FEDERAL CIVIL PROCEDURE: PREJUDICIAL EFFECTS OF STARE DECISIS CAN COMPEL INTERVENTION OF RIGHT UNDER RULE 24 (a)

IN *Atlantis Development Corporation v. United States*,[1] the Court of Appeals for the Fifth Circuit held that one who claims an interest relating to the very property and the very transaction which is the subject of a judicial determination may intervene as a matter of right under recently-amended Federal Rule of Civil Procedure 24 (a) (2) when the disposition of the litigation may impair his own claim because of the operation of stare decisis. Atlantis Development Corporation sought to intervene in an action brought by the United States to enjoin several defendants from erecting caissons on allegedly government-owned reefs off the Florida coast. Atlantis, believing that ownership of the reefs was vested in it by right of discovery and occupation, had previously expended a considerable sum for surveys and construction upon the reefs, and had requested the Government to either recognize its ownership or initiate litigation which would resolve the dispute. It was Atlantis that requested the Government to bring suit against the main defendants. The district court, without opinion, denied the motion to intervene,[2] and while appeal was pending, rule 24 (a) was amended to provide for intervention of right

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.[3]

The court of appeals, pursuant to the Supreme Court order approving the amendment,[4] gave the amendment retroactive effect, reversed the district court order, and authorized Atlantis to intervene as of right.

Prior to the 1966 revision, subsection (3) of rule 24 (a) provided for intervention of right whenever the applicant was "so situated as

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[1] 379 F.2d 818 (5th Cir. 1967).
[2] *Id.* at 822.
[3] FED. R. CIV. P. 24 (a) (2).
[4] 384 U.S. 1031 (1966).

to be adversely affected by a distribution . . . of property which is . . . subject to the control or disposition of the court . . . ."[5] Intervention pursuant to this subsection was traditionally limited to third persons claiming a legal or equitable interest[6] in a "fund" or res[7] which had come under court control. Former subsection (2) provided for intervention of right "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be *bound* by a judgment in the action . . . ."[8] Although courts commonly held that an applicant was bound within the meaning of this subsection "only when he may be subject to a plea of res judicata,"[9] a few courts preferred to give the word a "utilitarian and realistic interpretation,"[10] developing what the *Atlantis* court denominated the "ameliorative exceptions" to the res judicata rule.[11] Under this liberal interpretation of "bound," for example, intervention was held to be of right when an applicant would have been without legal recourse after judgment,[12] when the case involved review of an administrative regulation,[13] or when there

[5] Fed. R. Civ. P. 24(a)(3), 329 U.S. 853 (1947).

[6] *See* Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137 (1944) (defendant's competitor lacked sufficient "interest" to intervene in antitrust suit); Vaughan v. Dickinson, 19 F.R.D. 323 (W.D. Mich. 1955), *aff'd sub nom.* Duffy v. Vaughan, 237 F.2d 168 (6th Cir. 1956) (per curiam) (judgment creditor of plaintiff held to have no "direct interest"); United States v. Columbia Gas & Elec. Corp., 27 F. Supp. 116 (D. Del.), *appeal dismissed sub nom.* Missouri-Kansas Pipe Line Co. v. United States, 108 F.2d 614 (3d Cir.), *cert. denied,* 309 U.S. 687 (1939). *See generally* 4 J. MOORE, FEDERAL PRACTICE ¶ 24.09 (1950, Supp. 1966).

[7] *See, e.g.,* United States v. American Soc'y of Composers, 202 F. Supp. 340 (S.D.N.Y. 1962) (court's licensing power not a "res" for intervention purposes); *cf.* Cameron v. President & Fellows of Harvard College, 157 F.2d 993 (1st Cir. 1946); White v. Hanson, 126 F.2d 559 (10th Cir. 1942). *But see* Formulabs v. Hartley Pen Co., 275 F.2d 52 (9th Cir. 1960) (discovery procedures disclosing trade secret constitute rule 24(a) property disposition). *See generally* 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 598 (Wright ed. 1961, Supp. 1966).

[8] Fed. R. Civ. P. 24(a)(2), 308 U.S. 28-29 (1939) (emphasis added).

[9] Ar-Tik Systems, Inc. v. Dairy Queen, Inc., 22 F.R.D. 122, 123 (E.D. Pa. 1958); *accord,* Durkin v. Pet Milk Co., 14 F.R.D. 374 (W.D. Ark. 1953) (serious economic consequences insufficient); Jewel Ridge Coal Corp. v. Local 6167, UMW, 3 F.R.D. 251 (W.D. Va. 1943) (bound, "in a sense," by stare decisis insufficient).

[10] Kozak v. Wells, 278 F.2d 104, 110 (8th Cir. 1960); *accord,* International Mortgage & Inv. Corp. v. Von Clemm, 301 F.2d 857, 861-62 (2d Cir. 1962); Clark v. Sandusky, 205 F.2d 915, 918-19 (7th Cir. 1953); Knapp v. Hankins, 106 F. Supp. 43, 46-48 (E.D. Ill. 1952); cases cited notes 12-14 *infra* and accompanying text.

[11] 379 F.2d at 825.

[12] Ford Motor Co. v. Bisanz Bros., 249 F.2d 22 (8th Cir. 1957).

[13] Atlantic Ref. Co. v. Standard Oil Co., 304 F.2d 387 (D.C. Cir. 1962); Textile Workers Union v. Allendale Co., 226 F.2d 765 (D.C. Cir. 1955), *cert. denied,* 351 U.S. 909 (1956).

was the possibility of the establishment of adverse precedents.[14] The Supreme Court halted this liberal trend in *Sam Fox Publishing Company v. United States,*[15] which held that "bound" meant "legally bound,"[16] *i.e.,* in a res judicata sense.

