

NOTES

FEDERAL CIVIL PROCEDURE: INTERVENTION OF RIGHT GRANTED PRIVATE PARTY IN GOVERNMENT ANTITRUST SUIT UNDER NEW RULE 24 (a) (2)

Recent revisions of rule 24 of the Federal Rules of Civil Procedure removed certain restrictive interpretations which had been engrafted upon the old form. New rule 24(a)(2) states that a party may intervene of right in an action when he possesses an interest which may be substantially impaired by a determination in the proceeding, and he is not adequately represented by an existing party. In the first Supreme Court application of the new rule, the Court intimated that even in an antitrust context a pecuniary or possessory interest is not required for intervention. The Court failed, however, to delineate the representation requirement and the case may be of limited precedential value because of the clear nature of the government misconduct involved.

UNDER Federal Rule of Civil Procedure 24 (a) intervention as a matter of right is permitted in certain circumstances.¹ In the recent antitrust case of *Cascade Natural Gas Corporation v. El Paso Natural Gas Company*,² the United States Supreme Court has given an unprecedented interpretation to old rule 24 (a) (3)³ and to the term "interest" in its successor, new rule 24 (a) (2).⁴ As a result of these novel interpretations, private litigants were allowed to intervene as a matter of right in the Government's suit to compel a divestiture of illegally acquired assets.

In 1964 the United States Supreme Court in *United States v. El*

¹ FED. R. CIV. P. 24 (a).

² 386 U.S. 129 (1967).

³ "Upon timely application anyone shall be permitted to intervene in an action: . . . (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof." FED. R. CIV. P. 24 (a) (3), 308 U.S. 691 (1939).

⁴ New rule 24 (a) (2) reads: "Upon timely application anyone shall be permitted to intervene in an action: . . . (2) 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." FED. R. CIV. P. 24 (a) (2) (effective July 1, 1966).

*Paso Natural Gas Company*⁵ held that the acquisition of the Pacific Northwest Pipeline Corporation by the El Paso Natural Gas Company violated section 7 of the Clayton Act⁶ and ordered a divestiture "without delay."⁷ Prior to the formulation of the divestiture decree, a score of applications to intervene as a matter of right under old rule 24 (a) were denied by the district court.⁸ Thereafter, the district court announced its divestiture decree.⁹ Meanwhile, the State of California, Southern California Edison, and Cascade Natural Gas Corporation appealed the denial of their intervention motions. The United States Supreme Court held that the State of California and Southern California Edison were " 'so situated' geographically as to be 'adversely affected' within the meaning of old Rule 24 (a) (3)."¹⁰ Moreover, recognizing that the action had to be opened to allow the State of California and Southern California Edison to intervene, the Court concluded that new rule 24 (a) (2), effective subsequent to the district court's denial, was "broad enough to include Cascade [since the] . . . 'existing parties' [had] fallen far short of representing its interests."¹¹ Finding the divestiture decree unsatisfactory,¹² the majority took the extraordinary action of enunciating explicit guidelines pursuant to which it desired the new decree formulated.¹³ Finally, a new district judge was to be assigned to the case since the attitude of the presiding district judge was primarily responsible for "the evil" which permeated the divestiture decree.¹⁴

⁵ 376 U.S. 651 (1964).

⁶ *Id.* at 662.

⁷ *Id.*

⁸ *United States v. El Paso Natural Gas Co.*, 37 F.R.D. 330 (D. Utah 1965). Intervention was opposed by both the United States and El Paso. *Id.* at 332. There were twenty potential intervenors including the public utilities commissions of seven states, the State of California, eleven natural gas distributing companies, and a would-be purchaser. *Id.*

⁹ 1965 Trade Cas. 80,985 (D. Utah).

¹⁰ *Cascade Natural Gas. Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135 (1967).

¹¹ *Id.* at 136.

¹² *Id.*

¹³ *Id.* at 136-43. Mr. Justice Harlan, concurring in part and dissenting in part to the first *El Paso* case, stated that he knew of no decision in which the Court had initially directed a divestiture or any other relief. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 664 (1964). In the instant case, Mr. Justice Stewart observed that the issues relevant to a divestiture decree had never been submitted to the adversary process and that the proper remedy, assuming the majority's position on intervention was correct, was to remand the case for further hearings upon the divestiture decree. 386 U.S. at 159 (dissenting opinion).

¹⁴ The district judge approved a plan which provided for a division of the gas supplies to avoid the necessity of creating dual pipelines and storage facilities. The

Old rule 24 (a), drafted in 1938, was a codification of the then existing federal practice relating to intervention.¹⁵ That practice has its historical antecedents in the English Chancery procedure of petitioning *pro interessee suo*.¹⁶ By such a petition, a non-party who claimed an interest in the property under the court's dominion was permitted to enter a pending suit and assert his interest. In 1912 the United States Supreme Court, pursuant to a comprehensive revision of its equity rules, adopted Equity Rule 37¹⁷ which reflected this "property" concept. Similarly, admiralty practice recognized absolute intervention where a claimant asserted an interest in the proceeds of a fund under the control of an admiralty court.¹⁸ When the Advisory Committee drafted the first Federal Rules of Civil Procedure, this principle was incorporated in rule 24 (a) (3).¹⁹ Old rule 24 (a) (2), in an attempt to provide an alternative basis for intervention, allowed intervention as a matter 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."²⁰

New rule 24 (a) (2) was drafted to rectify certain difficulties which arose in the application of former rule 24 (a) (2) and (3).²¹ The old subsection (3) requirement of a fund or property in the possession

Supreme Court, however, desired duplication of facilities in order to promote competition between El Paso and the new company. 386 U.S. at 142-43.

¹⁵ *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 144 n.2 (1967) (dissenting opinion).

¹⁶ See 2 T. STREET, *FEDERAL EQUITY PRACTICE* § 1365 (1909).

¹⁷ Equity R. 37, 226 U.S. 659 (1912).

¹⁸ See *The Charles D. Leffler*, 100 F.2d 759 (3d Cir. 1938).

