Let's All Join In: Intervention Under Federal Rule 24

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Let's All Join In: Intervention Under Federal Rule 24*

By JOHN E. KENNEDY**

I. THE PROBLEM

The adversary system assumes that the parties have the power to control their own litigation. The plaintiff is given all the important initial powers such as naming the court, the parties, and the theory of the case. The named party defendant then has a variety of powers to change the parties to the controversy as originally structured by the plaintiff. Among his moves, the defendant may use Rules 17, 19, 14 or 25 to force joinder of additional plaintiffs and defendants, or third party defendants, or to substitute parties.

These powers of the plaintiff and the defendant to control the parties to the litigation are overriden to some extent by the power of the court to impose its will against the wishes of both the existing parties. Under Rule 19, for example, the court may, on its own motion, order non-parties to be brought in,¹ or under Rule 42, sever or consolidate actions even though both parties may resist.² However, consider the status of a non-party who feels that the outcome of the litigation will affect his interests, but who has been excluded by the plaintiff, the defendant, and the court. What

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* This article is based in part on the author's co-revision with Professor James W. Moore of Chapter 24 of Moore's Federal Practice, to be published in the spring of 1969. The article and its conclusions are also based in part on a thesis to be submitted by the author to the Yale Law School in partial fulfillment of the requirements for the J.S.D. degree. Related articles appear in Kennedy, Federal Rule 17(a): Will the Real Party In Interest Please Stand? 51 Minn. L. Rev. 675 (1967), and Kennedy, Federal Rule 17(b) and (c): Qualifying to Litigate in Federal Court, 43 Notre Dame Law. 273 (1968).

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¹ At least, the trial or appellate court on its own motion may object to the absence of an indispensable party, and presumably therefore under Rule 19 should be able to order a party brought in over the objection of both parties. See 3 J. Moore, Federal Practice ¶19.05[11] (2d ed. 1969) [hereinafter cited as Moore].

are his rights of entry? The process of answering this question results in a four-way clash of interests among the plaintiff, the defendant, the court and the proposed intervener. The resolution of this conflict is made under Federal Rule 24.

II. General Objectives in Solving the Problem

The interests of the initial parties to the law suit should be protected. These parties are bearing the litigation expense, including time, trial costs, and attorneys' fees. Their attorneys' choices regarding the scope of the controversy, especially their strategies pertaining to discovery, settlement, presentation, and appeal should be respected.

The interest of the intervener should be weighed against the availability of other adequate remedies open to him. The general objective here is a restatement of the theory that equitable remedies should be granted only where no adequate remedy exists at law. As evolved in modern context under the merger of law and equity, this general objective means that, in choosing whether to allow intervention, the court should consider what alternative remedies a petitioning intervener will have if the court rejects his petition.

The interests of the trial and appellate courts should be protected by promoting sound policies of judicial administration. In addition to facilitating the settlement process, other components of this objective are efficiency, speed, accuracy, and the avoidance of a multiplicity of law suits. In intervention situations, the trial court must decide whether the totality of these components will be served in the long run by a more complex litigation now, or by rejecting intervention and thus promoting a second law suit at a later date. The appellate courts must consider all the same

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3 See reference to various judicial administration policies at note 178 infra. Another set of interests and objectives that should be recognized are those of the attorneys. Their legitimate interests in fees and avoiding conflicts of interests should be promoted, but also regulated by the court. The court must also make a realistic appraisal of the attorney's strategical objectives in making applications for intervention. Some are made under conditions which might make them "sham," "collusive," "dilatory," "harassing," or a device for settlement leverage. Others may be related to such various objectives as by-passing jurisdictional barriers, creating new remedies, presenting claims or defenses unavailable to the original parties, or improving representation of interest.

4 In making the choice between one complex litigation against two separate litigations, it must also be recognized that the manner of deciding disputes has
objectives, and in addition, must determine the appropriate time for allowing appellate interference with the trial judge's decision, and the proper balance of power in reversing his decisions.  

The interest of political entities in restricting or limiting the scope of controversies must be given effect. Consistent with the United States Constitution, the federal court must give effect to general congressional mandates on diversity and federal question jurisdiction and must honor the interests of States under the *Erie* doctrine. In given legislative areas, the federal court must also interpret the specific will of Congress as to the scope of controversy it wishes to allow.

*Maximization of all interests* should be favored over the flat rejection of any one interest. Here a court should consider the possibility of using or creating types of limited intervention, analogous to the types of discretionary devices developed in handling multiple party and complex litigation in other areas, as alternatives to the rigid absolutes of total intervention or non-intervention. In appellate situations, the court should consider mechanisms for allowing appeals on the merits of intervention while simultaneously allowing the trial to move forward.

III. RULE 24: AN ATTEMPT TO REGULATE THE RESOLUTION

A. Rule 24 of 1938

Rule 24 of the Federal Rules does not explicitly treat intervention in terms of the five general objectives laid down in the previous section. Rather, the language of the present Rule 24 evolved as a response to historical situations most often giving rise to the need for intervention. Rule 24 of 1938, in addition to recognizing statutory rights to intervene, categorized three such situations.

The most obvious case for total intervention was one where...
the action was in the nature of an in rem proceeding disposing of claims to property. Here the non-party's interest in the property would be legally or practically cut off if he was not let in at the original proceeding. The evolution of this situation resulted in Rule 24(a)(3) of 1938:

(a) Intervention of Right. 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 in the custody of the court or of an officer thereof.7

7 A 1946 amendment expanded the concept of court “custody” to include cases where property was subject to the “control or disposition” of the court. See Formulabs, Inc. v. Hartley Pen Co., 275 F.2d 52 (9th Cir. 1960). Formulabs licensed a secret ink formula to Hartley; Hartley sued Dupont for supplying defective dye; on Dupont’s motions for discovery, the court ordered Hartley to disclose the secret formula; at that point Formulabs had the right to intervene under former Fed. R. Civ. P. 24(a)(3) because Hartley possessed its trade secret property under the license agreement, Hartley was subject to discovery orders, and therefore Formulabs’ property was subject to control or disposition by the court; cert. denied, 363 U.S. 830 (1960); see subsequent decision sustaining jurisdiction over this claim in intervention, Formulab, Inc. v. Hartley Pen Co., 318 F.2d 485 (9th Cir. 1963). But see Carey, Baxter & Kennedy, Inc. v. Wilshire Oil Co., 346 F.2d 110 (10th Cir. 1965) (rejecting an argument that goodwill and past salaries were property subject to the control or disposition of the court).

Some disagreement arises as to whether property vested in the Alien Property Custodian under the Trading with the Enemy Act is property subject to the control or disposition of the court when the Custodian is sued for the return of the property. One view is that the property is not subject to control of the court because the property is vested exclusively in the Custodian and the action against him is purely in personam and not in rem. In Kaufman v. Societe Internationale, 188 F.2d 1017 (D.C. Cir. 1951), Interhandel, a Swiss corporation, sued the Alien Property Custodian to recover seized assets on the grounds it was not enemy dominated. Minority United States shareholders were denied intervention because under former Fed. R. Civ. P. 24(a)(2) they would not be bound by judgment and under former Fed. R. Civ. P. 24(a)(3) because they did not have an interest in the property whose title was in Interhandel. The Supreme Court reversed without mentioning Fed. R. Civ. P. 24(a)(3) and held that the case fell squarely within Fed. R. Civ. P. 24(a)(2) in that Interhandel was inadequately representing the minority shareholder interests and they might be bound by the judgment. 343 U.S. 156 (1952).

Thereafter, a second group of shareholders, taking a different position from the first group of shareholders, was also allowed to intervene under Fed. R. Civ. P. 24(a)(2) on the grounds that the first group and Interhandel did not adequately represent their interests. However, in reaching this conclusion, the District Court rejected the claim of intervention under Fed. R. Civ. P. 24(a)(3) and said:

The present suit is solely of statutory origin (Sec. 9(a) of the Trading With the Enemy Act) and has all the indicia of an action in personam. . . . The injunctive provision of that section, preventing disposition of the assets until the court’s decision, does not convert the suit into an in rem proceeding; it is simply a freeze order designated to maintain the status quo. Nor can it be said that in any real sense property in the possession of the Alien Property Custodian is ‘in the custody or subject to the control or disposition of the court.’ No court process has touched (Continued on next page)
The second most obvious case was one where the non-party would potentially be bound under principles of res judicata because of his connection with some party to the litigation. A host of people, such as indemnitors or stockholders, could be bound because they were either in privity with, or were being represented by, a party to a proceeding. The idea was, however, that if the circumstances showed that an existing party would adequately represent the non-party's interests, there was no need for the intervention. Consequently the rule emerged in 24 (a) (2) of 1938:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing

(Footnote continued from preceding page)

it; it passes to plaintiff or remains with defendant depending on the court's in personam judgment. Indeed the injunctive provisions of Section 9(a) appear to put the property entirely outside the court's control from the day suit is filed. During all this time, the property may be used by the Custodian without court supervision, the sole condition being that it be held intact.


However, the better view asserts that when the Custodian is sued, since the Act requires the Custodian to retain custody and make disposition in accord with the court's final adjudication, the Act clearly subjects the vested property to the control or disposition of the court. International Mortgage and Investment Corp. v. Von Clem, 301 F.2d 857 (2d Cir. 1962). In allowing equitable owners and shareholders of a corporation to intervene as defendants in the corporation's suit against the Alien Property Custodian, the court sustained intervention both on the basis of former Fed. R. Civ. P. 24(a)(2) and (a)(3), indicating that prior to the 1946 amendment, the property would have been considered within the "custody" of the Custodian, and not the Court, but that after 1946 the property was subject to the "control or disposition" of the Court.

Under either theory, the results in the individual cases allowing or denying intervention under the Act can usually be reconciled by examining the nature of the intervenor's interest in relation to the stage of the proceedings and the various specific provisions of the Act. Some decisions have denied intervention on the legitimate grounds that the nature of the intervenor's claims were really claims against the plaintiff, were not claims asserting an interest in the property and were barred by various provisions of the Act prohibiting liens against the property once it had vested in the Custodian. Von Opel v. Ueberssee Finaz Korporation, A. G., 225 F.2d 580 (D.C. Cir. 1955), cert. denied, 350 U.S. 935 (1956) (wife could not assert lien on husband plaintiff's claim); Societe Internationale v. Kennedy, 281 F. Supp. 192 (D.C. Cir. 1964) (neither a party as attorney for the successful intervenor, nor an agent for the plaintiff could intervene to assert claims for fees after a stipulated settlement); see also McGrath v. American Nat'l Bank of Denver, 117 F. Supp. 133 (D. Colo. 1953), aff'd sub nom, Bantel v. McGrath, 215 F.2d 297 (10th Cir. 1954) (where the Attorney General institutes a summary proceeding under the Trading with the Enemy Act to compel delivery of possession of enemy-owned property which has been effectively seized by a valid vesting order, other persons claiming title thereto may not intervene but must seek relief in another proceeding).
parties is or may be inadequate and the applicant is or may be bound by a judgment in the action.\(^8\)

In the first two situations, the interest of the intervener and the absence of any effective alternative remedy so far outweighed the interests of the parties and of the court that intervention was said to be "of right." Some important consequences attached to this concept that intervention was "absolute" or "of right": (1) if the applicant's right to intervene was denied, the denial was a final order, and the applicant had the right to immediate appeal; (2) the standard of appellate review made the question one of law; (3) ancillary jurisdiction doctrines automatically applied to overcome jurisdictional objections to the interveners claim; and,

\(^8\) Under this subdivision, intervention had to be predicated upon both of the factors referred to therein, i.e., that the intervener's interest was or might be inadequately represented and that he would or might be bound by a judgment in the action. If it was clear that the applicant could not be bound by the judgment, he could not intervene as of right under (a)(2). Thompson v. Brodfoot, 165 F.2d 744 (2d Cir. 1948).


