N.Y. 1985); *N. Eng. & Plastics Corp v. Eddy*, 84 F.R.D. 621, 622-23 (W.D. Pa. 1979); see also 7 Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: Civil 3d §§ 1605, 1606 (2001) and cases cited therein.
15. See generally 7 Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: Civil 3d § 1605; see also *Dental Precision Shoulder, Inc. v. L.D. Caulk Co.*, 7 F.R.D. 203, 204 (E.D.N.Y. 1947) (“where formal process issuing out of the court can be used to bring a party into a suit, informal notice such as might be proper for the joinder of an involuntary plaintiff under other circumstances is unsatisfactory, for a number of reasons which ought to be clear.”)
16. Civ. R. 4(A) (emphasis added).
17. Civ. R. 4(B) (emphasis added).



President's Message:

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