No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF DELAWARE,

Plaintiff,

— against —

STATE OF NEW YORK,

Defendant.

BRIEF IN OPPOSITION TO MOTIONS FOR LEAVE TO INTERVENE

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Statement of the Case

On May 31, 1988, the Court granted the motion by the State of Delaware ("Delaware") for leave to file a complaint. The complaint alleged that Delaware was entitled to possession of certain unclaimed property held by or formerly held by brokers ("debtor brokers") located in New York and incorporated in Delaware under *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972). In *Texas v. New Jersey*, the Court established a clear rule for determining which states with conflicting claims to intangible property are entitled to escheat. It adopted the rule that "since a debt is the property of the creditor, not of the debtor, fairness among the States requires that the right and power to escheat the debt should be accorded to the State of the creditor's last known address as shown by the debtor's books and records." 379 U.S. at 680-81 (footnotes omitted). New York answered on July 27, 1988.

New York and Delaware have both agreed that the rule in *Texas v. New Jersey* and in *Pennsylvania v. New York* governs this case; neither has sought to overrule it. However, they disagree concerning the facts of this case. Delaware contends that the addresses of the creditors ("creditor brokers") cannot be determined from the debtor's books and records and New York argues that the addresses of the creditors can be determined from such records.

Texas, on the other hand, seeks to have this Court in effect replace the rule in *Texas v. New Jersey* and *Pennsylvania v. New York* by distorting long-established principles of commercial law regarding debtor-creditor relationships.[1] It contends that this Court should adopt one of three novel rules, each of which basically asserts that abandoned property should be remitted to the state of incorporation of the issuer, not the state of the creditor's last known address or the state of the debtor. First, it asserts that, "[i]f the identity and location of the Beneficial Owner," who is not a even a creditor, having been paid in the ordinary course of business by the creditor broker, "is unknown, the state of incorporation of the Issuer should be entitled to collect the Excess Receipts under that state's unclaimed property law." Complaint in intervention ("Texas complaint") at 11. Second, it contends that the Court should adopt the same rule for all abandoned dividends and interest which it applies when a paying agent — an agent of the issuer — cannot find a last-known address for the record owner — a creditor — and remit the abandoned property to the state of incorporation of the issuer. *Id.* at 22-23. Finally, in the prayer for relief, Texas demands "all of the Excess Receipts and Additional Excess Receipts paid or delivered to New York attributable to Issuers incorporated in the State of Texas and Texas Governmental Issuers which have been abandoned for the applicable dormancy period under the Texas Property Code[.]" *Id.* at 39. It defines both "Excess Receipts" and "Additional Excess Receipts" in the complaint so broadly that they encompass property abandoned

[1] This Court granted Texas leave to file its complaint in intervention on February 21, 1989. New York answered on April 21, 1989.

by creditors with last-known addresses and those without any last-known address. *See id.* at 9-10, 13.

Each of the 21 states seeking leave to intervene adopts the legal theories advanced by Texas that the state of the issuer of the underlying security — not the state of last-known address of the creditor broker or the state of incorporation of the debtor broker — is entitled to escheat the abandoned dividends.[2] Most of the states also agree with the theory of Texas that each of them is entitled to escheat all of the abandoned dividends and interest attributable to issuers incorporated in its state regardless whether the creditor's address is known or unknown.[3]

The state applicants for intervention part company with Texas concerning remedy only, asserting that should this Court overrule *Texas v. New Jersey* and *Pennsylvania v. New York* and adopt the proposed Texas rule, Texas at that point could not adequately represent them because it would not have any incentive to search for unclaimed dividends and interest attributable to securities issued by companies incorporated in

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[2] Thus, each of the states agree with Texas that when the beneficial owner — not the creditor broker — has no last-known address, the state of the issuer of the underlying security is entitled to escheat the abandoned dividends. *See* the complaint in intervention of Alabama, and 13 other states at 4; Arizona's complaint in intervention at 10; Connecticut's motion for leave to intervene at 3; Idaho's complaint in intervention at 8; New Mexico's motion to intervene at 3; Tennessee's complaint in intervention at 9; Virginia's motion for leave to intervene at 3; Wisconsin's complaint in intervention at 17-18.