A number of other cases, however, interpreted "bound" in the broader sense that as a practical matter the petitioner's ability to protect his interest would be substantially affected. Kozak v. Wells, 278 F.2d 104 (8th Cir. 1960); Ford Motor Co. v. Bisanz Bros., Inc., 249 F.2d 22 (8th Cir. 1957); Textile Workers Union v. The Allendale Co., 226 F.2d 765 (D.C. Cir. 1955), cert. denied, 351 U.S. 909 (1956); Clark v. Sandusky, 205 F.2d 915 (7th Cir. 1953).


... the Court in Sam Fox Publishing Co. v. United States ... made it clear ... that its present conception of Rule 24(a)(2) limits its application to cases in which judgment in the main action would legally preclude the applicant under the rule of res judicata. Id. at 866.


But even after Sam Fox, it was asserted that some liberality remained in situations where the total absence of a remedy for the applicant could be analogized to the binding effect of res judicata. Atlantic Refining Co. v. Standard Oil Co., 304 F.2d 387 (D.C. Cir. 1962).
the successful intervener had full procedural status as a party in the litigation.

The third situation covered by the 1938 rule did not contemplate either of the above two situations, that is, that there was property in custody of the court, or that an inadequately represented intervener would be bound by res judicata. Rather, here the intervener had a claim or defense which, as a matter of convenience, he would like to enter, instead of initiating his own lawsuit against either of the parties. Since in these cases the intervener presumably had some effective alternative remedy, his interest did not automatically predominate over the interests of the parties and of the court. This type of intervention was thus thought of as "permissive," or subject to the discretion of the trial judge. Thus, in contrast to "intervention of right," the opposite consequences attached to the concept "permissive intervention": (1) the denial of the permissive or conditional right was not generally a ground for immediate appeal; (2) the standard of appellate review of the trial judge's denial was whether he abused his discretion; (3) there had to be independent jurisdictional bases to sustain the intervener's claim; and (4) the procedural status of the successful permissive intervener was subject to regulation of the court. To cover this third situation of permissive intervention, Rule 24 (b) of 1938 provided:

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

After the adoption of Rule 24 in 1938, several developments occurred. First, there were cases where the applicant practically had no effective alternative remedy if intervention was denied, but the language of Rule 24 did not seem to cover it. Here the courts had to stretch the language of all three provisions in order to grant intervention. One stretch came under Rule 24 (b). This rule seemed to contemplate a two-way dispute and the alignment of the intervener either on the side of plaintiff or of the defendant with his common "claim or defense." Cases involving modern
three-way disputes, where the plaintiff was really claiming against both parties, conceptually did not fit this language. Consequently, the language of Rule 24(b) was stretched to allow intervention where it was difficult to see what claim or defense, or interest the intervener had in common with the claims of the original parties. Sometimes intervention of right under 24(a)(3) was used. Here by stretching the word "property" in the custody of the court, or by fictionalizing constructive funds, the courts were able to encompass other three-way disputes which would not formerly have been considered in the nature of in rem proceedings.

But the developments under Rule 24 were not all in the direction of expanding intervention. There was a cyclical movement where Rule 24(a)(2) was at times expanded and at times contracted for varying reasons. Expansions took place to cover cases where the intervener would not be bound under strict res judicata principles because of his lack of relation to the parties, but as a practical matter, the impact of the decision upon the intervener would be the equivalent of res judicata. The equivalent impact could occur for various reasons such as the precedential effect of stare decisis or lack of the intervener’s standing to obtain an alternative remedy. Here the courts were justified in granting intervention by stretching the requirement that the intervener would be “bound.” Running in the opposite direction, contractions of Rule 24(a)(2) took place in cases where it seemed best to the court to bring the litigation to a conclusion without interference from the intervener, either because the intervener would have some other adequate remedy, or if he had none, because the court was not concerned about leaving him factually prejudiced, but legally without a remedy.

B. Rule 24(a) of 1966

The strains of expansion and contraction were relieved by revising the 1938 Rule in 1966. The 1966 amendment, effective July 1, 1966, combined and recast former (a)(2) and (a)(3) into

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9 See 4 Moore, \$24.10[2], and discussion of cases considering the question of sufficient interest under Fed. R. Civ. P. 24(b) in note 43 infra.
10 See summary of 1966 Committee Note, in text at note 12 infra.
11 See cases cited at note 8 supra.
one subdivision numbered (a) (2). Rule 24 (b) was left unaltered. Rule 24 (a) now provides:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (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.

It is to be noted that the old rule did not require a showing that representation was inadequate in cases involving property in the custody of or subject to the control or disposition of a court. The new rule, however, subjects the right to intervene in all cases, in which no absolute right exists under statute, to the concluding clause "unless the applicant's interest is adequately represented by existing parties." In other words, intervention of right, other than statutory intervention, can be exercised only if the applicant's interest is not adequately represented by existing parties.

The reasons for the 1966 amendment are fully explored in the Advisory Committee's Note. In brief summary, these reasons are:

1. The amendment makes Rule 24 consistent with the 1966 revision of Rules 19 and 23.

2. Former (a) (3) was unduly restricted to cases where property was in the control of the court; through the fiction of finding a fund, the courts could satisfy the requirement in almost any case; the true test should not be whether the court has control of property, but whether the interest of the absent person will as a practical matter be substantially affected.12

12 See dissent of Justice Stewart in Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 153-154 (1967): "The purpose of the revision was to remedy certain logical shortcomings in the construction of the former 24(a)(2) ... and to give recognition to decisions ... which had expanded intervention under the former 24(a)(3) beyond the strict pro interesse suo model it embodied."

The Advisory Committee's Note refers to the test as: "if an absentee would be substantially affected in a practical sense" (emphasis added). However the word "substantially" does not appear in the Rule, and was deleted from an earlier draft which required that the judgment "substantially" impede or impair the applicant's interest. See Cohn, The New Federal Rules of Civil Procedure, 54 Geo. L.J. 1204, 1232 (1966).
3. In certain cases, subdivision (a) (2) was capable of being interpreted so narrowly as to be meaningless. The original purpose of the provision was to allow intervention where representation was inadequate, and the person would be bound in the sense that he would, as a practical matter, be substantially affected. However, since the view was taken that “bound” meant only in the res judicata sense, in class actions at least, it might theoretically be argued that no applicant would ever be entitled to intervene, since if he were inadequately represented, he might not at the same time be “bound” because of due process requirements.  

4. The revision theory of Rule 19 calls for a listing of factors for decision, rather than definitional concepts. In keeping with this theory, the language of the 1966 amendment to Rule 24 grants intervention to a person when his position is comparable with that of a person “needed for just adjudication” under Rule 19 (a) (2) (i),  unless his interest is already adequately represented.  

13 Professor James states the dilemma and then poses a practical way out of it: If the would-be intervenor is adequately represented he cannot meet the first requirement; if he is so represented he will not be bound by the judgment and therefore fails to meet the second requirement. But inadequacy is not an integer. Surely representation might be inadequate for the purpose of intervention in many cases where it would not reach due process proportions. F. JAMES, CIVIL PROCEDURE §10.19, at 503-04 (1965).

See cases cited, note 8 supra, and text, Part V C infra.

14 FED. R. CIV. P. 19(a)(2)(i) provides:
(a) A person . . . shall be joined . . . if . . . (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.

15 The difficulty in applying the old distinctions between property cases under former (a)(3) and res judicata cases under (a)(2) was shown in a series of suits by foreign corporations to reclaim property vested by the Alien Property Custodian under the Trading with the Enemy Act, 40 Stat. 411, 50 U.S.C. App. §119, as amended by the First War Powers Act of 1941, 55 Stat. 839, 50 U.S.C. App. (Supp. V) § 5(b). In a leading case on the subject, Kaufman v. Societe Internationale, 343 U.S. 156 (1952), “Interhandel,” a Swiss corporation, sued to recover assets on the grounds it was not enemy-dominated. Minority United States shareholders moved to intervene as plaintiffs to assert their claim conceding that Interhandel was enemy-dominated, but that they, as innocent shareholders, were entitled to return of assets which were proportionate to their interests. In reversing a denial of their right to intervene, the Supreme Court first agreed with the shareholders’ interpretation of the Act that Congress had no intent to confiscate innocent interests. The Court then found that Interhandel was inadequately representing those interests by denying enemy-domination and by taking the position that any recovery or settlement would be distributed to all shareholders rather than only to innocent shareholders. Since the innocent shareholders might be bound by a judgment in this corporate action, the claim for intervention fell (Continued on next page)
IV. MECHANICS OF INTERVENTION

Under the practice prior to the Federal Rules, it was better, although not necessary, to give notice to the parties of the petition for leave to intervene.\(^\text{16}\) Rule 24 (c) as originally promulgated in 1937 required that the motion to intervene be served, but only on parties "affected thereby."\(^\text{17}\) The 1963 amendment of Rule 24 (c) eliminated these words and provided that service shall be made as provided in Rule 5. Thus, in all cases, whether the right to intervene is unconditional or conditional, statutory or non-statutory, the person desiring to intervene must serve a motion to intervene on all parties as provided in Rule 5.