¹⁹ See generally D. LOISELL & G. HAZARD, *CASES AND MATERIALS ON PLEADING AND PROCEDURE* 750 (1962); Moore & Levi, *Federal Intervention: I. The Right to Intervene and Reorganization*, 45 YALE L.J. 565 (1936) (research paper upon which rule 24 was based).

²⁰ Fed. R. Civ. P. 24 (a) (2), 308 U.S. 690 (1939). In *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961), the Court interpreted "bound" in terms of the concept of res judicata, which had the effect of making former rule 24 (a) (2) a nullity in class actions. A member of a class against whom a prior class judgment was sought to be enforced could avoid liability by showing that he was inadequately represented. *Hansberry v. Lee*, 311 U.S. 32, 41-46 (1940). See generally C. WRIGHT, *FEDERAL COURTS* § 72, at 268 (1963). Thus, if the intervenor's representation was in fact inadequate, the judgment would not be res judicata as to him and he would not be entitled to intervene. Conversely, if the judgment would have res judicata effect, the applicant would have no right to intervene since his representation was, by definition, adequate. See generally C. WRIGHT, *supra* at 284; Comment, *Intervention of Right in Class Actions: The Dilemma of Federal Rule of Civil Procedure 24(a)(2)*, 50 CALIF. L. REV. 89 (1962).

²¹ See Advisory Committee's Note, 39 F.R.D. 109, 109-10 (1966). See generally Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204 (1966).

of the court was unduly restrictive.²² Thus, new rule 24 (a) (2) permits intervention when the action will substantially affect some "interest" of the applicant, regardless of the existence of a fund.²³ The present rule also omits the "bound" phraseology of old subsection (2) and permits non-discretionary intervention when the applicant "is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect"²⁴ his interest, unless such interest is adequately represented by the existing parties.²⁵

Though the new provision embodies the principles of the old rules without the objectionable *res judicata* and "fund" concepts, the current form still requires an "interest," as well as inadequate representation, before the absolute right to intervene is recognized. Due to the amendment of rule 24 (a), it would be of limited value to explore the intervention granted to the State of California and Southern California Edison under former subsection (3). Hence, attention will be focused upon new rule 24 (a) (2) under which the Court permitted Cascade, a private distributor of gas, to participate in the litigation.

Under former rule 24 (a) (3) the applicant was generally required to possess an *interest recognized and protected by the law*, such as a lien or claim of ownership, either equitable or legal, before a non-discretionary right to intervene was acknowledged.²⁶ Such an absolute right has been recognized upon assertion of a claim to attached

²² To avoid the technical requirement of a fund, some courts gave a liberal interpretation to the concept. See *Formulabs, Inc. v. Hartley Pen Co.*, 275 F.2d 52 (9th Cir. 1960); *D. LOUISELL & G. HAZARD*, *supra* note 19, at 750. As a consequence, it has been stated that: "The concept of a fund has been applied so loosely that it is possible for a court to find a fund in almost any *in personam* action." 4 J. MOORE, *FEDERAL PRACTICE* ¶ 24.09[3], at 55 (2d ed. 1950) [hereinafter cited as MOORE].

²³ See Advisory Committee's Note, 39 F.R.D. 109 (1966).

²⁴ FED. R. CIV. P. 24 (a) (2). The language of this section is comparable to that of FED. R. CIV. P. 19 (a) (2) (i), which provides for joinder of a party when: "(2) he claims an interest relating to the subject of the action and 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 . . ."

²⁵ See Advisory Committee's Note, 39 F.R.D. 110 (1966).

²⁶ *Brotherhood of Ry. Clerks v. Atlantic Coast Line R.R.*, 88 F. Supp. 115, 119 (E.D.N.C.), *aff'd sub nom. Rose v. Brotherhood of Ry. Clerks*, 181 F.2d 944 (4th Cir.), *cert. denied*, 340 U.S. 851 (1950); *First State Bank v. Citizens State Bank*, 10 F.R.D. 424, 426 (D. Neb. 1950); *Gross v. Missouri & Ark. Ry.*, 74 F. Supp. 242, 249 (W.D. Ark. 1947); *United States v. Columbia Gas & Elec. Corp.*, 27 F. Supp. 116, 120 (D. Del.), *appeal dismissed sub nom. Missouri-Kansas Pipe Line Co. v. United States*, 108 F.2d 614 (3d Cir. 1939), *cert. denied*, 309 U.S. 687 (1940); see 4 MOORE ¶ 24.09[2], at 45; 6 H. TOULMIN, *ANTI-TRUST LAWS* § 6.7, at 208 (1951).

property or its proceeds,²⁷ part ownership of a chattel mortgage,²⁸ a mortgage lien on a leasehold interest subject to forfeiture,²⁹ and the claim of a purchaser of land involved in foreclosure proceedings against the seller.³⁰ Courts have realized that it is "not always easy to draw the line,"³¹ but have in close cases been guided by the historical policies behind intervention as a matter of right, and thus generally have adopted a legal interpretation of "interest."³²

Consequently, in a long series of precedents both before and after the adoption of rule 24 (a), intervention as a matter of right has been consistently refused to persons claiming to represent some general public interest in suits where a public authority is already representing that interest.³³ This principle was related to the anti-trust field in *Ex parte Leaf Tobacco Board of Trade*³⁴ where the

²⁷ *Krippendorf v. Hyde*, 110 U.S. 276, 283-87 (1883).

²⁸ *Osborne & Co. v. Barge*, 30 F. 805 (C.C.N.D. Iowa 1887).

²⁹ See *United States v. Radice*, 40 F.2d 445 (2d Cir. 1930).

³⁰ *Gaines v. Clark*, 275 F. 1017 (D.C. Cir. 1921).

³¹ *Central Trust Co. v. Chicago R.I. & P.R.R.*, 218 F. 336, 339 (2d Cir. 1914); see *United States v. Radice*, 40 F.2d 445, 446 (2d Cir. 1930).

³² The receiver of a drainage district was not permitted to intervene in a suit against the district for bonds which had been issued, the theory being that a receiver does not represent the parties but is merely a custodian of the property. *Board of Drainage Comm'rs v. Lafayette Southside Bank*, 27 F.2d 286, 295 (4th Cir. 1928).

