No. 111 Original

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

STATE OF DELAWARE,
STATE OF TEXAS, *Plaintiff,*
v. *Plaintiff-Intervenor,*
STATE OF NEW YORK,
Defendant.

REPLY OF THE STATES OF ALABAMA, HAWAII, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MONTANA, NEVADA, OKLAHOMA, SOUTH DAKOTA, UTAH AND WASHINGTON, AND THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA TO THE STATE OF NEW YORK'S OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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ARGUMENT

The States Should Be Permitted To Intervene Because They Claim Property Which Also Is Claimed By New York And Delaware

Delaware and Texas do not oppose the Motion of the States of Alabama, *et al.* ("States") to intervene; they recognize that "such intervention ought not to cause any complication to, or hindrance or delay in, the proceeding to resolve the presently competing claims * * * of Delaware, New York and Texas" (Del. Resp. at 2; *see*

also Tex. Reply at 2). New York makes no showing to the contrary and asserts no prejudice to it from intervention. Nevertheless, New York contends that this Court should deny the States' motion or defer ruling thereon. While the absence of prejudice to New York in and of itself may be sufficient reason for rejecting its position, *cf. Maryland* v. *Louisiana*, No. 83 Original, Report of Special Master at 4 (May 14, 1980), *approved*, 451 U.S. 725, 745 n. 21 (1981), we shall show herein that New York's contentions are without merit, primarily because they are contrary to this Court's precedents in original jurisdiction cases, and emanate from a misunderstanding or mischaracterization of the States' proposed complaint.

A. Fundamental fairness requires granting intervention before decision on the governing law of the case

New York urges the Court to defer ruling on the motion for intervention, taking varying positions as to how long such deferral should last, *i.e.*, "until [the Court] decides [New York's as yet unfiled] motion for judgment on the pleadings" (N.Y. Opp. at 6), or until "the conclusion of the lawsuit" (N.Y. Opp. at 8).[1] In so arguing, New York assumes, *inter alia*, that resolution in its favor of its anticipated motion for judgment against Texas will dispose of the States' claims (N.Y. Opp. at 8). If this were so, however, it would argue strongly for, rather than against, allowing intervention at this time. For it would be fundamentally unfair to deny the States an

[1] New York is essentially making the novel argument that the States' Motion is too *early*, rather than too late, which in some instances is a basis for denying intervention (*cf. NAACP* v. *New York*, 413 U.S. 345 (1973)). If New York's concern about "opening the floodgates" to subsequent intervention by other states is justified, the proper way to address it is by challenging the timeliness of any such subsequent interventions. *See Pennsylvania* v. *New York*, No. 40 Original, October Term 1970, Report of Special Master on Applications of the States of California, Arizona, and Indiana for Leave to Intervene at 5 (February 8, 1971), *approved*, 401 U.S. 931 (1971).

opportunity to be heard as parties on a motion, the disposition of which could adversely affect their interests.

In urging that intervention by the States should be delayed because of the planned motion for judgment against Texas, New York necessarily assumes that Texas' complaint and the States' proposed complaint are virtually identical, which they are not.[2] It further assumes that the viability of the States' complaint depends on the overruling of this Court's earlier unclaimed property cases. New York, however, misstates the States' position. As was explained in the States' Brief in Support of Motion for Leave to File Complaint in Intervention ("States' Brief" at 3, emphasis added): "Delaware, New York and the States assert conflicting claims to the Excess Receipts *based on* the decisions of this Court in *Texas* v. *New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania* v. *New York*, 407 U.S. 206 (1972)," the very decisions which New York asserts the States seek to overrule.[3]

In *United States* v. *Louisiana*, 354 U.S. 515 (1957), this Court granted the motions of Alabama, Florida, Mississippi and Texas to intervene notwithstanding the fact that the United States *had previously filed* a motion for judgment on the pleadings, on grounds directly applicable to the instant motion:

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[2] There are sufficient differences between the States' proposed complaint and Texas' complaint that decision on a motion for judgment on Texas' complaint will not necessarily be dispositive on the merits of the States' complaint. *See* discussion *infra* pp. 4-5. We note in this connection that the States have not "adopted" Texas' complaint. Texas' complaint is 41 pages, the States' only six. There are differences in the factual allegations. And resolution on the merits may ultimately depend on sustaining varying factual allegations, their relevance, and the application of the governing law (both federal and state) to the facts.