Like other motions, the motion to intervene must state its grounds.\(^\text{18}\) The Rule also provides that the motion is to be accompanied by a pleading which sets forth the claim or defense for which intervention is sought. That is, the pleading is to be served with the motion. The motion thus technically may not "adopt" the pleading of an original party,\(^\text{19}\) nor may it merely describe a future pleading. However, some leeway has been allowed where there could be no prejudice to the parties.\(^\text{20}\) Cases showing such leniency could probably be categorized as instances of adding or substituting necessary parties to the claims already made by the original parties. Further leniency might be authorized

(Footnote continued from preceding page)

\(^{\text{17}}\) Teamsters Local 523 v. Keystone Freight Lines, 123 F.2d 826 (10th Cir. 1941).
\(^{\text{18}}\) Hunt v. Yeatman, 264 F. Supp. 490 (E.D. Pa. 1967) (denying permissive intervention to mother of infant plaintiff in action brought by father as next friend when it appeared that the intervention was for the purpose of discontinuing the suit on behalf of the infant and it did not appear that the father was inadequately protecting the interests of the infant; court characterized petition as one essentially for substitution, rather than intervention). See Official Form 23; R. A. Lavine & G. D. Horning, MANUAL OF FED. PRACTICE §§ 3.153-3.155 (1967).
\(^{\text{20}}\) Turner v. McWhirter Material Handling Co., 35 F.R.D. 560 (N.D. Ga. 1964) (in FLSA case, motion to strike Secretary of Labor's intervention motion for his failure to attach pleading was defeated by the Secretary's counter-motion to allow the filing of a pleading); Dalva v. Bailey, 158 F. Supp. 204 (S.D.N.Y. 1957) (allowing intervening plaintiff in stockholder derivative suit to "adopt" plaintiff's complaint, but, upon dropping of original party plaintiff, requiring the intervener to file an amended complaint complying with verification requirements of FED. R. CIV. P. 23.1).
by interpreting Rule 10 (c) to allow adoption of averments in other pleadings by reference.

The original motion and pleading are to be served and filed in accordance with Rule 5. One provision of Rule 5 (a) is worth noting. In case a party to the action is in default for failure to appear, the motion and pleading of the person seeking intervention need not be served on the non-appearing party, unless the intervener's pleading states a new or additional claim for relief against the non-appearing, defaulting party. If it does state such a claim, then service is to be made in the manner provided for service of a summons in Rule 4.21

It is possible, of course, for original parties to waive any objections they otherwise might have because of the intervener's failure to comply with proper procedure.22 At the same time, such interveners who have been admitted into the action by the trial court must be distinguished from a mere amicus curiae or a person who has been heard but has never intervened.23

V. Application of Revised Rule 24 (a) of 1966

A. In General

As a result of the 1966 revision, the absolute right to intervene now exists under present Rule 24 (a) (2) when the petitioner claims an interest in the subject of the action, the interest may be adversely affected by disposition of the action, and the interest is not adequately represented.24 The 1967 decision of the Supreme

21 Ruck v. Spray Cotton Mills, 120 F. Supp. 944 (M.D.N.C. 1954) (where a plaintiff settled his case without the knowledge of his attorneys, the attorney's attempt to serve him by mail with a notice and motion to intervene was ineffectual to bring him back into court).

In a case within 28 U.S.C. § 2403 (1964), the court must certify the facts to the Attorney General so that he becomes apprised that the constitutionality of an act of Congress has been drawn into question, and hence can take steps to intervene if he so desires. But failure to certify does not deprive the district court of jurisdiction, and an opportunity for the Attorney General to participate may be afforded later, on appeal, or rehearing. See Wallach v. Lieberman, 366 F.2d 254 (2d Cir. 1966) (where the constitutional issue was frivolous and the Attorney General was afforded a later opportunity to submit a brief amicus but indicated that he did not wish to intervene, the decision of the lower court was affirmed).

22 See Simms v. Andrews, 118 F.2d 803 (10th Cir. 1941); Klein v. Nu-Way Shoe Co., 136 F.2d 986 (2d Cir. 1943).

23 Thus participation without attempt at formal intervention does not give the participant a right to appeal as a party. Peckham v. Casalduc, 261 F.2d 120 (1st Cir. 1958), cert. denied, 359 U.S. 958 (1959).

24 See text Part III supra.
Court in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*\(^{25}\) serves to show both a liberal interpretation of the old, and the transition to the new Rule 24 (a).

The government brought a civil anti-trust suit against El Paso Natural Gas Company, charging that El Paso's acquisition of Pacific Northwest Pipeline Corporation violated § 7 of the Clayton Act. The Supreme Court ultimately agreed with the government and sent the case back to the district court for El Paso's divestiture of Pacific Northwest without delay. Three parties then moved to intervene and were denied intervention by the district court: (1) the State of California wanted to intervene to assure that under the terms of the divestiture, Pacific Northwest, or the equivalent new company, would be restored as an effective competitor in California; (2) California Edison, a large industrial purchaser of natural gas from El Paso, was also interested in retaining competition in the California market; (3) Cascade Natural Gas Corporation was a Washington-Oregon distributor which received its sole source of supply from Pacific Northwest and thus also wanted to see Pacific restored to full competitive status. The government negotiated a settlement with El Paso and the district court approved a consent decree governing the terms of the divestiture. The three non-parties who had been denied intervention appealed. The Supreme Court reversed and remanded with directions to allow the three to intervene as of right, to vacate the consent decree, to have de novo hearings on the type of divestiture, and to have a new judge assigned to hear the case. Speaking for five members of the Court, Justice Douglas justified the intervention of the State of California and of California Edison under former Rule 24 (a) (3):

> Under old Rule 24(a)(3) those 'adversely affected' by a disposition of property would usually be those who have an interest in the property. But we cannot read it to mean exclusively that group.
>
> Rule 24(a)(3) was not merely a restatement of existing federal practice at law and in equity. If it had been, there would be force in the argument that the rigidity of the older cases remains unaltered, restricting intervention as of right

very narrowly, as for example where there is a fund in court to which a third party asserts a right that would be lost absent intervention. . . . But the Advisory Committee [of 1938] stated that Rule 24 "amplifies and restates the present federal practice at law and in equity." We therefore know that some elasticity was injected; and the question is, how much. [footnotes omitted]²⁶

Justice Douglas then drew an analogy to Missouri-Kansas Pipe Line Co. v. United States²⁷ where Panhandle, as a protected competitor, had been allowed to intervene in a subsequent consent decree proceeding because the original decree had been specifically designed to protect Panhandle's economic independence. Here, the purpose of the divestiture order was to protect the competitive system in California, and thus both the State and California Edison were directly interested and "so situated" as to be "adversely affected" under former (a) (3). Continuing, Justice Douglas summarily concluded that Cascade (the Washington-Oregon distributor) could also intervene under the new Rule 24 (a) (2) as one having an "interest in the transaction" and on the grounds that the government had fallen far short of representing that interest. On this point, Justice Douglas examined at length the proposed terms of the divestiture decree to show that the government had "knuckled under" to El Paso in granting too many concessions as to gas reserves, financial power and control, and that the trial judge had improperly approved a plan of non-competition. Justice Stewart, joined by Justice Harlan, dissented, primarily on the grounds that private parties should not be allowed to intervene in government anti-trust suits since the government should be considered to represent their interests.²⁸

²⁶ 386 U.S. at 133-34.
²⁷ 312 U.S. 502 (1941).
²⁸ Commentators have generally viewed the case as being somewhat unique and limited as precedential value for the following reasons: (1) there is strong policy and precedent generally against allowing private parties to interfere with the government's strategy of enforcing the anti-trust laws; (2) this was a unique case of the government "knuckling under" in the face of a prior Supreme Court decree in the same case; (3) the intervention here was applied for and allowed after the violation had been judicially determined and thus should be limited to proceedings to determine shaping of the decree; and (4) it is difficult to agree analytically with the court's implied conclusion that the interveners were equivalent to "necessary" parties under Rule 19, who could have been joined in any event. Rather, the result is more compatible with a finding under Rule 24(b) that private parties ought to be let in under these circumstances. See Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil (Continued on next page)
In summary, an application for non-statutory intervention as of right under the 1966 version of Rule 24 (a) must meet the following requirements: The application must (1) be timely, (2) show an interest in the subject matter of the action, (3) show that the protection of the interest may be impaired by the disposition of the action, and (4) show that the interest is not adequately represented by an existing party. The 1966 amendment did not change the words concerning the first requirement as to timeliness, and consequently did not change that previous standard. Each of the last three requirements is discussed separately in following sections. However, even though they are treated separately for analytical purposes, the three requirements of interest, impairment, and inadequacy of representation are only different facets of the same question: considering the impact on the applicant's interest if he is not given the right to intervene, should the applicant now be granted that right?

In considering the three requirements, the general objectives stated at the beginning of this article should be kept in mind. In this context, as the absolute right of the applicant for intervention is expanded, the rights of the original parties to control the litigation are diminished. Further, as the absolute right of intervention is expanded, the interests of judicial administration are served to the extent that the substitution of a more complex litigation now, for what would otherwise probably be two or more separate law suits, furthers efficiency, consistency and accuracy.
The obvious point is that the interests of the original parties and the interest of judicial administration are also at stake in every intervention case. Rule 24 (a), however, formally speaks only to an analysis of the interests of the applicant for intervention, i.e., whether he has an intent, whether it will be impaired, and whether it is adequately represented. Nevertheless, since analogous language has been used in Rule 19, appropriate judicial treatment of intervention will necessarily consider the policies implicit in Rule 19, i.e., the interests of the original parties and of the court in judicial administration.33

The case of Atlantis Development Corp. v. United States34 represents the new approach that should be taken under new Rule 24 (a) (2). The United States brought a declaratory judgment and injunction action against the defendants to restrain them from erecting structures on a coral reef lying ten miles off the Florida coast. The Atlantis Corporation had previously attempted to lay claim to ownership of the coral reef and sought to intervene to answer and to cross-claim against the defendants. The district court denied intervention on the ground that Atlantis did not have an "interest" that would justify intervention. The Fifth Circuit reversed and held that Atlantis could intervene as of right. The court first reviewed the revision of Rule 24. But before moving to an analysis of the three requirements in the Rule, Judge Brown, speaking for the court, examined whether Atlantis was a party needed for just adjudication under Rule 19.35 Having con-

33 Similar policies are explicitly stated in Fed. R. Civ. P. 24(b), raising the suggestion, a view held by this author, that the distinction between intervention of right and permissive intervention is really one of degree rather than of kind. See Shapiro, Some Thoughts on Intervention before Courts, Agencies and Arbitrators, 61 Harv. L. Rev. 721, 758 (1968).

Professor Cohn describes the three interests as those of (1) the non-parties applying for intervention, (2) trial convenience and (3) the original parties, and states: "The concept of intervention as of right carries with it an implicit judgment that justice demands that the first interest should predominate over the other two." Cohn, supra note 12, at 1332. See also analysis of interests in Note, The Litigant and the Absentee In Federal Multiparty Practice, 118 U. Pa. L. Rev. 531 (1969).

34 379 F.2d 818 (5th Cir. 1967), noted 1967 Duke L.J. 1251.

35 The judge stated: In assaying the new Rule, several things stand out. The first, as the Government acknowledges, is that this amounts to a legislative repeal of the rigid Sam Fox res judicata rule. But more important, the revision was a coordinated one to tie more closely together the related situations of joinder, FR Civ. P. 19, and class actions, FR Civ. P. 23.