³³ A telephone subscriber was refused intervention in a suit between the city and the telephone company over the city's rate ordinance and disposition of rate overcharges. *In re Engelhard & Sons*, 231 U.S. 646 (1914). Depositors were denied intervention under former rule 24 (a) (3) in proceedings by the Federal Home Loan Bank Board against savings and loan association officers. *Reich v. Webb*, 336 F.2d 153, 159-60 (9th Cir. 1964), *cert. denied*, 380 U.S. 915 (1965). Intervention under rule 24 (a) was denied in a suit over mineral rights between the Government and a railroad to one claiming the mineral rights under a patent from the United States. *MacDonald v. United States*, 119 F.2d 821, 827-28 (9th Cir. 1941), *modified sub nom.* *Great N. Ry. v. United States*, 315 U.S. 262 (1942). A business injured by a utility's proposed dam was not allowed intervention in a suit between the utility and the Federal Power Commission. *Radford Iron Co. v. Appalachian Elec. Power Co.*, 62 F.2d 940 (4th Cir.), *cert. denied*, 289 U.S. 748 (1933). Participation was denied to a rate-payer protesting a proposed settlement of litigation between a utility and a municipality. *O'Connell v. Pacific Gas & Elec. Co.*, 19 F.2d 460 (9th Cir. 1927). Intervention was denied to over-represented towns in a reapportionment suit brought against state authorities. *Butterworth v. Dempsey*, 229 F. Supp. 754, 798-99 (D. Conn.), *aff'd sub nom.* *Town of Franklin v. Butterworth*, 378 U.S. 562 (1964) (*per curiam*). A similar refusal was rendered to municipalities served by a railroad involved in a reorganization proceeding to which the state was a party. *Gross v. Missouri & A. Ry.*, 74 F. Supp. 242, 248-49 (W.D. Ark. 1947).

Professor Moore states that the real reason rate-payers and taxpayers are denied intervention is because their interest is insufficient, rather than because it is adequately represented. 4 MOORE ¶ 24.08, at 39-40. Professor Wright, on the other hand, contends that inadequacy of representation is a factual question which in cases of doubt should be resolved in the intervenor's favor. C. WRIGHT, *supra* note 20, § 75 at 283.

³⁴ 222 U.S. 578 (1911) (*per curiam*).

Court denied intervention to tobacco sellers in the Government's suit to dissolve the American Tobacco combination. The subsequent refusals of several other courts to allow applicants to participate in government antitrust suits³⁵ has led one commentator to state unequivocally that the only interest which will promote absolute intervention is a *legal interest*.³⁶

In addition to an "interest," new rule 24 (a) (2) requires that such interest be inadequately represented,³⁷ such as when the representative colludes with the adverse party,³⁸ has some interest adverse to that of the petitioner,³⁹ or fails to execute his responsibilities.⁴⁰ According to one view, to allow absolute intervention in a government antitrust action on the grounds of inadequate representation would violate the legislative policy behind the antitrust statutes.⁴¹ Historically, two considerations have supported this position: first, when the Government initiates an antitrust suit, it is deemed to be acting in the public interest;⁴² and secondly, effective vindication of

³⁵ *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137, 140-41 (1944); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 315 F.2d 564 (7th Cir.), *cert. denied*, 375 U.S. 834 (1963); *United States v. Radio Corp. of America*, 186 F. Supp. 776 (E.D. Pa.), *appeal dismissed sub nom. Westinghouse Broadcasting Co. v. United States*, 364 U.S. 518 (1960) (per curiam).

³⁶ See 6 H. TOULMIN, *supra* note 26, § 6.7 at 208.

³⁷ FED. R. CIV. P. 24 (a) (2). See note 4 *supra*.

³⁸ *Farmland Irrigation Co. v. Dopplmaier*, 220 F.2d 247, 249 (9th Cir. 1955) (dictum); *Park & Tilford, Inc. v. Schulte*, 160 F.2d 984, 988 (2d Cir.), *cert. denied*, 332 U.S. 761 (1947); *Klein v. Nu-Way Shoe Co.*, 136 F.2d 986, 989 (2d Cir. 1943); *Twentieth Century-Fox Film Corp. v. Jenkins*, 7 F.R.D. 197, 198 (S.D.N.Y. 1947).

³⁹ *Pyle-National Co. v. Amos*, 172 F.2d 425 (7th Cir. 1949); *Mack v. Passaic Nat'l Bank & Trust Co.*, 150 F.2d 474 (3d Cir. 1945), *aff'd on rehearing*, 154 F.2d 907 (3d Cir. 1946); *International Bhd. of Teamsters v. Keystone Freight Lines, Inc.*, 123 F.2d 326 (10th Cir. 1941); *Galconda Petroleum Corp. v. Petrol Corp.*, 46 F. Supp. 23 (S.D. Cal. 1942).

⁴⁰ *Wolpe v. Poretzky*, 144 F.2d 505 (D.C. Cir.), *cert. denied*, 323 U.S. 777 (1944) (failure to prosecute an appeal); *Turner v. Willard*, 157 F. Supp. 451 (S.D.N.Y. 1957) (same); *American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co.*, 3 F.R.D. 162 (S.D.N.Y. 1942) (same). See also *Duncan v. National Tea Co.*, 14 Ill. App. 2d 280, 144 N.E.2d 771 (1957). In the latter case, intervention was allowed because of the possibility of inadequacy of representation by the original plaintiff who failed to prosecute her derivative stockholder's suit and sold her stock while the suit was still pending. See generally Note, *Shareholder Intervention in Corporate Litigation*, 63 HARV. L. REV. 1426 (1950).

⁴¹ 6 H. TOULMIN, *supra* note 26, § 6.9. The Clayton Act provides for a bifurcated system of public and private enforcement. Compare Clayton Act § 15, 15 U.S.C. § 25 (1964), with Clayton Act § 16, 15 U.S.C. § 26 (1964). The public enforcement of anti-trust laws is further divided since the responsibility is shared by the antitrust division of the Department of Justice and the Federal Trade Commission. See A. NEALE, *THE ANTI-TRUST LAWS OF THE U.S.A.* 364 (1960); 32 FORDHAM L. REV. 135, 139-42 (1963).