[3] It may be, however, that the Court ultimately will conclude, after development of the record is complete, that the law in this area should be re-examined in light of Congress' legislative disapproval of the holding in *Pennsylvania* v. *New York* in enacting Pub. L. No. 93-495, 88 Stat. 1525, 12 U.S.C. § 2501 (October 28, 1974).

> The Court has before it the motions of the United States for judgment and of Louisiana for leave to take depositions. As a result of its consideration of these matters, including the representations made by the State of Texas in its *amicus curiae* brief, the Court is of the opinion that *the issues in this litigation are so related to the possible interests of Texas, and other States situated on the Gulf of Mexico, in the subject matter of this suit, that the just, orderly, and effective determination of such issues requires that they be adjudicated in a proceeding in which all the interested parties are before the Court.*

Id. at 515-16 (emphasis added). The States submit that the same conclusion is warranted in the pending Motion to intervene.

B. The States satisfy this Court's criteria for intervention

The States are not seeking an abstract articulation of the law of abandoned property. Nor are the States seeking to intervene to support Texas' claim to any property which is the subject matter of the litigation. While there is substantial overlap in the *categories* of property sought by the States and Texas, the States assert a separate and distinct claim to *specific* property wrongfully taken or claimed by New York, including certain specific property within categories of property not put in issue by Texas.[4] Texas cannot be expected to pursue on the States' behalf this *specific* property claimed by the States.

Within the overlapping *categories* of property claimed both by the States and Texas, the States and Texas are not now asserting claims to the same property, but to entirely different property wrongfully taken or claimed by New York. Some of the property claimed by the States is also claimed by Delaware in addition to New

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[4] The categories not put in issue by Texas consist of certain unclaimed property held by non-Delaware brokerage firms and by non-brokerage firm intermediaries in addition to clearinghouses (*see* Motion at 3; States' Brief at 3).

York. Moreover, as set forth in the States' Brief (at 6-7), as the facts develop, there may turn out to be some property to which Texas and the States do assert conflicting claims. Under the circumstances, the States' concrete interest in the property at issue in this action fully supports the grant of intervention, and renders representation of the States' interests by Texas inadequate.

New York, attempting to bring itself within the rubric of the requirements of Fed. R. Civ. P. 24, nevertheless argues that deferral is appropriate because Texas can adequately represent the States "concerning the legal theories it advances, which they adopt as their own," and because deferral "would promote judicial economy" (N.Y. Opp. at 6).[5] While the States in their Brief showed that they satisfy all of the requirements for intervention as of right set forth in Fed. R. Civ. P. 24(a)(2), they noted that, under Rule 9.2 of this Court, those requirements serve as a guide only. Precedents on intervention in original jurisdiction actions involving states establish the weight to be given those requirements, and under those precedents New York's arguments must be rejected and intervention granted.[6]

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[5] New York's further contention, that the States would not be prejudiced by deferral (N.Y. Opp. at 6), has been disposed of above.

[6] New York cites a plethora of appellate court decisions which deny intervention when a party can adequately represent the interests of the applicant for intervention. It is sufficient to note that none are original jurisdiction cases involving states, which have no other neutral forum in which to protect their interests and litigate their claims. In addition, New York relies upon *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972), for the proposition that an "applicant for intervention has the burden of demonstrating that no party in the case can adequately represent its interests" (N.Y. Opp. at 7). In *Trbovich*, however, in the very footnote cited by New York, this Court noted that:

> [T]he requirement of the Rule is satisfied if the applicant shows that representation of his interest "may be" inadequate; and the burden of making that showing should be treated as minimal.

The controlling standard in original jurisdiction actions involving states is whether the state applicant for intervention claims an interest "in the subject matter of th[e] suit" (*United States* v. *Louisiana*, 354 U.S. at 516), not the extent to which an original state party might be able to protect the interests of an applicant state. Indeed, a due respect for the sovereignty of each state repels the proposition that one state can be required to have its rights represented by another state, rather than by its own chosen attorney. This is particularly so with respect to unclaimed funds which, because of due process restrictions, can be rightfully claimed by only one state. *Western Union Telegraph Company* v. *Pennsylvania*, 368 U.S. 71 (1961).