As the Advisory Committee's notes reflect, there are competing interests at work in this area. On the one hand, there is the private
cluded that it was such a party, Judge Brown, in an explicit analysis under Rule 24 (a), held that Atlantis had an interest\textsuperscript{36} which would be practically affected and that it was not adequately represented.\textsuperscript{37} This decision is an important one, for it analyzes intervention not only in terms of the three requirements expressed on the face of Rule 24 (a), but also in terms of the considerations expressed in amended Rule 19.\textsuperscript{38}

**B. Applicant Must Claim an Interest Relating to the Property or Transaction Which is the Subject of the Action**

Former Rule 24 (a) (2) required that representation of the applicant's "interest" might be inadequate and that the applicant might be "bound."\textsuperscript{39} Former Rule 24 (a) (3) required that the applicant be adversely "affected" by the disposition of "property" within the control of the court.\textsuperscript{40} In merging these requirements, the 1966 amendment requires an "interest relating to the transaction or property that is the subject of the action." Since

(Footnote continued from preceding page)

sutor's interests in having his own lawsuit subject to no one else's direction or meddling. On the other hand, however, is the great public interest, especially in these explosive days of ever-increasing dockets, of having a disposition at a single time of as much of the controversy to as many of the parties as is fairly possible consistent with due process.

In these three Rules the Advisory Committee, unsatisfied with the former Rules which too frequently defined application in terms of rigid legal concepts such as joint, common ownership, res judicata, or the like, as well as court efforts in applying them, deliberately set out on a more pragmatic course. For the purpose of our problem, this course is reflected in the almost, if not quite, uniform language concerning a party who claims an interest relating to the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest. [footnotes omitted].

379 F.2d 818, 823-25 (5th Cir. 1967).

38 See text at 45 infra.

37 See note 62 infra.

39 At the outset, the court noted the wastefulness and delay that denial of intervention can create: (1) the trial court stayed the main action pending the appeal; in this time the merits could already have been decided; (2) the sparring over intervention inevitably led deep into arguments going to the merits of the case; yet after all the delay and effort, nothing had been decided since intervention merely resolves an issue at the pleading stage as to the sufficiency of the applicant's pleading to raise a right to intervene.

Consider the common sense approach, where after an extensive analysis showing that the applicant was not entitled to intervene, Judge Wright granted the right to intervene so that on appeal, the entire case could be considered on its merits. Hobson v. Hansen, 269 F. Supp. 401 (D.C. Cir. 1968).

39 See note 8 supra.

40 See note 15 supra.
the intervener must now have an interest relating to the transaction or property, prior precedent deciding that the applicant had a sufficient "interest" under 24 (a) (2), \textsuperscript{41} or an interest in "property" under 24 (a) (3), \textsuperscript{42} is generally controlling under the new rule. It does not necessarily follow, however, that precedent finding insufficient interest and denying intervention is also controlling.

The liberalization of Rule 24 (a) was not aimed at revising the nature of the applicant's interest, but was focused mainly on relaxing the requirement that the applicant might be bound under the doctrine of res judicata. Thus, as observed by Judge J. Skelly Wright:

[W]hile one’s interests need no longer be decisively affected before intervention will be allowed, there is nothing in the new rule or in its attendant commentary to indicate that it effected a change in the kind of interest required. Thus the thrust of the revision seems clearly to be concerned with the adequacy of representation and not with any notion of expanding the types of interests that will satisfy the rule. Still required for intervention is a direct, substantial, legally protectable interest in the proceedings.\textsuperscript{43}

\textsuperscript{41} See 4 Moore \textsuperscript{\textcopyright}24.08[1]. However, under the old FED. R. Civ. P. 24(a) (2), the emphasis was not on the nature of the applicant's interest, but on the question: was there a possibility that the applicant would be bound? See Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1968), quoting this position from 4 Moore \textsuperscript{\textcopyright}24.08[1].

\textsuperscript{42} See Moore \textsuperscript{\textcopyright}24.09[2], at 45: "[I]t must be an interest known and protected by the law: a claim of ownership, or a lesser interest, sufficient and of the type to be denominated a lien, equitable or legal."

\textsuperscript{43} Hobson v. Hansen, 269 F. Supp. 401 (D.C. Cir. 1968). However, a commentator on Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967) notes that Rule 24(a) emphasizes what he calls a "consequential" view of interest; that is that "interest" cannot be discussed in the abstract but only in the context that if intervention is not allowed, the applicant will have no feasible alternative remedy for protecting his interest. Noted in 1968 Duke L.J. 117, 124. See also quote in text at note 44 infra.

The concept of "interest" is not susceptible of definition apart from a case-by-case approach in the context of continuously changing criteria of the substantive law. One clear analogy, however, is the concept of "standing" in constitutional litigation. Just as "standing" can be expanded to give greater power to the "private attorney general," see Flast v. Cohen, 88 S. Ct. 1942 (1968) (allowing taxpayer to contest federal expenditure), so too, "interest" under FED. R. Civ. P. 24(a) can be expanded with substantive law to grant representation of interests and remedies heretofore rejected.

Other sources of comparative analysis are the cases granting or denying permissive intervention under FED. R. Civ. P. 24(b). Here, although FED. R. Civ. P. 24(b) requires only a "claim or defense" in common, and does not mention "interest," many of the cases talk in terms of the "interest" of the applicant. The two headings below give examples of such cases under FED. R. Civ. P. 24(b).

**Insufficient Interest**—A labor union has been denied intervention in a reapportionment suit. League of Nebraska Municipalities v. Marsh, 209 F. Supp. (Continued on next page)
(Footnote continued from preceding page)

189 (D. Neb. 1962) (League of Municipalities also dismissed as improper party plaintiff); see also Butterworth v. Dempsey, 229 F. Supp. 754 (D. Conn. 1964) (denying intervention to towns in reapportionment suit with no discussion of 24(b), aff'd per curiam, 378 U.S. 562 (1964)). The United States has been denied intervention in a school desegregation case. Allen v. County School Bd. of Prince Edward County, 28 F.R.D. 388 (E.D. Va. 1961); but see later cases allowing intervention by Attorney General under the Civil Rights Act of 1964, § 903, 42 U.S.C. § 2000h-2 (1964); Harris v. Crenshaw County Bd. of Educ., 250 F. Supp. 167 (M.C. Ala. 1966); Stell v. Savannah-Chatham County Bd. of Educ., 255 F. Supp. 88 (S.D. Ga. 1966). Competitors and other private parties have been denied intervention in government anti-trust proceedings. United States v. Aluminum Co. of America, 41 F.R.D. 342 (E.D. Mo. 1967) (where ALCOA had been a successful bidder on a large contract and had obtained government approval to assign the contract to wholly owned subsidiary, unsuccessful bidder would not be permitted to intervene in government anti-trust suit in which ALCOA had been ordered to divest itself of subsidiary when applicant sought to intervene to request injunction against award of the contract); United States v. Chicago Title & Trust Co., 10 Fed. Rules Serv. 2d 24a.5, Case 1 (N.D. Ill. 1966) (competitor not permitted to intervene in government anti-trust suit for purpose of challenging a clause in divestiture order that is believed will put it at a competitive disadvantage). Others have been similarly denied intervention for lack of the requisite interest. Rose v. Brotherhood of R. & S.S. Clerks, 181 F.2d 944 (4th Cir. 1950), cert. denied, 340 U.S. 851 (1950) (petition to intervene must present a justiciable controversy and not one within the exclusive jurisdiction of the Mediation Board); Wilson v. Illinois Cent. R.R., 21 F.R.D. 588 (N.D. Ill. 1957) (union could not intervene as defendant in veterans suit against employer for reinstatement). Still others have been denied permissive intervention where the court must by implication find that the claimant is a person with sufficient interest and standing to press its claim. Textile Workers Union v. The Allendale Co., 226 F.2d 765 (D.C. Cir. 1955), cert. denied, 351 U.S. 909 (1956) (dictum: union permitted to intervene in action by employers challenging Walsh-Healey determination that had raised minimum wages); Ruby v. Pan Am. World Airways, Inc., 232 F. Supp. 393 (S.D.N.Y. 1966) (rival union FEIA allowed to intervene in ALPA's declaratory judgment action against employer to determine crew complement), appeal dismissed as moot, 360 F.2d 69 (2d Cir. 1966); Groseclose v. Great N. Ry., 25 F.R.D. 181 (D. Mont. 1960) (union permitted to intervene in action by employees against railroad for determination of re-employment rights under Universal Military Training Act); O'Keefe v. Boeing Co., 38 F.R.D. 929 (S.D.N.Y. 1965) (United States allowed to intervene to resist discovery of government documents); Holcomb v. Aetna Life Ins. Co., 255 F.2d 577 (10th Cir. 1958) (persons alleged to have conspired with insurance company to defraud insured were permitted to intervene in company's interpleader action brought to determine beneficiaries of annuity policy); United States v. Martin, 267 F.2d 764 (10th Cir. 1959) (in declaratory class action by United States to adjudicate rights of parties affected by irrigation project, land owner claiming overflow rights could intervene as defendant as of right and would be permitted to file counterclaim); Berman v. Herrick, 30 F.R.D. 9 (E.D. Pa. 1962) (fraud action against building owners); Markovic v. National City Bank, 12 F.R.D. (Continued on next page)
The direct interest described by Judge Wright has been found lacking in a number of cases, but has been found present in others. While the principle has remained constant through the 1966 revision that the applicant must have a sufficient interest, the application of this principle has been subject to some change.

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175 (S.D.N.Y. 1959) (in an action by plaintiff to recover deposit made by a corporation whose assets were decreed to have been vested in plaintiff by Yugoslav nationalization decree, permissive intervention was granted the corporation and two individuals who asserted a claim to a portion of the funds by virtue of certain agreements or assignments made by the corporation, long prior to the promulgation of the nationalization decree); Stell v. Savannah-Chatham County Bd. of Educ., Harris v. Gibson, 333 F.2d 55 (5th Cir. 1964) (affirming permissive intervention by Negro students previously accepted for transfer to all white school in suit by parents of white children to enjoin effectuation of voluntary plan for desegregation), cert. denied, 379 U.S. 935 (1964).

Old Colony Trust Co. v. Penrose Indus. Corp., 387 F.2d 939 (3d Cir. 1968) (where plaintiffs sought a declaratory judgment against a lender and its other creditors that the plaintiff's proposed sale of pledged collateral held by them was "commercially reasonable" under § 9-507(2) of the U.C.C., applicant who was offering a price for the collateral had no interest in the property so as to justify intervention).