In part, the 1966 revision of rule 24 (a) corrected specific defects in both former subsections. The "bound" language of former subsection (2), which had led to the *Sam Fox* holding, was eliminated. Similarly, the new rule discarded the subsection (3) notion that a fund or other "disposition of property" is requisite to intervention.[17] The revised rule did, however, retain the existing threshold requirements for intervention as a matter of right—an interest, inadequately represented. Significant, however, was the deliberate effort to "dovetail" revised rules 19 (joinder) and 23 (class actions) with the new intervention rule in order to place greater emphasis on "the practicalities of the various factual situations involved"[18] and less on sterile legal concepts.[19] In identifying persons who should be joined if feasible, the type of action which should represent and bind a class rather than merely the litigants, and persons who should be entitled to intervene, the new rules all use similar or identical language to stress the need to protect parties who otherwise might, as a practical matter, be impeded in the protection of their interests.[20] This pragmatic approach was intended to expand the availability of the rules and increase their use, thereby alleviating the necessity for "repeated lawsuits on the same essential subject matter."[21]

Although recognizing the question-begging nature of its analysis, the *Atlantis* court, noting the Advisory Committee's attempt to inosculate the policy underlying the revised rules, suggested that hereafter the question of whether intervention of right exists may often turn "on the unstated question of whether joinder of the intervenor was called for under new Rule 19."[22] Aware of Atlantis'

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[14] Kozak v. Wells, 278 F.2d 104 (8th Cir. 1960).

[15] 366 U.S. 683 (1961). *See generally* Comment, *Intervention of Right in Class Actions: The Dilemma of Federal Rule of Civil Procedure 24(a)(2),* 50 CALIF. L. REV. 89 (1962).

[16] 366 U.S. at 694.

[17] Advisory Committee's Note, 39 F.R.D. 69, 109 (1966).

[18] Cohn, *The New Federal Rules of Civil Procedure,* 54 GEO. L.J. 1204 (1966).

[19] *See* Advisory Committee's Note, 39 F.R.D. 69, 90, 99, 109 (1966).

[20] *Compare* FED. R. CIV. P. 19 (a) (2) (i), *with* FED. R. CIV. P. 24 (a) (2), *and* FED. R. CIV. P. 23 (b) (1) (B).

[21] Advisory Committee's Note, 39 F.R.D. 69, 91 (1966).

[22] 379 F.2d at 825.

continuing attempts to develop the reefs, and substantial investments toward that end, the court had no difficulty finding that Atlantis claimed an interest relating to the property or transaction (the right to build structures with or without permission of the Government) which was the subject of the main suit. Furthermore, there was no doubt that Atlantis was inadequately represented since both parties to the litigation claimed interests clearly adverse to those of Atlantis. A more difficult problem, however, was whether a disposition on the merits would impair or impede Atlantis' ability to protect its interests. The court noted that, because of the identity of the issues raised by Atlantis' claim with those which would necessarily be decided in the main case, Atlantis' claim might be rendered worthless by operation of stare decisis, a principle closely followed within the Fifth Circuit.[23] Thus, as a practical matter, Atlantis' ability to protect its interests in the reefs would be impaired. The court, however, was careful to point out that intervention of right is not compelled in every case in which the operation of stare decisis might create a "substantial obstacle" to the applicant in future litigation.[24] Requiring intervention of right in this case, the court concluded, was the proposed intervenor's claim to and an interest in the very property and the very transaction which was the subject of the action.[25]

The court's conclusion that stare decisis may, in some cases, sufficiently impair a person's ability to protect his interest seems justified both by the language of the rule and by the drafters' official comments.[26] The importance of *Atlantis,* therefore, may lie more in the limitations which it suggests than in the pragmatic viewpoint from which it was written. In light of the Supreme Court's *Cascade Natural Gas Corporation v. El Paso Natural Gas Company*[27] holding which implied that the "interest relating to" language of the new rule[28] should be liberally construed, not limited to the customary legal or equitable interest notion,[29] the *Atlantis* court's reiteration of

[23] *Id.* at 828.
[24] *Id.* at 829.
[25] *Id.* at 825-26, 829.
[26] *See* Advisory Committee's Note, 39 F.R.D. 69, 109-11 (1966).
[27] 386 U.S. 129 (1967).
[28] FED. R. CIV. P. 24 (a) (2). See note 3 *supra* and accompanying text.
[29] 386 U.S. at 135-36 (divestiture proceeding affecting intervenor's sole supplier). *Compare El Paso, with* cases cited note 6 *supra* and accompanying text.

the importance of Atlantis' interest in the disputed transaction and property is significant. Future litigants undoubtedly will seek to intervene on the basis of interests less specific than the traditional, direct claim of ownership interest in *Atlantis*—necessitating exposition of the language "interest relating to the property or transaction which is the subject of the action . . . ."[30] In many cases, *some* "interest" of a non-party may be affected by the outcome of an action. If, however, the focus is placed in the first instance on the potential harm, rather than on the quality of the interest upon which intervention is sought, much of the rule 24 (b) provision for permissive intervention when a common question of law or fact exists would be rendered extraneous. Construed in this light, as *Atlantis* indicates, rule 24 (a) seems to require the traditional ownership interest for intervention as a matter of right. Once this interest has been established, however, potential injury too remote under previous rule 24 (a) may now prescribe intervention upon proper application of the party whose interest may be injured.

[30] FED. R. CIV. P. 24 (a) (2). See note 3 *supra* and accompanying text.