⁴² See *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 688-90 (1961); *Buckeye*

the public injury requires continued and unfettered governmental control over the suit.⁴³ The Court has also recognized, however, that the entrusting of such discretion to the Department of Justice "includes the power to make erroneous decisions as well as correct ones."⁴⁴

The majority in the instant decision attempted no definition of Cascade's interest in the *El Paso* case, although the opinion details the factual considerations relied upon by the competitor in its claim for intervention. Hence, it appears that the majority adopted Cascade's allegations as showing a sufficient interest under new rule 24 (a) (2). The distributor argued that an inequitable division of gas reserves between the new company to be created and El Paso would seriously jeopardize the potential of the new company to function profitably. Since the new company would be Cascade's sole supplier of natural gas, Cascade's own future performance would be threatened.⁴⁵ Viewed in this manner, Cascade had a strong economic interest in the asset distribution. Furthermore, it seems clear that the intervenor's interest was not merely synonymous with the general public interest in promoting effective competition within the state of California.⁴⁶ Left unspecified, however, was the legal claim of ownership or lien which the dissenters contended was a prerequisite to an absolute right to intervene.⁴⁷

However, this contention assumes that the "interest" required in new rule 24 (a) (2) is identical with the property-type interest required under former rule 24 (a) (3). If this were the case, the standard for intervention under the new rule would seemingly be more strict than that formerly imposed. Under old rule 24 (a) (2), intervention of right was granted when the applicant's interest may have been inadequately represented in the action and he may have been bound by

Coal & Ry. Co. v. Hocking Valley Ry., 269 U.S. 42, 48 (1925); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 315 F.2d 564 (7th Cir.), *cert. denied*, 375 U.S. 834 (1963).

⁴³ See *United States v. American Soc'y of Composers*, 341 F.2d 1003, 1008 (2d Cir. 1965), *cert. denied*, 382 U.S. 877 (1966).

⁴⁴ *Swift & Co. v. United States*, 276 U.S. 311, 331-32 (1928).

⁴⁵ Cascade also alleged that the decree approved unfair contracts between El Paso and the new company, imposed onerous price conditions upon the new company, and improperly allowed the sale of stock by El Paso of a company formerly owned by Pacific Northwest prior to the merger. These factors further implicated the competitive ability of the new company. 386 U.S. at 133.

⁴⁶ See note 67 *infra* and accompanying text.

⁴⁷ 386 U.S. at 147, 154.

a judgment.⁴⁸ The crucial determination involved the *effect* of the judgment upon the applicant and not his direct interest in property.⁴⁹ Old rule 24 (a) (3), on the other hand, constituted an exception to the *res judicata* approach of 24 (a) (2). Where a fund or property existed in the control of the court, intervention was granted in the absence of *res judicata* possibilities because of the inherently prejudicial effects of a judgment upon an applicant asserting a "legal" claim such as ownership or a lien.⁵⁰ Elimination of the "bound" phraseology from new rule 24 (a) (2) should make it possible for the courts to consider the *practical* effects of a decree upon the applicant apart from technical *res judicata* concepts. Viewed in this manner, cases considering the requirements of former rule 24 (a) (3) are easily incorporated under the broad provisions of the new rule. If, however, the new rule were interpreted as requiring a property interest similar to that formerly necessary under 24 (a) (3), situations cognizable under old subsection (2) would apparently be deleted from consideration under the new rule. This result would be contrary to the purposes motivating revision of the rule. It seems clear that under the present rule 24 (a) (2) the courts should look primarily to the practical consequences of a decree upon the applicant rather than minutely examining the applicant's "interest."⁵¹ At any rate, a legal claim of ownership or a lien should not be considered a prerequisite to intervention under the new rule.

The liberalization of the interest requirement would seemingly revitalize those cases arising under old rule 24 (a) (2) in which intervention was granted to an applicant who possessed something less than a "legal" interest and who would not have been "bound" by any judgment in the action. These cases typically involved an intervenor who would have potentially suffered severe economic injury and *had no feasible alternative remedy for protecting his interest.*⁵²

⁴⁸ See note 20 *supra* and accompanying text.

⁴⁹ See 4 MOORE ¶ 24.08, at 35, 37.

⁵⁰ 4 MOORE ¶ 24.08, at 35; *id.* ¶ 24.09, at 45.

⁵¹ Examination of practical consequences is approved by the Advisory Committee. 4 MOORE ¶ 24.01, at 7 (Supp. 1967). The majority in *El Paso* quoted approvingly from the Committee's notes and placed special emphasis upon that portion arguing for intervention where an absentee would be substantially affected in a practical sense by a determination in the action. 386 U.S. at 134 & n.3.

⁵² See, e.g., *Atlantic Ref. Co. v. Standard Oil Co.*, 304 F.2d 387 (D.C. Cir. 1962); *Kozak v. Wells*, 278 F.2d 104 (8th Cir. 1960); *Ford Motor Co. v. Bisanz Bros.*, 249 F.2d 22 (8th Cir. 1957); *Textile Workers Union v. Allendale Co.*, 226 F.2d 765 (D.C. Cir. 1955).

In such circumstances, the courts sometimes stretched the "bound" concept by holding that the judgment would, as a practical matter, possess a finality commensurate with that resulting from a strict application of the *res judicata* doctrine.⁵³ The similarity of the rationale of these cases and that portion of new rule 24 (a) (2) dealing with the practical inability of the applicant to protect his interest is clear.

This liberalized conception of "interest" is broad enough to encompass Cascade's situation within the *El Paso* context. The formulation of any divestiture decree by the district court placed Cascade's future gas supply in potential jeopardy.⁵⁴ Furthermore, if the company believed its interests to be threatened, the present state of the law afforded no practical, available private remedies which it might have utilized to alter any asset distribution ordered by the court. Apparently, private parties may not sue under section 16 of the Clayton Act to require the divestiture of illegally-acquired assets.⁵⁵ A corollary of this doctrine denies a private litigant formal means of altering a divestiture decree obtained by the Government should it later appear ineffective in protecting the private party's interests. A government divestiture decree, therefore, is final and conclusive as to a third party who may be significantly affected by the division of assets. In summary, new rule 24 (a) (2) seems consistent with a "consequential" view of interest; *i.e.*, a party may be deemed to have a sufficient interest in the litigation if the substantive resolu-

⁵³ See *Atlantic Ref. Co. v. Standard Oil Co.*, 304 F.2d 387 (D.C. Cir. 1962); *International Mortgage & Inv. Corp. v. Von Clemm*, 301 F.2d 857 (2d Cir. 1962).