[3] Thus, each of the complaints in intervention or motions for leave to intervene have prayers for relief which are virtually identical to that of Texas. *See* Arizona's complaint in intervention at 21; Connecticut's motion for leave to intervene at 5; Idaho's complaint in intervention at 11; New Mexico's motion to intervene at 6; Tennessee's complaint in intervention at 11; Virginia's motion for leave to intervene at 4; Wisconsin's complaint in intervention at 73. The prayer for relief in the complaint in intervention by Alabama and 13 other states, at 5, although slightly different, also disregards the address of the creditor broker. The District of Columbia contends that it is entitled to escheat abandoned dividends and interest attributable to issuers incorporated in the District. District of Columbia's complaint in intervention at 5. To the extent that it relies on this theory, its application also is premature.

their states. In the words of Alabama and 13 other states seeking leave to intervene:

> Texas, moreover, cannot be expected to identify, advocate and protect the rights of the States for several reasons: (1) Texas has no incentive to identify the property held by New York which properly belongs to the States. (2) Each State's claims are based on its own unclaimed property statute, which Texas cannot be expected to master so as to adequately represent the interests of the States. (3) Although Texas and the States dispute the right of Delaware and New York to the Funds, Texas and the States may assert conflicting claims thereto as the record becomes fully developed.

Brief of Alabama and 13 States in support of motion for leave to file complaint in intervention at 6-7.

The Special Master asked the parties to submit a proposed discovery schedule by May 12, 1989. Letter from Thomas Jackson, Esq. to counsel of record, dated April 4, 1989. Counsel for record for Alabama and 13 other states wrote to the Special Master on May 5, 1989, asking him to extend the deadline for submitting a proposed discovery schedule until 30 days after the Court ruled on the motions to intervene. Letter from Bernard Nash, Esq., to Thomas Jackson, Esq., dated May 5, 1989, at 1. On May 10, 1989, the counsel for New York informed the Special Master in a conference call with counsel for the other parties that New York intended to move before May 31, 1989, for judgment on the pleadings on the Texas complaint and for a stay of discovery against Texas pending determination by the Court of this motion. In the conference call, the Special Master deferred the deadline for submitting a proposed discovery schedule *sine die.*

ARGUMENT

THE COURT SHOULD DEFER A DECISION ON THE PENDING MOTIONS TO INTERVENE AND STAY DISCOVERY UNTIL IT DETERMINES WHETHER TO OVERRULE *TEXAS V. NEW JERSEY* AND *PENNSYLVANIA V. NEW YORK*

This Court, in *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972), fixed a bright line rule for determining the respective rights of States to unclaimed property. In *Texas v. New Jersey*, the Court concluded that the question of which state is entitled to escheat abandoned intangible property "should be settled once and for by a clear rule which will govern all types of intangible obligations like these and to which all States may refer with confidence." 379 U.S. at 678. It held that "each item of property in question in this case is subject to escheat only by the State of the last known address of the creditor, as it is shown by the debtor's books and records." *Texas v. New Jersey*, 379 U.S. at 681-82. When the last known address cannot be determined from the debtor's books and records, "the property [is] subject to escheat by the State of [the debtor's] corporate domicile." *Id.* at 682. In that situation, however, the state where the debtor is incorporated may "cut off the claims of private persons only, retaining the property for itself only until some other State comes forward with proof that it has a superior right to escheat." *Id.*

Seven years later in *Pennsylvania v. New York*, the Court was called upon to reconsider the decision in *Texas v. New Jersey*. It flatly refused, holding that "to vary the application of the *Texas* rule . . . would require this Court to do precisely what we said should be avoided – that is, 'to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts.' " *Pennsylvania v. New York*, 407 U.S. at 215 (citing *Texas v. New Jersey*, 379 U.S. at 679).

In accordance with this Court's previous holdings, New York intends to move by May 31, 1989, for judgment on the pleadings

pursuant to Rules 12(c) and 12(h)(2) of the Federal Rules of Civil Procedure dismissing the Texas complaint, and for a stay of discovery pending the determination of this motion.[4] In light of this, the Court should defer deciding the pending motions to intervene until it decides the motion for judgment on the pleadings. Deferring a decision is consistent with the standards applied to intervention as of right, because Texas would adequately represent each of the state applicants for intervention concerning the legal theories it advances, which they adopt as their own, the short deferral would promote judicial economy, and deferral would not prejudice them. Moreover, granting permissive intervention at this stage of the proceedings, before resolving threshold legal issues, would be unduly burdensome and not add to the defense of the legal theories advanced by Texas.