Edmondson v. Nebraska ex rel Meyer, 383 F.2d 123 (8th Cir. 1967) (State employee's estate had no interest in declaratory judgment action brought by State against a tort judgment creditor of the employee to declare that the judgment had been obtained by fraud; but note special circumstances here made the motion for intervention a "sham").

United States v. Blue Chip Stamp Co., 272 F. Supp. 432 (C.D. Cal. 1967) (where government settled anti-trust case by a consent decree, the legal interests of private parties with pending anti-trust actions against the same defendants were not "impaired or impeded" nor was the loss of the benefit of having the government try the case a sufficient interest to justify intervention; petition also untimely).

See Hobson v. Hansen, 269 F. Supp. 401 (D.C. Cir. 1968) (school superintendent who resigned after decree was entered in school desegregation case, and parents of school children who failed to show specific interest, had no sufficient interest to intervene when school board in good faith voted not to appeal, but intervention was granted in order to have full review on merits).

Atlantis Dev. Corp. v. United States, 379 F.2d 818 (5th Cir. 1967), discussed in text notes 34-38, supra (in suit by Government to declare exclusive ownership of coral reef against the defendant, another party claiming exclusive ownership had the right to intervene to claim against both the government and the defendant).

Thus, Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967), which was decided under both old FED. R. CIV. P. 24(a) and the new FED. R. CIV. P. 24(a), represents an expanded application of "interest" in holding a State, a customer, and a competitor have a sufficient interest to intervene in a government anti-trust divestiture proceeding when that interest is inadequately represented. The dissent argued that the interests asserted by the applicants were no more than the general public interests in preserving competition and that in anti-trust cases brought by the government, the Attorney General represents these interests.

See also United States v. First Nat'l Bank & Trust Co., 280 F. Supp. 260, 263 (E.D. Ky. 1967). El Paso was found directly in point in an anti-trust case granting intervention to a shareholder and a competitor after the government failed to appeal. After a hard-fought contest against a bank merger, Judge Mac Swinford states that the government "without warning to anyone . . . makes about a ninety per cent capitulation and now becomes the advocate of the merger," and comments:

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In *Nuesse v. Camp*, the Court of Appeals for the District of Columbia applied the principle to what it termed "administrative cases." The Court there granted intervention of right to a state banking commissioner as plaintiff in a suit brought by a state bank against the Comptroller of the Currency to enjoin the Comptroller from authorizing a national bank to open a branch bank where state law did not permit branching. In the trial court, both the plaintiff state bank and the defendant Comptroller had successfully resisted intervention on the theory that the only issue involved was the construction of the National Bank Act, and that the state banking commissioner did not have sufficient interest in this issue. But the Court of Appeals reversed by holding that, since protection of competitive equality of state banks was the core of the federal statute controlling the branching of national banks, a state banking commissioner has an adequate interest in the construction of the federal act to justify intervention. The Court found authority for this in *El Paso* and in the revision policy of Rule 24:

We know of no concise yet comprehensive definition of what constitutes a litigable 'interest' for purpose of standing and intervention under Rule 24(a) . . . . We know from the recent amendments to the civil rules that in the intervention area the 'interest' test is primarily a practical guide to disposing of law suits by involving as many apparently concerned persons as is compatible with efficiency and due process. Compare Amended Rule 19 . . . and Rule 23 . . . and the Advisory Committee Notes.48

C. Applicant is so Situated that the Disposition of the Action May as a Practical Matter Impair or Impede His Ability to Protect that Interest.

Former Rule 24 (a) (2) required that the "applicant is or may be bound by a judgment in the action." This requirement was

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If the Court by its decision in Cascade grants intervention of right to any volunteer claiming to speak for the public interest when he can convince a court that the Government might have used bad judgment in conducting or settling a law suit, these interveners are well within the class entitled to intervene.

Judge Swinford also noted that in such a case, where community interest runs high, intervention would promote public confidence in the judicial system.

47 385 F.2d 694 (D.C. Cir. 1967).
48 Id. See also discussion of "interest" in note 43 supra.
interpreted to mean that the applicant would be "bound" under the doctrine of res judicata.\(^{49}\) But later developments in due process concepts led to a dilemma here. In 1940 the Supreme Court in *Hansberry v. Lee\(^ {50}\) held it would be a denial of due process to give res judicata effect to a class action judgment when the parties against whom the judgment was invoked were not parties to the original class suit, nor in privity with any other parties, nor represented by any party to that litigation. This holding created, theoretically, a logical impossibility on the face of Rule 24 (a) (2) in that the conjunctive requirements of inadequate representation and binding effect could be considered to be mutually exclusive. The way out of the dilemma was to realize that many inadequacies of representation do not rise to the level of due process objections and that inadequacy and binding effect can co-exist.\(^ {51}\) But in 1961 the Supreme Court in *Sam Fox Publishing Co. v. United States\(^ {52}\) encouraged the dilemma thus tending to make intervention under Rule 24 (a) (2) somewhat restrictive. In order to eliminate the logical inconsistency, and to move from a legalistic test of res judicata to a factual test of practical impact, a new test was sought. In keeping with a consistent theory in revising Rules 19, 23, and 24, the revision defined a party needed for just adjudication in Rule 19 and used comparable language to describe a member of a class under Rule 23 and a person entitled to intervention as of right under Rule 24.\(^ {53}\)

Since the purpose of the revision was in part to liberalize the old requirement that the applicant would be "bound" under the doctrine of res judicata, it must follow under the 1966 rule, that if the applicant can show by precedent that he would have been "bound" within the meaning of former 24 (a) (2), he falls a fortiori within the meaning of the 1966 provision that "he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest."\(^ {54}\) It

\(^{49}\) See note 8 supra.

\(^{50}\) 311 U.S. 32 (1940).


\(^{52}\) 366 U.S. 983 (1961).

\(^{53}\) See Atlantis Dev. Corp. v. United States, 379 F.2d 818 (5th Cir. 1967), noted 1967 Duke L.J. 1251; discussed in text, notes 34-38 supra.

\(^{54}\) Coleman Capital Corp. v. Fidelity & Deposit Co., 43 F.R.D. 407 (S.D.N.Y. 1967) (contractor has right to intervene as defendant in a suit against his surety). See 4 Moore 124.08 for cases decided under former Fed. R. Civ. P. 24(a) (2).
would also be a valid inference that the new rule approves those cases which even prior to the 1966 amendment had departed from the strict res judicata test, and had sanctioned intervention where the impact of the intervener was so severe as to be analogous to res judicata.\textsuperscript{55}

However, the pre-1966 cases denying intervention are now subject to re-evaluation in light of the language and policy of the new Rule. The question as to the practical effect on the interest of the applicant cannot properly be answered until the interest of the applicant is first analyzed and determined.\textsuperscript{56} Analysis may end with the conclusion that the applicant has an insufficient interest.\textsuperscript{57} If he has a sufficient interest, the question then becomes: what impact will the disposition of this case have on that interest? Certainly if the applicant will or may be bound under the principles of res judicata, or, analogously affected,\textsuperscript{58} or if his interest in property subject to control of the court would be adversely affected,\textsuperscript{59} he is within the rule.

The further question can be raised whether the adverse impact of stare decisis standing alone can be sufficient to satisfy the requirement.\textsuperscript{60} The Fifth Circuit, while conceding that no pre-1966 case had done so, has answered this question in the affirmative. The court, in a case previously discussed,\textsuperscript{61} held that a company claiming ownership of a coral reef could intervene in the government's suit for declaration of ownership of the reef against another claimant to the reef. The court examined at length the practical difficulties the applicant would have in attempting to upset the precedent if the government should win, and concluded that these would as a practical matter impair or impede its ability to protect its interest.\textsuperscript{62} The Court of Appeals for the Dis-

\textsuperscript{55} See note 8 supra and cases cited in 4 Moore \textsuperscript{24.08}[1] n. 8.
\textsuperscript{56} Hobson v. Hansen, 269 F. Supp. 401 (D.C.Cir. 1968).
\textsuperscript{57} See notes 43-47 supra.
\textsuperscript{58} See note 8 supra.
\textsuperscript{59} That is, if the applicant meets the test of former Fed. R. Civ. P. 24(a)(3), see 4 Moore \textsuperscript{24.09}, he should also meet the test of present Fed. R. Civ. P. 24(a)(2); see note 15 supra.
\textsuperscript{60} Before 1966, the impact of stare decisis would clearly be a basis for participation as an amicus curiae, and probably would be a basis for participation as a permissive intervener. C. Wright, Federal Courts \textsuperscript{7} 75 (1963).
\textsuperscript{61} Atlantis Dev. Corp. v. United States, 379 F.2d 818 (5th Cir. 1967), and text notes 34-38 supra.
\textsuperscript{62} The question of law involved the interpretation of the Outer Continental Shelf Lands Act and other statutes. In outlining the obstacle the applicant would face in upsetting an adverse decision, the Court noted that the practice for the

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tract of Columbia has agreed with this analysis of the Fifth Circuit, stating, "[w]e think that under this new test stare decisis principles may in some cases supply the practical disadvantage that warrants intervention of right." On the other hand, where there is no real, practical impairment of the intervener's interest as is required by the rule, intervention has been denied.

D. Applicant's Interest is Not Adequately Represented by Existing Parties

The bases for non-statutory intervention previously discussed are subject to the condition that the applicant's interest is not adequately represented by existing parties. As originally expressed, pre-1966 Rule 24(a)(2) granted intervention "when the representation of the applicant's interest by existing parties is or may be inadequate...." The 1966 revision, in merging former clauses (2) and (3), rephrased the old standard so that Rule 24(a)(2) now grants intervention "unless the applicant's interest is adequately represented by existing parties." As noted by Justice Stewart, the "requirement of inadequate representation by existing parties as a precondition of the right to intervene under

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Fifth Circuit is to follow the precedent of its own decisions, unless a hearing is obtained en banc, and that fewer than ten percent of cases were granted certiorari to the Supreme Court. The Fifth Circuit cautioned, however, that not every case will justify intervention based on the prospective impact of stare decisis, but only where the claims coincide and the first litigation will realistically determine the subsequent litigation.

63 Nuesse v. Camp, 385 F.2d 694, 702 (D.C. Cir. 1968). The Court of Appeals allowed a state Commissioner of Banking to intervene in an action by a state bank to enjoin the Comptroller of the Currency from allowing a national bank to start a branch bank, since the first decision on the subject would probably be given great weight in subsequent litigations. The court here also reasoned from the affirmative policy underlying the new intervention rule: if the banking commissioner were not allowed to intervene, he might bring suit in "the hope of sparking a conflict between circuits, and possibly even Supreme Court resolution," and that "it is the fragmented approach to adjudication that the revitalized rules seek to avoid."

64 Edmondson v. Nebraska ex rel Meyer, 383 F.2d 123 (8th Cir. 1967). See also cases deciding that applicant has no sufficient interest, discussed in text at notes 43-47 supra.