⁵⁴ See note 45 *supra* and accompanying text.

⁵⁵ Clayton Act § 16, 15 U.S.C. § 26 (1964); see *Fein v. Security Banknote Co.*, 157 F. Supp. 146, 148 (S.D.N.Y. 1957); *Westor Theatres v. Warner Bros. Pictures*, 41 F. Supp. 757, 763 (D.N.J. 1941). There is some indirect support for the proposition that private parties may seek divestiture relief. See *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957), *aff'd on other grounds*, 259 F.2d 524 (2d Cir. 1958); *National Supply Co. v. Hillman*, 57 F. Supp. 4 (W.D. Pa. 1944). See generally Note, *Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act*, 49 MINN. L. REV. 267 (1964). Even assuming that divestiture is an available private remedy, a prior government-secured decree may practically foreclose effective private action. Divestiture is a harsh remedy, and its utilization is dependent, to some extent, upon the speed with which the relief is sought; *i.e.*, the longer the time span between the merger and the court action, the more difficult divestiture becomes. See Comment, *Divestiture of Illegally Held Assets*, 64 MICH. L. REV. 1574, 1594, 1597 (1966). Hence, a private party would encounter substantial difficulties in attempting to expand upon a prior government decree. Furthermore, a court might, as a matter of comity, refuse to extend further relief. See *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 694 (1961); *Torquay Corp. v. Radio Corp. of America*, 2 F. Supp. 841, 843-44 (S.D.N.Y. 1932).

tion of the basic controversy⁵⁶ may, or does, expose it to potentially adverse economic and procedural consequences.

Assuming this test is met, the requirement of inadequate representation must still be considered. A potential intervenor may argue that an existing party has failed adequately to represent *goals* common to both parties.⁵⁷ Alternatively, it may be contended that even diligent pursuit by an existing party of its goals will not adequately protect the would-be intervenor. Stated differently, the hopeful intervenor may wish to be considered a member of a *class* different from any of the existing parties.⁵⁸

The majority in *El Paso* apparently adopted the first approach mentioned above, for its opinion assumed that Cascade's interest, like that of the State of California, coincided with the "public" interest, represented by the Government, of vindicating gas competition within California.⁵⁹ Hence, inadequacy of representation could

⁵⁶ The majority in *El Paso* spoke in terms of an interest which goes to the "heart of the controversy." 386 U.S. at 135. This characterization may be helpful in excluding parties concerned with problems incidental or collateral to the basic issues of the litigation. See *United States v. Blue Chip Stamp Co.*, 272 F. Supp. 432, 438 (C.D. Cal. 1967) (collateral concern); cf. *Torquay Corp. v. Radio Corp. of America*, 2 F. Supp. 841 (S.D.N.Y. 1932). The definition is, however, difficult to apply and cannot be confidently used in deciding close questions. It would seem preferable to place greatest emphasis upon the potential intervenor's ability to utilize alternative means for asserting his interest. Cf. 4 MOORE ¶ 24.08, at 37.

⁵⁷ See, e.g., *Pellegrino v. Nesbit*, 203 F.2d 463 (9th Cir. 1953); *Wolpe v. Poretzky*, 144 F.2d 55 (D.C. Cir.), cert. denied, 323 U.S. 777 (1944). When goals are determinative of the representation requirement, a court must examine the conduct of the existing party purportedly representing the would-be intervenor's interest. Hence, inadequate representation under this standard can usually be shown only after the litigation has been substantially completed. Cf. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 156 (1967) (dissenting opinion).

⁵⁸ See *First Congregational Church v. Evangelical & Reformed Church*, 21 F.R.D. 325, 326-27 (S.D.N.Y. 1958); 4 MOORE ¶ 24.08, at 38. Where class is the basis for a claim of inadequate representation, the court must compare the *nature* of the potential intervenor's interest with that of the existing party. Since *conduct* is not in question, this comparison can usually be made at an early stage in the proceedings. The disparities between this approach to the representation requirement and the approach indicated in note 57 *supra* would remain viable even if intervention were limited to the remedial stages of litigation, or to the period after a consent decree has been filed with the court. See note 76 *infra* and accompanying text.

⁵⁹ See 386 U.S. at 136. The State of California was concerned with the restoration of competition within the state. *Id.* at 135. Hence, its interest coincided with the "public" interest necessarily represented by the Government's attempted procurement of a divestiture decree which would effectively establish the new company as a competitive factor within the state. Because of the coincidence of interests, the Court properly conditioned a finding of inadequate representation upon a review of the Government's conduct in the litigation. See note 57 *supra* and accompanying text. On the other hand, Cascade's interest in assuring itself an adequate present and future gas supply seemingly cannot be equated with the interest promoted by the Govern-

be determined only upon review of the Government's conduct in the litigation.⁶⁰ In this regard, the majority found that the Government had "knuckled under" to *El Paso* by agreeing to an ineffective divestiture decree in violation of a prior mandate from the Supreme Court.⁶¹

Courts have consistently held that, within the context of antitrust litigation, the Government is *deemed* to act in the public interest.⁶² In the past, this doctrine has been equivalent to a conclusive presumption of adequacy. Occasional dictum, however, indicates that this supposition may be overcome by a showing of bad faith or malfeasance on the part of the public litigator.⁶³ Read narrowly, the present case apparently establishes that government action inconsistent with a prior Court mandate is sufficient evidence of bad faith. While the majority opinion does not explicitly establish this type of government response as an *exclusive* test of bad faith, the Court was careful to point out that it was not questioning the general prerogative of the Justice Department to conduct and settle antitrust controversies.⁶⁴ Hence, it is quite possible that the present case will be strictly limited to its facts insofar as the question of government representation of the public interest in antitrust litigation is concerned.⁶⁵ *El Paso* will not, therefore, necessarily result in a dramatic expansion of intervention by private parties in the public antitrust area.⁶⁶

ment. A decree might effectively restore competition within California without ensuring an adequate gas supply for Cascade. See note 67 *infra* and accompanying text. Thus, a review of government conduct is not necessary to decide the representation point in Cascade's case. See note 58 *supra* and accompanying text.