Thus, in *Pennsylvania* v. *New York*, *supra*, an unclaimed property suit, Pennsylvania sued Florida, Oregon, Virginia and New York. Each asserted claims to certain funds which conflicted with the claim of Pennsylvania. Connecticut moved for leave to intervene as a party plaintiff, advancing the same legal theory as Pennsylvania. The Court granted Connecticut's motion. 400 U.S. 811 (1970). California subsequently moved for leave to intervene as a party plaintiff, advancing a position substantially the same as Connecticut's and Pennsylvania's. Indiana also sought to intervene as a party plaintiff, asserting a claim under its unclaimed property statutes. Arizona sought leave to intervene as a party defendant, advancing a position virtually identical to Florida's.

The Special Master recommended that all three interventions be granted, noting that:

> [T]he same type of controversy exists between these three states and the states claiming in opposition to them as existed between the original parties to the case. *The position of California is the same as that of Connecticut whose motion for leave to intervene was granted by the Court. The position of Arizona*

> *appears to be the same as that of Florida.* Although the position of Indiana differs somewhat from each of the others, the presence of real controversy seems clear.

Pennsylvania v. *New York*, *supra*, Report of Special Master on Applications of the States of California, Arizona, and Indiana for Leave to Intervene at 4-5 (emphasis added). The Special Master's recommendation and report were adopted by this Court. 401 U.S. 931.

Similarly, in *Maryland* v. *Louisiana*, *supra*, where eight states challenged the constitutionality of a Louisiana tax, the Special Master recommended granting New Jersey's motion to intervene despite the pendency of a motion to dismiss. New Jersey "alleg[ed] facts comparable to those alleged by the complaining states and assert[ed] the same claims." Report of Special Master at 3. Indeed, New Jersey's complaint was "virtually indistinguishable" from that of the original plaintiffs, "merely add[ing] the facts applicable to it and its citizens." *Id.* at 4. This Court "agree[d] that New Jersey, whose allegations of injury are identical to that of the original plaintiff States, clearly has standing and should be permitted to intervene." 451 U.S. at 745 n. 21.

Moreover, even under the strict application of Rule 24(a)(2) advocated by New York, Texas cannot "adequately represent" the States, as New York asserts. First, the adequacy of representation standard is not limited to "legal theories * * * advance[d]" (N.Y. Opp. at 6), but applies to all facets of a case. Here, development of the facts with respect to the property at issue is likely to be crucial, and Texas cannot be expected to develop facts pertinent only to the States. Second, New York's argument is based on a mischaracterization of the States' position. Although there are, to be sure, important similarities between Texas' position and that of the States—most significantly, that Texas and the States are opposed to the positions of the original parties which fo-

cus, in general, on the headquarters or state of incorporation of the involved brokerage firm intermediaries—the States, as noted above, have not adopted Texas' complaint and legal theories *in toto*.

In addition, deferral would not promote judicial economy. Regardless of the outcome of any motion on Texas' complaint, the action will proceed on Delaware's complaint. As noted above, the States are claiming some of the property claimed by Delaware and New York which is not claimed by Texas (although, depending on the factual development, they may be claiming some of the same property claimed by Texas). The States could have filed an independent original action seeking that property and moved to consolidate it with this action. *Maryland* v. *Louisiana*, *supra*, Report of Special Master at 4. Under the circumstances, particularly where New York cannot claim any prejudice, judicial economy is promoted by allowing a single suit to proceed. *Id.* ("[f]iling as an intervenor has the advantage of promoting judicial economy"); *Texas* v. *New Jersey*, No. 13 Original, October Term 1962, Report of Special Master on Application of Florida for Permission to Intervene at 5 (May 10, 1963) (Florida's motion to intervene, in which it claimed certain property also claimed by another State, granted).

CONCLUSION

For the foregoing reasons, and those previously set forth in their Motion and Brief, the Motion of the States for Leave to File Complaint in Intervention should be granted.

Respectfully submitted,

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