65 The bases are: "when the applicant claims an interest relating to the property or transaction which is the subject of the action," see text, Part VB supra, 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," see text Part VC supra.

66 The omitted part of Fed. R. Civ. P. (a)(2) reads: "and the applicant is or may be bound by a judgment in the action." See text at note 8 supra.

67 Fed. R. Civ. P. 24(a)(3), granting intervention where the court had control of property, contained no such requirement as to inadequacy of representation.
the new Rule 24 is obviously an adaptation of the similar standard contained in the former 24 (a) (2)." Consequently it must be inferred that prior precedent defining what constituted "inadequacy of representation" under the old rule, should generally be applicable under the new rule.

The question can be raised whether the change in language from "when" the representation may be inadequate to "unless" the interest is adequately represented, and the relocation of this clause at the end of the sentence has the effect of placing on the person opposing intervention the burden of showing adequacy of representation. In the absence of a stronger showing that this was

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69 See 4 Moore ¶ 24.08[2]. The annotation in 84 A.L.R.2d 1412, 1419-22 (1962) sets out four different sets of categories that may enter into this question: (1) to what degree are the interests of the applicant and the interests of the party purportedly representing the applicant's interests, identical or divergent? (2) who is the counsel, how good is he, and what is his relationship with the applicant? (3) how effective will the counsel's representation be in light of possible legal disabilities to present claims of the applicant, or collusiveness, or strategy of representation? (4) what alternative remedies is the applicant presently seeking in order to represent his interest?
71 Peterson v. United States, 41 F.R.D. 131 (Minn. 1966) (issue raised but not resolved where in suit by executor-trustee for refund of estate tax based on disallowance of a deduction for a charitable bequest to the trust's remaindermen, the remaindermen were denied intervention on grounds that, although their interests varied in kind and degree, the interests of the plaintiff and remaindermen were not adverse and were both concerned in seeking recovery of the tax refund for the trust; participation as amicus curiae granted).

Compare Nuesse v. Camp, 385 F.2d 694, 702 (D.C. Cir. 1968): Little guidance for the present case is furnished by the discussion in the pre-amendment cases which focused on such inadequacy as collusion between the parties, a conflict in position urged, or an indication that the alleged representative would fail in his duty to prosecute the action diligently. These factors have their most common and appropriate application in class actions, where the applicant's interest is identical to that of an existing party.

However, previously there was no expressed requirement in the rule as to inadequacy of representation where there was property in the control of the court. See also Nuesse v. Camp, 385 F.2d 694, 702 (D.C. Cir. 1968):

In making the language conversion from an affirmative requirement that the representation "is or may be inadequate" to the exception clause "unless the...", (Continued on next page)
the draftsmen's intent, the burden on the issue ought to be placed, according to traditional considerations of policy and convenience,72 upon the applicant. At the same time, it can be argued that the applicant should be the best judge of the adequacy of the representation of his own interests. Thus in the absence of special circumstances,73 if an attorney has been able to convince the applicant that he should bear the expense of intervening, the court should liberally find that the applicant has met his burden of showing that the representation of his interest by someone else may be inadequate.74

VI. INTERVENTOR'S POWER TO RAISE COUNTERCLAIMS, CROSS-CLAIMS AND TO IMPLEAD

A. Where Jurisdiction Is Not In Issue

1. Counterclaims—Aside from the jurisdictional question, where discretionary intervention is involved, some cases have followed the old rule denying intervention unless the original defendant has an interest in the counterclaim.75 But the better interest is adequately represented, the words "may be" have been dropped. The resulting meaning should, nevertheless, remain the same. That is if it is now shown that the representation "r.y be inadequate," then this should preclude a finding that the exception has been satisfied that "the interest is adequately represented." See Note, Federal Civil Procedure: Intervention of Right Granted Private Party in Government Antitrust Under New Rule 24(a)(2), 1968 DUKE L.J. 117, 129.

72 For a general exploration of these considerations in various contexts, see Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 STAN. L. REV. 5 (1959).

73 See note 69 supra.

74 See note 71 supra. See also Shapiro, Some Thoughts on Intervention before Courts, Agencies and Arbitrators, 81 HARV. L. REV. 721, 740-48 (1968); cf. Cook & Feldman, Insider Trading Under the Securities Exchange Act, 66 HARV. L. REV. 385, 414-15 (1953). Under the Securities Exchange Act, the security holder has an implied statutory right to intervene in a corporation's suit to recover insider profits when the corporation "shall fail diligently to prosecute." Cook and Feldman urge the courts to grant liberal intervention in light of the legislative policy of the Act, the difficulty in appraising the "diligence" of the corporation and its counsel, and the opportunity of the court to limit the compensation of the intervenor's attorney if he makes no contribution to the case. Of course, the correlation between attorney fees and claims of the right to intervene is difficult to appraise.

75 Equity Rule 37 provided that "intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding." In addition, Equity Rule 30, which dealt with counterclaims, was limited to the "defendant." Under these two rules, the results of the decided cases were fairly restrictive against the right of the intervener to raise counterclaims. 4 MOORE 5724.16[1], 24.17[2]. Thus in 1935, in Chandler & Price Co. v. Brandtjen & Kludge, Inc., 296 U.S. 53 (1935), the Supreme Court held that the intervener could counterclaim only if the original defendant had an interest in the counterclaim. However, the deliberate omission in 1938 from Fed. R. Civ. P. 24 of the subordination provision of old

(Continued on next page)
rule would give the judge the discretion to allow a counterclaim even though the defendant is not interested in it so long as the counterclaim was closely enough related to the transaction or subject matter of the law suit.

Under these modern principles, permissive intervention as defendant has been denied the government where it attempted to set up counterclaims on unrelated government contracts. In suits against the drivers of automobiles, passengers have been denied permissive intervention as defendants when they wanted to

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(Footnote continued from preceding page)

Equity Rule 37, and the extension of the availability of counterclaims in new Fed. R. Civ. P. 13 to a "pleader," rather than a mere "defendant," support the conclusion that the restrictive rule of the Chandler decision was overturned by the 1938 rules. See discussion by Judge Mathes in Hartley Pen Co. v. Lindy Pen Co., 16 F.R.D. 141 (S.D. Cal. 1954):

The limitation of former Equity Rule 37 ... was not carried into Rule 24 ... Nor did Rule 13 carry over the limitation of former Equity Rule 30 that counterclaims, including those in the nature of crossbills, should be available only to a defendant ...

To be sure, the intervener still must take the main suit as he finds it ..., but only in the sense that he cannot change the issues framed between the original parties, and must join subject to the proceedings that have occurred prior to his intervention; he cannot unring the bell. ...

By amplifying Rule 24 to give the intervener equal standing as a party to the litigation and by broadening Rule 13 to accord the privilege of counterclaims and cross claims to all parties, the incidence of intervention has been enlarged and the field of ancillary jurisdiction has been broadened. Id. at 153.

But see caveat to this position by Judge Friendly, who states in New York Central R. Co. v. United States, 200 F. Supp. 944 (S.D.N.Y. 1961):

Whether or not the elimination of the subordination provision, along with the difference in language in F.R.Civ.Proc. 13 as against Rule 30, would call for a different decision on the precise issue presented in Chandler & Price, [footnote omitted] the Supreme Court does not consider everything said in that opinion to have been rendered obsolete by the new Rule, as witness its statement 'As intervenor the United States was limited to the field of litigation open to the original parties', accompanied by a citation of Chandler & Price, in Columbia Gas & Electric Corp. v. American Fuel & Power Co., 322 U.S. 379, 383, 64 S.Ct. 1068, 1071, 88 L.Ed. 1137 (1944). Id. at 949.

Cf. Fuller v. Volk, 351 F.2d 323 (3d Cir. 1965), where Judge Biggs in a school desegregation case, denied jurisdiction as to original plaintiff taxpayers, but allowed jurisdiction to be re-examined as to intervening plaintiff parents, and stated:

[A] court has discretion to treat the pleading of an intervener as a separate action in order that it might adjudicate the claims raised by the intervener. [citation omitted.] This discretionary procedure is properly utilized in a case in which it appears that the intervener has a separate and independent basis for jurisdiction and in which failure to adjudicate the claim will result only in unnecessary delay. Id. at 328-29.

76 H. K. Ferguson v. Nickel Processing Corp., 33 F.R.D. 263 (S.D.N.Y. 1963) (plaintiff was subcontractor suing prime contractor who had been instructed to withhold payment because the government had claims against the subcontractor on other contracts).
assert counterclaims for personal injury against the plaintiff.\textsuperscript{77} Some of these cases are subject to criticism, however, for implying that permissive intervention can never be used to assert an affirmative counterclaim in which the defendant is not interested, even though the counterclaim arises out of the same general transaction as that asserted in the complaint.\textsuperscript{78} It would seem that, consistent with rights under other Rules, the court should have discretion to allow the permissive intervention if the purpose of the intervention is either (1) to assert a claim which originally could have been joined by the defendant and the intervener as plaintiffs under Rule 20, or (2) to assert a claim, which but for the non-joinder of the intervener, would have been a compulsory counterclaim under Rule 13 (a). The courts have come close to supporting this proposition by allowing subsidiaries of defendants charged with patent infringement to intervene to assert factually related claims of patent infringement and unfair competition,\textsuperscript{79} by allowing the manufacturer who has already intervened


\textsuperscript{78} The court in Kauffman v. Kebert, 16 F.R.D. 225 (W. D. Pa. 1954), arrives at the result that the wife and son passengers of the defendant may not intervene to join their counterclaims with that of the defendant father. Since the father was being sued in Pennsylvania by an Ohio administrator, there was the substantial possibility that the son and wife would have to pursue their claims in Ohio; whereas if they could sue in Pennsylvania, the court concedes the actions would probably be consolidated with the suit against their father. In reaching this result, the court states the following theory, which is quoted with approval in Medd v. Westcott, 32 F.R.D. 25 (N. D. Iowa 1963):

It seems that the applicants here are seeking to shortcut a lawsuit. They have no interest in the main suit, not being bound by the result thereof, but it appears they desire to step aboard the present going lawsuit as a matter of convenience in the trial of their own case for damages against plaintiff. They have a right to bring a separate suit. This, however, should not be confused with the right to intervene. Id. at 28.

See also Northern Ins. Co. v. Grone, 126 F. Supp. 457 (M.D. Pa. 1954), where the court, in sustaining the insurance company plaintiff's motion for voluntary dismissal of its declaratory judgment action over the objection of the intervener insurance company that its counterclaims were still pending, made the unnecessarily broad statement: "I can find no authority in Rule 24 to grant an intervenor affirmative relief." Id. at 458.