⁶⁰ Cf. 386 U.S. at 136. See note 57 *supra*.

⁶¹ 386 U.S. at 141-42.

⁶² See note 42 *supra*.

⁶³ *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 157 (1967) (dissenting opinion); *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689 (1961).

⁶⁴ 386 U.S. at 136.

⁶⁵ See Flynn, *A Survey of Injunctive Relief Under State and Federal Antitrust Laws*, 1967 UTAH L. REV. 344, 349 & n.43; BNA ANTITRUST & TRADE REG. REP. B-1 (April 18, 1967).

⁶⁶ It has been argued that the Court rejected the bad faith standard in *El Paso* and, instead, required only an in-fact showing of inadequate representation. Note, 53 IOWA L. REV. 219, 225 (1967). The Court does not specifically discuss the standard used to determine inadequate representation, and the government conduct in *El Paso* can arguably be encompassed within the strict bad faith rule. Utilization of an in-fact standard, however, presents several problems. In the first instance, it can be applied only after the litigation or negotiation has been substantially completed. Such belated application is often wasteful and productive of delay. See 386 U.S. at 156 (dissenting opinion). Furthermore, the administrative problems caused by the application of this

There is some question, however, whether the majority's approach to the representation requirement reflected a sufficient appreciation of the nature of Cascade's interest in the *El Paso* litigation. It could be argued that Cascade's primary interest was in protecting its own supply of natural gas and, only secondarily, in vindicating gas competition within California. Viewed in this manner, Cascade's *private* interest did not necessarily coincide with the "public" interest, and formal recognition of the distributor's interest in the proceedings should not depend upon the quality of governmental prosecution.⁶⁷ The representation requirement of new rule 24 (a) (2) denies intervention only where the potential intervenor *is* adequately represented by an existing party.⁶⁸ Thus, participation in the litigation

criterion seemingly conflict with the purpose of the rule 24 requirement that application for intervention be "timely." See note 4 *supra*. See also *United States v. Blue Chip Stamp Co.*, 272 F. Supp. 432, 436-38 (C.D. Cal. 1967). The in-fact standard also places the courts in a position of second-guessing the Justice Department in the latter's pursuit of the public interest. No standards exist to aid in this endeavor, and it seems somewhat inappropriate for the courts to supervise strictly the policy decisions of the executive branch in the antitrust area. For these reasons, the Supreme Court has recognized the broad discretion of the Attorney General to conduct and settle cases. See *Swift & Co. v. United States*, 276 U.S. 311, 331-32 (1928). It has been admitted that the potential intervenor's burden of proof would be heavy under an in-fact standard of inadequate representation. Note, 53 *IOWA L. REV.* 219, 226 (1967). Indeed, even if the courts were to embrace an in-fact standard, it seems unlikely that the criterion could be met in the absence of conduct reasonably classifiable as "bad faith." Two recent cases, wherein the court reviewed government conduct, summarily found the conduct to be proper. See *United States v. Aluminum Co. of America*, 41 F.R.D. 342 (E.D. Mo.), *appeal dismissed sub nom. Lupton Mfg. Co. v. United States*, 388 U.S. 457 (1967); *United States v. Blue Chip Stamp Co.*, *supra*. Of course, the administrative problems mentioned above are also attendant to utilization of the bad faith standard, though the limited nature of this standard makes its application less difficult. If possible, the propriety of intervention should be determined during the initial stages of the litigation. In some cases at least, by concentrating upon the *nature* of the intervenor's interest, the court could determine the representation question prior to the entry of a decree without violating the spirit of the new rule. See notes 67-70 *infra* and accompanying text.

⁶⁷ Presumably, the public interest is to remedy effectively the antitrust violation. The mere formulation of an "effective" decree, however, will not necessarily protect an interest like that of Cascade in the present case, for a decree which restored competition within California might fail to assure the needed supply of gas to Cascade. Of course, the court will usually have some discretion in fashioning, or approving, the details of the needed remedy. Cf. Comment, *Divestiture of Illegally Held Assets*, 64 *MICH. L. REV.* 1574, 1591 (1966); Comment, 32 *FORDHAM L. REV.* 135, 142 (1963). There is little reason to presume that the Government will urge that formulation which gives maximum protection to the private interest. This is particularly true in the consent decree context where the Government, in negotiating a remedy, must consider problems such as difficulty of proof, uncertainty of outcome, and allocation of resources which would arise upon litigation. See Letter from D. F. Turner to Rep. E. Celler, Mar. 17, 1967, in *BNA ANTITRUST & TRADE REG. REP.* X-1, X-2 (March 21, 1967).

⁶⁸ See note 4 *supra*.

should be allowed where the representation *may be* inadequate.⁶⁹ Within the *El Paso* context, it can be argued that since Cascade's interest might be considered as belonging to a different class than that represented by the Government,⁷⁰ the necessary degree of doubt existed as to whether the Government would vigorously protect that company's existing and future gas supply.

If the appropriate test of representation is resolved by examining the public/private "nature" of the proposed intervenor's interest, some expansion in the number of successful intervenors in government antitrust actions can be anticipated. The increase, however, would probably not be dramatic because of the necessity of satisfying the other prerequisites of the new rule. Courts have in the past, however, articulated two policy reasons, aside from the formal requirements of the rule itself, as barriers to *any* increase in the frequency of intervention by private parties in public antitrust actions. First, it has been asserted that Congress has clearly manifested its desire to separate public and private interests by providing for a dual system of antitrust enforcement.⁷¹ Secondly, it has been noted that intervention by private parties in government antitrust actions would substantially complicate the prosecution of these suits.⁷² With regard to the first objection, the new rule denies inter-

⁶⁹ Under the old rule, intervention was occasionally granted when the court decided that the potential intervenor *might be* inadequately represented. See *Kozak v. Wells*, 278 F.2d 104 (8th Cir. 1960); *Ford Motor Co. v. Bisanz Bros.*, 249 F.2d 22 (8th Cir. 1957).