The state applicants for intervention are not entitled to intervene as of right unless the Court decides to overrule *Texas v. New Jersey* and subsequently determines that Texas would not adequately represent them in establishing the amount of their claims. An applicant for intervention as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure may do so only if it satisfies each of the requirements of that rule: "When the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that

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[4] The overly broad and burdensome discovery request served by Texas on May 11, 1989, demonstrates the necessity of a short stay of discovery pending determination of the motions to intervene and for judgment on the pleadings. Texas demands that New York search its files for the past eleven years and supply the amounts remitted separately by year of abandoned dividends and interest attributable to all issuers, whether incorporated in Texas or not, by more than 550 debtor brokers. *See* Plaintiff in intervention Texas' first set of interrogatories propounded to defendant and first request for production of documents directed to defendant. Copies of these requests have been lodged with the Clerk. As New York intends to challenge these requests, the Court and parties should not be burdened with preliminary discovery issues which need never be reached should the Court grant New York's motion for judgment on the pleadings.

interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a).

The applicant for intervention has the burden of demonstrating that no party in the case can adequately represent its interests. *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972). In the words of leading commentators, "The most important factor in determinating the adequacy of representation is how the interest of the absentee compares with the interests of the present parties." 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1909 at 318 (1986) ("*Federal Practice and Procedure*") (footnote omitted). Although the burden of demonstrating inadequacy of representation ordinarily is "minimal," *Trbovich*, 404 U.S. at 538 n.10, when the interest of the party seeking to intervene "is identical to that of one of the present parties, . . . then a compelling interest should be required to demonstrate why this representation is not adequate." *Id.* § 1909 at 318-19 (footnote omitted). Thus, courts routinely deny intervention as of right when a person seeking intervention asserts an interest which is the same as an interest being asserted by a party. *Bottoms v. Dresser Industries, Inc.*, 797 F.2d 869, 873 (10th Cir. 1986); *State of California v. Tahoe Regional Planning Agency*, 792 F.2d 775, 779 (9th Cir. 1986) (each of the concerns of the proposed intervenor was being addressed by at least one of the parties); *Bush v. Viterna*, 740 F.2d 350, 356 (5th Cir. 1984) (per curiam) ("possibility that interests of intervenors and defendants might clash in some future dispute does not demonstrate the necessary adverse interest in a present suit"); *Aluminum Company of America v. Utilities Commission of the State of North Carolina*, 713 F.2d 1024, 1025 n.1 (4th Cir. 1983) (finding that "the interests of the existing plaintiffs and the movants coincide and that the plaintiffs adequately have represented those interests").

Under these standards, the state applicants for intervention have failed to meet their burden to demonstrate that Texas cannot adequately represent their interests at this stage of the proceedings. Since the legal theory relied upon by each of the state applicants is exactly the same as that of Texas, they will be

adequately represented by Texas' defense of this theory in the motion for judgment on the pleadings. As they admit in their motions, each of them adopts the Texas complaint fully and their only interest in joining this lawsuit is to participate in discovery to establish the amount of their claim under the Texas theory. *See* Statement of the Case at 3-4. According to Idaho, it "merely seeks to intervene in this action in order to preserve its rights should this Court rule favorably on the theory espoused by Texas." Motion for leave to intervene at 4. Virginia declared that it "does not seek to inject a new theory of the case, but, rather to join in the Texas complaint." Virginia's motion for leave to intervene at 11. Indeed, they have failed to make *any* attempt to explain why Texas could not represent them adequately on the threshold legal issue.

Furthermore, should Texas successfully defeat a motion for judgment on the pleadings and ultimately be successful in persuading this Court to overrule *Texas v. New Jersey* and *Pennsylvania v. New York*, Texas would continue to represent the claim of all the state applicants for intervention as each relies on the theory proposed by Texas to establish its claim to the property. Each of the state applicants would have a right to assert a claim funds held by New York at the conclusion of the lawsuit; therefore deferring any possible intervention until then could not impair their interests.

The key reason proposed by each of these states for seeking intervention by right is that Texas cannot and will not adequately represent their interests in discovery. This potential inadequacy need not be addressed at this point, since if the Court continues to adhere to its nearly quarter-century old rule in *Texas v. New Jersey*, and grants New York's motion for judgment on the pleadings by dismissing the Texas complaint, the claims of all the state applicants would also be defeated. Since every State currently seeking intervention has based its rights to any of the unclaimed funds solely on the legal theories espoused by Texas, each of them is adequately represented by Texas' defense to a motion by New York for judgment on the pleadings.