\textsuperscript{79} Stewart-Warner Corp. v. Westinghouse Elec. Corp., 325 F.2d 882 (2d Cir. 1963), cert. denied, 376 U.S. 944 (1964) (defendant parent owned 76% of stock in Canadian subsidiary which in turn owned the patents which were subject of the counterclaim). Cf. Distillers Co. v. Standard Oil Co., 10 Fed. Rules Serv. 2d 18a.21, Case 5 (N.D. Ohio 1964) (foreign subsidiary of defendant was permitted to intervene in a patent infringement action against the parent for the purpose of filing a counterclaim for unfair competition when defendant parent had been allowed to file a counterclaim which was closely related to the counterclaim of the intervener; in this case, however, the parent perhaps had sufficient interest to maintain the full counterclaim even without the intervention of its subsidiary).
as defendant in patent litigation to assert anti-trust claims against the plaintiff, and by allowing contractors, in suits against their sureties, to intervene to assert related counterclaims against the plaintiff. As Chief Judge Lumbard of the Second Circuit states:

The whole tenor and framework of the Rules of Civil Procedure preclude application of a standard which strictly limits the intervenor to those defenses and counterclaims which the original defendant himself could have interposed. Where there exists a sufficiently close relationship between the claims and defenses of the intervenor and those of the original defendant to permit adjudication of all claims in one forum and in one suit without unnecessary delay—and to avoid as well the delay and waste of judicial resources attendant upon requiring separate trials—the district court is without discretion to deny the intervenor the opportunity to advance such claims.

... [T]o whatever extent Chandler may look the other way, the decision in that case was rendered prior to the Supreme Court's enactment in 1938 of the Federal Rules. The Rules, as we have indicated, were designed to permit the speedy and inexpensive litigation of controversies and to maximize the expenditure of judicial resources wherever possible...

[Footnote omitted]... While it would be highly undesirable to construe Rules 13 and 24 to permit a permissive intervenor to interpose all permissive counterclaims—however unrelated to the original litigation—[Rules 13, 14, 22, and 24] clearly manifest the spirit of modern federal procedure not unduly to restrict the scope of litigation among parties.

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80 See Switzer Bros., Inc. v. Locklin, 207 F.2d 483 (7th Cir. 1953), cert. denied, 347 U.S. 912 (1954). Once the manufacturer had been permitted to intervene, it was not important whether the intervention was as of right or permissive, because he then had a right to file either a compulsory counterclaim under 13(a) or a permissive counterclaim under 13(b). The court distinguished Chandler, discussed at note 75 supra, on the grounds that here: (1) the anti-trust counterclaim alleged an abuse of the patents sued upon by the plaintiff; (2) the original defendants had an interest in the counterclaim; (3) the original complaint named the interveners as wrongdoers and sought injunctive relief against them as being in privity; (4) the counterclaim was related to the subject matter of the plaintiff's claim.

81 United States v. Fidelity & Deposit Co., 22 F.R.D. 248 (M.D. Pa. 1958) (treating as a "typical case for permissive intervention" the entry of a contractor to assert counterclaims against the defendant-third-party-plaintiff who had raised a third party complaint against the contractor's sureties; here, however, it seemed to be a case of intervention as of right, see United States ex rel. Foster Wheeler Corp. v. American Surety Co., 25 F. Supp. 700 (E.D.N.Y. 1938), aff'd, 142 F.2d 726 (2d Cir. 1944), discussed in the text at note 94 infra.
whenever consistent with a speedy and just determination of the controversy.  

Where intervention is of right the court literally should have no authority to strike out any counterclaims the intervener might set up—assuming that jurisdiction exists—although it might order separate trials. Professor Shapiro, however, takes a more qualified view that the party who intervenes as of right is limited to raising issues related to the basis for the intervention. Under this qualified view, the intervener as of right should not be entitled to assert permissive, unrelated counterclaims under Rule 13(b). Under either view the court should allow the intervener of right to file a claim which would be in the nature of a compulsory counterclaim under 13(a).  

2. Cross-Claims—The principles applicable to counter-claims as set out above should also apply to cross-claims raised by the intervener. However, since Rule 13(g) requires the cross-claim to arise out of the transaction that is the subject matter of the original action or of a counterclaim therein, the Rule does not

83 Fed. R. Civ. P. 42(b). If the counterclaim arose out of the same transaction or occurrence as the plaintiff’s claim, the intervener would be required to plead it; see Fed. R. Civ. P. 13(a). See Switzer Bros., Inc. v. Locklin, 207 F.2d 483 (7th Cir. 1953), and later decision in same case, Switzer Bros., Inc. v. Chicago Cardboard Co., 252 F.2d 407 (7th Cir. 1958), cert. denied, 347 U.S. 912 (1954).  
85 Professor Shapiro would reach this conclusion on the basis of the court’s discretion, however, and not on the basis of the intervener’s right, see Shapiro supra note 84. See Plitt v. Hofferbert, 125 F. Supp. 809 (D. Md. 1954) (federal government may intervene in an income tax refund action against a former Collector of Internal Revenue to assert a counterclaim for jeopardy tax assessments for which the Collector could not sue), distinguishing H. K. Ferguson v. Nickel Processing Corp., 33 F.R.D. 208 (S.D.N.Y. 1963); Switzer Bros., Inc. v. Locklin, 207 F.2d 483 (7th Cir. 1953), cert. denied, 347 U.S. 912 (1954); Stewart-Warner Corp. v. Westinghouse Elec. Corp., 352 F.2d 892 (2d Cir. 1963), cert. denied, 376 U.S. 944 (1964); Lenz v. Wagner, 240 F.2d 666 (5th Cir. 1957) (in a tax receivership initiated by the government, court had jurisdiction to grant a deficiency judgment in favor of an intervening mortgagee-creditor against a defendant on a theory that the intervention was of right, the claims were compulsory under Rule 18(a), and jurisdiction was ancillary).  

In Otis Elevator Co. v. Standard Constr. Co., 10 F.R.D. 404 (D. Minn. 1950), Judge Nordbye found that a hospital presented a sufficient pleading to be allowed intervention as principal in suit against its contractor-agent in order to raise counterclaims for deficient work by the plaintiff and stated:  

That one who may intervene as a matter of right should be accorded the right to assert a counterclaim related to the transactions upon which the action is based is within the logic and intent of the Rules 24 and 13, which concern intervention and counterclaims, seems apparent. Id. at 407.
explicitly authorize a party who intervenes as of right to raise an unrelated cross-claim. By implication Rule 13 does allow the intervener to raise a related cross-claim.

3. Third Party Claims—Rule 14, which provides for third-party practice, speaks of the rights of a defendant and of a plaintiff to implead a third person. If this be given the construction which was given to Equity Rule 30, which used the word "defendant," Rule 14 would not apply to interveners. However, where an intervener is allowed to come in as a defendant or as a plaintiff, there should now be no objection to allowing him to implead under Rule 14.

Where a third party complaint has been filed by one of the original defendants, an intervener may be allowed in as a third party defendant.

B. Where Jurisdiction is in Issue

1. In General—If it is conceded that the court, under Rules 24 and 13 may allow a permissive intervener to raise counter-
claims, and generally must allow an intervener of right to counter-claim, then the remaining issues are whether there is jurisdiction over the counterclaim and appropriate venue. Certainly, if there is independent jurisdiction to sustain the counterclaim, then, even though the original action is dismissed, the court may retain jurisdiction over the counterclaim and dispose of it on the merits. However, if there is no independent jurisdiction, various distinctions have been raised to justify rejection or reception of ancillary or pendent jurisdiction over the counterclaim. Some of the analytical distinctions which have been used are: (1) whether the nature of the action is in rem, or in personam; (2) whether the intervention is of right or permissive only; (3) whether the nature of the counterclaim is compulsory or permissive. The use of these procedural distinctions is to be expected: the same factors which give rise to them are similar to the pragmatic considerations which give rise to doctrines of pendent and ancillary jurisdiction.

One of the first cases to arise involving Rules 24 and 13 was United States to Use of Foster Wheeler Corp. v. American Surety Co. There, a party intervening as of right in an action against its surety was permitted to set up a counterclaim against the plain-tiff arising out of a breach of the same contract upon which the plaintiff sued. While there would have been no federal jurisdiction of an independent action by the intervener against the plaintiff,
jurisdiction was found to exist because the plaintiff’s action was brought under a federal statute. Thus prior history and the adoption of the Federal Rules might be said to have produced the following jurisdictional rule for in personam actions: a counterclaim based on intervention of right can be sustained on ancillary jurisdiction, whereas a counterclaim based on permissive intervention requires an independent jurisdictional base, unless it arises in a class suit or in an in rem action.

The rule that intervention of right will sustain ancillary jurisdiction had its origin in cases where there was property in the custody of the federal court. Thus in diversity cases raising multiple claims to property, it was a matter of compelling necessity and efficiency that the federal court should allow claimants to the property to intervene as of right without regard to their citizenship. When the Federal Rules of 1938 explicitly recognized the right of intervention in non-property cases, the ancillary jurisdiction rule followed by implication. That is, even in non-property cases, if the right to intervene can be called absolute in a procedural sense, the label also carries with it the consequence that ancillary jurisdiction can be sustained over the claim on ancillary theories without requiring independent jurisdiction.

This principle then should carry over and be fully applicable to all cases involving the absolute right to intervene under the 1966 version of Rule 24(a).

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95 In Hartley Pen Co. v. Lindy Pen Co., 16 F.R.D. 141 (S.D. Cal. 1954), plaintiff brought suit against defendant for patent infringement. Intervener entered the suit as a plaintiff under Rule 24(a)(2), claiming that it was the equitable owner of the patent sued on. It attempted to assert a claim for patent infringement against plaintiff and two additional parties as well as against the original defendant. The court held that because intervener’s rights as owner would have to be determined by state law, there was no independent “case arising” jurisdiction as to any of these claims; that inasmuch as the claim against the original defendant was ancillary to the main claim and intervention had been of right, the original jurisdiction over the original claim warranted retention and disposition of this aspect of the intervener’s demands, provided amendment would be able to cure a statute of limitations defect; but that the cross-claim against the original plaintiff and the claims against the additional parties were not ancillary and therefore, there being no independent basis of jurisdiction, must be dismissed. Intervener’s retained claim denied on merits, sub nom. Kimberly Corp. v. Hartley Pen Co., 237 F.2d 294 (9th Cir. 1956).

96 C. WRIGHT, FEDERAL COURTS § 9 (1963).


98 See Coleman Capital Corp. v. Fidelity & Deposit Co., 43 F.R.D. 407 (Continued on next page)
The application of this principle under Rule 24 leads to apparent inconsistencies with the jurisdictional results under Rule 19. Assume that under Rule 19, one of the original parties to a lawsuit moves either to add an absent party or to dismiss because of his absence. The traditional rule has been that if the non-party is classified as indispensable, and his presence would defeat the diversity jurisdiction of the court, then the court must dismiss the action. However, if the non-party is categorized as merely necessary, then the court will not add him if his presence will defeat diversity.