⁷⁰ Cf. *First Congregational Church v. Evangelical & Reformed Church*, 21 F.R.D. 325 (S.D.N.Y. 1958).

⁷¹ The dissenters in *El Paso* contended that "intervention must be denied because Congress has carefully provided separate statutory procedures for private and public antitrust litigation." 386 U.S. at 148. They then cited the following provisions of the United States Code to substantiate their position: 15 U.S.C. §§ 4, 15, 15a, 25, 26, 28 & 29. Section 4 empowers the Attorney General to enforce violations of the Act; § 15 allows any person to sue for a violation of the Act and recover threefold damages; § 15a permits the United States to sue when it is injured by a violation of the Act; § 25 provides for the restraining of violations by the Attorney General; § 26 empowers any person or corporation to sue for injunctive relief against violations of the Act; § 28 allows the Attorney General to expedite cases of general public importance; and § 29 states that in every civil action in which the United States is a complainant, appeal lies only to the Supreme Court. Courts have seized upon this dual statutory system as justification for denying private parties intervention in government litigation. See, e.g., *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961); *United States v. General Elec. Co.*, 95 F. Supp. 165 (D.N.J. 1950); *United States v. Bendix Home Appliances, Inc.*, 10 F.R.D. 73 (S.D.N.Y. 1949).

⁷² Intervention has frequently been denied because of a fear of prolonging a type of litigation which is, by its nature, complex. See *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 315 F.2d 564 (7th Cir.), *cert. denied*, 375 U.S. 834 (1963); *United*

vention where the intervenor's ability to protect his interest would not be substantially impaired.⁷³ In an antitrust context, the practical availability of adequate private relief would be persuasive against intervention.⁷⁴ However, even in those cases where no practical private remedy is available, congressional failure to provide an explicit private remedy should not be interpreted as a desire to leave a party remediless in asserting his interest.

Increased intervention by private litigants in government antitrust proceedings could present a number of administrative prob-

States v. Aluminum Co. of America, 41 F.R.D. 342 (E.D. Mo.), *appeal dismissed sub nom.* Lupton Mfg. Co. v. United States, 388 U.S. 457 (1967). Furthermore, courts have asserted that the presence of private parties would hamper the Government in its control of the litigation, and hence damage the effectiveness of the public prosecution. See United States v. American Soc'y of Composers, 11 F.R.D. 511, 513 (S.D.N.Y. 1951).

⁷³ See note 4 *supra*.

⁷⁴ It has been suggested that an adverse government decree will *always* substantially disadvantage the private litigant in a later private action. Note, 53 IOWA L. REV. 219, 226 (1967). Where the Government fails to win a litigated judgment, or accepts a consent decree in settlement of the case, a private party will be handicapped in a later treble damage suit since he will be denied the opportunity of utilizing a prior government judgment under § 5 (a) of the Clayton Act, 15 U.S.C. § 16 (a) (1964). See note 81 *infra*. Furthermore, a private litigant primarily interested in injunctive relief may have difficulty expanding a prior government injunction or consent decree. See Sam Fox Publishing Co. v. United States, 366 U.S. 683, 694 (1961). Total de-emphasis of the private remedy in the intervention context may, however, give rise to difficulties. If that portion of the new rule which requires substantial impairment of alternative remedies is automatically satisfied in antitrust litigation, the attention of the courts will tend to focus upon the representation aspects of the new rule. In an effort to avoid second-guessing governmental conduct and to limit the availability of intervention, the courts may retreat to a restrictive, mechanical approach to the representation question similar to the old "bad faith" rule. Where a private party is primarily concerned with obtaining damages for past violations, the private remedy should be considered adequate and intervention denied. United States v. Blue Chip Stamp Co., 272 F. Supp. 432 (C.D. Cal. 1967). Also, where the potential intervenor claims that a proposed government injunction or consent decree is inadequate to prevent existing or future violations, intervention should ordinarily be disallowed on the ground that the existing private injunctive remedy is sufficient to supplement the government action should the threatened harm materialize. See Atlantic Ref. Co. v. Standard Oil Co., 304 F.2d 387, 393 (D.C. Cir. 1962); United States v. Radio Corp. of America, 3 F. Supp. 23, 26 (D. Del. 1933). On the other hand, private remedies to modify divestiture decrees are presently limited. See note 55 *supra* and accompanying text. Also, where a party is complaining of threatened injury due to a proposed government injunction or consent decree which is allegedly *over-inclusive*, utilization of the private injunctive remedy is restricted. See Atlantic Ref. Co. v. Standard Oil Co., *supra* at 393, citing Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961). The "balanced" approach to the impairment problem exemplified above would allow courts to view the representation question without fear of sanctioning widespread intervention in public antitrust actions. Maintaining the courts' ability to weigh *each* of the requirements of the new rule will increase the probability of just decisions in future intervention cases.

lems.⁷⁵ In the first instance, the scope of these problems could be mitigated by restricting intervention to the decree-formulating stage of the litigation, or, where a consent decree is involved, to the period after the decree has been filed with the court.⁷⁶ Allowing *appropriate* private parties to intervene at the decree-formulating stage would not present substantial difficulties for governmental prosecutions. Government control over the litigation aimed at establishing the *violation* would be unhampered. Furthermore, since the structuring of a decree is the final responsibility of the court,⁷⁷ no government remedial prerogative could be usurped by

⁷⁵ The addition of intervening parties to the litigation may result in a significant increase in the volume of testimony, exhibits, and arguments. See *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137 (1944) (permissive intervention); cf. *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972 (D. Mass. 1943) (permissive intervention). Furthermore, all intervenors, once intervention has been allowed, have the right to appeal any interlocutory and final orders which affect them. 4 MOORE ¶ 24.15, at 103. These possibilities for delay acquire added significance in the antitrust area since such actions are inherently complicated and protracted in the first instance. See Marcus, *The Big Antitrust Case in the Trial Courts*, 37 IND. L.J. 51 (1961); *Proceedings of the Seminar on Protracted Cases for United States Judges*, 23 F.R.D. 319 (1958).