Indeed, several of the states requesting intervention have declared that Texas has offered to, and if the intervention is granted will, serve as lead counsel for these States.[5] The willingness of these states to allow Texas to act as lead counsel on behalf of their interests also demonstrates that Texas adequately represent their positions and, therefore, they are not entitled to intervene as of right. Denying intervention at this stage and deferring discovery will also serve the interests of judicial economy by avoiding potentially needless discovery conducted on the part of 21 states and the District of Columbia on issues which may never come before the Court. Additionally, since New York will move promptly for judgment on the pleadings and request that a stay of discovery be issued during the pendency of this motion, none of the state applicants seeking intervention based on the Texas complaint would be prejudiced.

The states are free to renew their motions for leave to intervene should this Court overrule *Texas v. New Jersey* and *Pennsylvania v. New York*. Courts will decline to permit intervention as of right at one stage of the proceedings where the person seeking to intervene will be adequately represented even though at some future stage, when the interests may become adverse, intervention may then become necessary. *See, e.g., Bush v. Viterna*, 740 F.2d at 358 ("the mere possibility that a party *may* at some future time enter into a settlement cannot alone show inadequate representation") (emphasis in original). In *Bush*, the court suggested the party seeking to intervene could do so at the settlement stage if it were able to meet its burden to show adversity of interest. *Id.*

Moreover, permissive intervention by 21 states and the District of Columbia at this preliminary juncture under Rule 24(b) of the Federal Rules of Civil Procedure would be unduly burdensome and would not add to the defense of the legal claim

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[5] Arizona's motion for leave to intervene at 5; Connecticut's motion for leave to intervene at 4-5; New Mexico's motion for leave to intervene at 5; Tennessee's motion for leave to intervene at 5-6; Virginia's motion for leave to intervene at 3; Wisconsin's motion for leave to intervene at 9.

advanced by Texas and echoed by the other states. The principal consideration which a court must consider in determining whether to permit intervention is "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b); 7C *Federal Practice and Procedure* § 1913 at 379. Intervention by Texas already opened the floodgates to requests for intervention by 22 additional applicants. Permitting them to intervene under Rule 24(b) could likely lead to the request for intervention by every state in the Union. Discovery could become exceedingly burdensome, if not unmanageable, and would involve many issues which might never come before the Court.

"In acting on a request for permissive intervention, it is proper to consider, among other things, 'whether the intervenors' interests are adequately represented by other parties' and whether they 'will significantly contribute to full development of the underlying factual issues in the suit.' " *New Orleans Public Service, Inc. v. United Gas Pipe Line Company*, 732 F.2d 452, 472 (5th Cir.), *cert. denied sub nom. Morial v. United Gas Pipe Line Company*, 469 U.S. 1019 (1984) (quoting *Spangler v. Pasadena City Board of Education*, 552 F.2d 1326, 1329 (9th Cir. 1977)). In that case, the court affirmed a district court order denying permissive intervention where the proposed intervenor and the plaintiff sought exactly the same relief on exactly the same grounds against the defendant, and there was no collusion between the plaintiff and the defendant. As demonstrated above, Texas will provide adequate representation of the interests of the state applicants and no factual development is required to resolve the motion for judgment on the pleadings.

Although the court in *Commonwealth of Virginia v. Westinghouse Electric Corporation*, 542 F.2d 214 (4th Cir. 1976), did not specifically rule on permissive intervention, the logic it adopted in denying Virginia intervention is particularly apt in denying permissive intervention in this case. It stated that it denied Virginia's request for intervention because such intervention could have the effect of encouraging another 13 states to intervene. In light of the added burden without any benefit,

"[t]he resultant complexity of the litigation, combined with increases in cost and judicial time, would hinder resolution of the present conflict. The trial court, deluged with additional briefs and pleadings, would be provided with no new viewpoints and little, if any, illumination to the original . . . disputes." *Virginia*, 542 F.2d at 217. The same considerations mandate deferring a decision on permissive intervention here until threshold legal issues are resolved.

CONCLUSION

For all the foregoing reasons, this Court should deny the motions to intervene or defer a ruling on the motions and stay discovery until after it resolves the motion for judgment on the pleadings.

Dated: New York, New York
May 18, 1989

Respectfully submitted,

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