⁷⁶ Limiting intervention to litigative stages would preserve governmental control over the initial establishment of a *violation* and would vindicate those sections of the Clayton and Sherman Acts which explicitly require that suits brought by the Government for injunctive relief be under the direction of the Attorney General. Sherman Act § 4, 15 U.S.C. § 4 (1964); Clayton Act § 15, 15 U.S.C. § 25 (1964). Furthermore, the broad discovery powers of the Government perhaps render it best qualified to prosecute infractions. See generally Siegel, *The Antitrust Civil Process Act: the Attorney General's Pre-Action Key to Company Files*, 10 VILL. L. REV. 413 (1965). Though the majority opinion in *El Paso* does not discuss the possibility of limiting intervention to the remedial stages of litigation, the dissenting opinion impliedly recognizes that such limitation would mitigate many of the administrative problems posed by intervention. 386 U.S. at 152.

Presently, consent decrees are filed in court with a stipulation which gives the Government an unqualified right to withdraw its consent within thirty days. Letter from D. F. Turner to Rep. E. Celler, Mar. 17, 1967, in BNA ANTITRUST & TRADE REG. REP. X-1, X-2 (March 21, 1967). Limiting intervention with respect to consent decrees to the period subsequent to filing appears necessary to preserve this method of antitrust enforcement. Defendants are apparently unwilling to negotiate when third parties are present. See A. GOLDBERG, *THE CONSENT DECREE: ITS FORMULATION AND USE* 68-69 (1962). Consent decrees obtained by the Government cannot be used as prima facie evidence by parties in private actions under § 5 (a) of the Clayton Act, 15 U.S.C. § 16 (a) (1964). See note 81 *infra*. This exemption has been interpreted as indicating a congressional desire to encourage the consent mechanism. See *Burbank v. General Elec. Co.*, 329 F.2d 825 (9th Cir. 1964); *Simco Sales Serv. v. Air Reduction Co.*, 213 F. Supp. 505 (E.D. Pa. 1963); *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366 (D. Minn. 1939). There is little reason to fear a flood of private intervenors in any particular antitrust action. Once a private party is allowed to intervene, other hopeful private intervenors would have to demonstrate inadequate representation by the then-existing private party.

⁷⁷ See *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 322-23 (1961); *United States v. United States Gypsum Co.*, 340 U.S. 76, 89 (1950).

the intervenors. Of course, formal participation by non-public parties might increase the probability of appeal. Consequently, the Government would be forced to assume additional litigative burdens. However, this would not seem to be a significant problem since divestiture decrees are often appealed even in the absence of intervention.⁷⁸

The traditional "administrative burden" argument against intervention is more persuasive in the consent decree context, even assuming intervention is limited to the period after the negotiated decree has been filed with the court. Allowing private opposition to negotiated decrees might tend to undercut this method of antitrust enforcement. Since the intervenor would presumably have the right to present evidence and to appeal the final decision of the court, both consenting parties—the Government and the defendant—would be forced to undertake some of the burdens of litigation which would otherwise have been avoided.⁷⁹ This prospect alone may make companies hesitant to enter consent negotiations. Even when a decree has been filed, the Government might still be led into full-scale litigation if the defendant chose, in the face of intervention, to withdraw his consent or if the trial court found the proposed decree lacking in some respect.⁸⁰

Other considerations, however, cast doubt upon the proposition that intervention would substantially undercut the consent mechanism. Besides seeking to avoid the burdens of litigation, corporate parties often prefer to negotiate consent settlements in order to escape the impact of section 5 (a) of the Clayton Act.⁸¹ This consideration would presumably remain important despite the possibility, or actuality, of intervention, and would militate against a decision to refrain from consent negotiations or to withdraw consent at some later time. And, unless it is assumed that many consent

⁷⁸ *E.g.*, *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961).

⁷⁹ Letter from D.F. Turner to Rep. E. Celler, Mar. 17, 1967, in *BNA ANTITRUST & TRADE REG. REP.* X-1, X-2 to X-3 (March 21, 1967).

⁸⁰ *Id.*

⁸¹ 15 U.S.C. § 16 (a) (1964). Section 5 (a) provides that a final judgment obtained by the Government in an antitrust action may be introduced as prima facie evidence against the same defendant in later private litigation. However, a proviso exempts consent decrees from the scope of the section. *Id.* Since most successful private actions are based upon prior judgments obtained by the Government, substantial motivation exists for a defendant in a public action to avoid the impact of § 5 (a) by utilization of the consent mechanism. *See* Comment, *Consent Decrees and the Private Action: An Antitrust Dilemma*, 53 *CALIF. L. REV.* 627, 627-28 (1965).

decrees are clearly defective, an intervenor would likely find it difficult to upset the negotiated settlement. Allowance of non-public intervention does not, of course, compel recognition of *all* conflicting private objections. A potential intervenor would still have to demonstrate an adequate private interest and a lack of alternative methods for protecting that interest.

El Paso apparently lends support to the view that a court should consider the economic and procedural consequences of a decree upon the applicant seeking intervention, and should grant intervention where the applicant would be "substantially affected in a practical sense." Yet, because of the antitrust context of the decision, any observations concerning its impact upon future interpretation of new rule 24(a)(2) are necessarily speculative. The assertion that *El Paso* will produce widespread intervention in public antitrust actions is negated if a potential intervenor must show bad faith or malfeasance on the part of the Government in its conduct of the litigation or negotiations. Perhaps government conduct is an inappropriate standard by which to judge adequacy of representation when the applicant is asserting a strong, individualized *private* interest. While rejection of a fault-finding orientation would increase the frequency of intervention in government antitrust actions, the increase would be limited and would not pose overwhelming administrative problems. Aside from protecting legitimate third party interests, such intervention could assist the court in finding the most efficient remedy. Furthermore, the possibility of even limited intervention would tend to make the Government more considerate of affected non-public interests in the antitrust area.