These results under Rule 19 are partially reconciled with results under Rule 24 by pointing to those intervention cases which first examine whether the intervener is really an indispensable party. If he is an indispensable party and his original presence would have destroyed diversity, then intervention should not be allowed and the suit should be dismissed. Dismissal here is consistent with Rule 19. But if the intervener is found not to have been originally indispensable, then the intervention is allowed.

The granting of intervention in such a case leaves us with the following anomaly. If one of the original parties is demanding the presence of an absent necessary party whose presence would destroy jurisdiction, the court will not allow joinder. However, if entry into the case is initiated by the absent party through a motion for intervention, the court will allow the intervention.

(Footnote continued from preceding page)

(S.D.N.Y. 1967) (in action against its surety, contractor had absolute right to intervene and to raise compulsory counterclaims joining non-diverse parties plaintiff).

99 1 Moore ¶0.60[8.—5]; 3 Moore ¶¶19.0-19.03, 19.19.
100 1 Moore ¶0.60[8.—4]; 3 Moore ¶19.04[2].
102 See Drumwright v. Texas, 16 F.2d 657 (5th Cir. 1927), cert. denied, 274 U.S. 749 (1927) (non-diverse plaintiff dismissed from suit, and allowed re-entry as intervener); Kozak v. Wells, 278 F.2d 104 (8th Cir. 1960); Northeast Clackamas County Elec. Co-op., Inc. v. Continental Cas. Co., 221 F.2d 329 (9th Cir. 1955) (in diversity suit by Oregon Co-op. against Maryland surety on performance bond, Oregon contractor was not indispensable to original suit and could intervene to assert counterclaim); Texas & N. O. R.R. v. New Orleans, 22 F.R.D. 84 (E.D. La. 1958) (in diversity suit by Texas R.R. against City of New Orleans to interpret contract for use of railroad bridge, other Texas and Louisiana bridge users were not indispensable parties plaintiff or defendant, and could intervene as defendants). Cf. Dery v. Wyer, 265 F.2d 804 (2d Cir. 1951) (dissent, states that indemnitor can intervene as of right without independent jurisdiction).
under ancillary theories of jurisdiction. It appears then that the jurisdictional result turns on whether the entry is initiated by one of the original parties under Rule 19, or by the absent party under Rule 24. The distinction seems difficult to rationalize with jurisdiction or non-jurisdiction and leads to possible creation of jurisdiction through intervention rather than joinder.

The majority of recent cases continue to follow the principle that where the right to intervene in an in personam action is discretionary, independent jurisdictional grounds must be shown.

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103 Glens Falls Ins. Co. v. Cook Bros., Inc., 23 F.R.D. 269 (S.D. Ind. 1959) (non-diverse subrogor of property damage claim could intervene as plaintiff in action by subrogee to assert unsubrogated part of claim against defendant; note the anomaly here that jurisdiction was thus sustained even though the defendant had lost an earlier motion to force joinder of the subroger as an indispensable party under Rule 19, and the court had previously ruled that the intervener was merely necessary and thus was not involuntarily joinable where its presence would defeat jurisdiction).

104 The anomaly is not complete, however, because even if an absent party falls within the category of a "necessary" party under Fed. R. Civ. P. 19, he will still have to show that his interest is not adequately represented in order to be an intervenor of right under Fed. R. Civ. P. 24. See note 102 supra, cf. note 134 infra. At the same time it may be that diversity and ancillary jurisdiction rules are incapable of really rational reconciliation, apart from historical evolution, see C. Wright, Federal Courts §§ 9, 75 (1962).

105 See 4 Moore ¶24.18[3].


McCarthy v. Autocar Co., 21 FED. RULES SERV. 24c.31, Case 2 (E.D. Pa. 1955), aff'd original order in 20 FED. RULES SERV. 24c.31, Case 4 (E.D. Pa. 1955). Chief Judge Kirkpatrick gave the following rationale for denying intervention of what were apparently additional non-diverse plaintiffs:

In summary—in cases where the intervenor is attempting to prosecute or defeat the original cause of action, the courts are concerned with whether or not there is jurisdiction of that original cause of action. In the present case where the proposed intervenors are asserting an independent cause of action, the court must concern itself with whether or not it has jurisdiction of the intervenor's cause of action.

Cf. Humble Oil & Ref. Co. v. Sun-Oil Co., 190 F.2d 191 (5th Cir. 1951), cert. denied, 342 U.S. 920 (1952) (error to allow State of Texas to intervene in diversity suit to establish title to oil lands since intervention was not authorized under 24(a) and independent jurisdiction was lacking under 24(b); Hunt Tool Co. v. Moore Inc., 212 F.2d 688 (5th Cir. 1954) (court agrees with rule but holds settlement of original action and dismissal of non-diverse parties saves jurisdiction over claim presented by permissive intervention); Komlos v. Compagnie Nationale Air France, 18 F.R.D. 363 (S.D.N.Y. 1955) (workman's compensation carrier could not intervene to assert lien against non-diverse plaintiff, but court would entertain petition to intervene as owner of plaintiff's claim).

See McIntire v. Davis, 246 F. Supp. 872 (S.D. Ohio 1965), in which the (Continued on next page)
However, there are several cases which have taken a broader view and have not required independent jurisdiction. Judge Luongo of the Eastern District of Pennsylvania summarized and adopted this broader view in deciding that various sub-contractors did not have to show independent jurisdiction to intervene as plaintiffs in a fraud suit by the general contractor against the owners of a building. In a later case, however, in response to criticism, he retracted this view and returned to the prevailing rule that independent jurisdiction is required for discretionary intervention.

As shown by Judge Luongo's repentance, where it is concluded that the intervention is permissive and the intervener's claim requires an independent jurisdictional base, the federal problem is considered as one under Rule 20 governing permissive joinder, and subrogated insurer was thus denied intervention as plaintiff because insurer was of the same citizenship as defendant.

(Footnote continued from preceding page)


108 Berman v. Herrick, 30 F.R.D. 9 (E.D. Pa. 1962). In summarizing this view, Judge Luongo stated:

Such a requirement [of independent jurisdiction] would virtually eliminate all distinction between Rule 24(b) (intervention) and Rule 42(a) (consolidation). Considered in that light, Rule 24(b) would serve very little purpose other than, perhaps, to effect some minor saving in fees for service of process. We cannot ascribe such a limited purpose to the rule makers in promulgating Rule 24(b).

We recognize that there is a great potential for abuse in the view we have taken. It is possible that suits may be instituted whose real purpose is to eliminate jurisdiction barriers for proposed intervenors who might be the real parties in interest. But since intervention under Rule 24(b) is committed to the court's discretion, the courts have the power to control or eliminate such abuses wherever they are found to exist. Id. at 12.


110 Olivieri v. Adams, 11 Fed. Rules Serv.2d 20a.72, Case 3 (E.D. Pa. 1968). Judge Luongo wrote the opinion of a special three judge panel which was established to bring uniformity within the district pending a definitive ruling from the court of appeals. The court refused to allow joinder of parents' claims in a suit on behalf of a minor where the federal court's jurisdiction was based on the foreign citizenship of the minor's guardian. The court retracted the view taken in Berman v. Herrick, 30 F.R.D. 9 (E.D. Pa. 1962), re-adopted the view that there is no pendent jurisdiction over such claims and that discretionary intervention under Rule 24(b) requires independent jurisdiction. The result thus remains consistent with the rules on permissive joinder of parties in diversity suits, 3A MOORE ¶20.03, 20.08 and with the rules on pendent jurisdiction, 3A MOORE ¶18.07. The decision in effect holds to the view that reformation is the job of Congress and not the courts.
courts have not been expansive with theories of pendent jurisdiction. Thus, the fact that the intervener's claim shares some commonality with an original federal question does not always mean that the intervener's claim will also have an independent federal basis of jurisdiction to sustain it. For example: where the original suit is in admiralty, there is no admiralty jurisdiction over an intervener's claim on a non-maritime contract;\(^\text{111}\) where the original action is a condemnation suit by the United States, there is no jurisdiction over a claim by the subsequent grantee of the property;\(^\text{112}\) and where original suits are brought by the Secretary of Labor, there is no jurisdiction over claims by an intervening plaintiff,\(^\text{113}\) or intervening defendants,\(^\text{114}\) unless they could have been parties in original suits.

Intervention in a class action by a member of the class need not be supported by independent federal jurisdictional grounds. This principle should apply even to class actions of the type that would have been categorized as spurious class actions under former Rule 23.\(^\text{115}\)

2. Venue—Assuming that the court can take jurisdiction over the counterclaim, should the plaintiff be allowed to raise an


\(^{112}\) Toles v. United States, 371 F.2d 784 (10th Cir. 1967) (because of the anti-assignment act, purchasers of land who purchased after entry upon the land by government, were not permitted to intervene in suit to fix compensation; any claim that the purchasers might have against their grantors under a warranty was an independent claim requiring a separate jurisdictional basis not present because of want of diversity).

\(^{113}\) Stein v. Wirtz, 366 F.2d 188 (10th Cir. 1966), cert. denied, 388 U.S. 996 (1967) (since union member whose complaint resulted in action by Secretary of Labor to redress alleged infringement of member's right to run for union office could not bring suit originally, there is no way for him to do so by intervention after Secretary and union agreed to hold suit in abeyance).

\(^{114}\) Durkin v. Pet Milk Co., 14 F.R.D. 374 (W.D. Ark. 1953) (milk haulers not allowed to intervene to assert they were independent contractors and not employees of defendant in FLSA injunction suit; participation as amici curiae allowed).


Contra, Keavy v. Anthony, 2 F.R.D. 19 (D.R.I. 1941). See Gentry v. Hibernia Bank, 23 Fed. Rules Serv. 23a.53, Case 2 (N.C. Cal. 1956) (where the same attorneys who represented the two Oregon plaintiffs, suing as class representatives of California bank depositors, also represented the fifty-nine California interveners, the court denied intervention, stating, "The so-called interventions are only for the purpose of avoiding the jurisdictional barrier, and not in the real spirit of intervention... .")
objection as to venue? It is submitted that since the intervening defendant's counterclaim, whether compulsory or permissive, must be closely related to the original suit in order to justify the intervention, the plaintiff should not be allowed to object to venue.\footnote{116}

VII. Other Procedural Consequences of the Right to Intervene

An amicus curiae is one who has the right to present argument at the discretion of the court.\footnote{117} On the other hand, a party is one who has full procedural rights in the litigation. The question arises as to the wisdom and the power of the trial judge to provide interveners with unique statuses ranging between the extremes of amicus curiae and full party.\footnote{118}

The traditional theory has been that if the petitioning party has the right to intervene, then upon his admission, all the procedural rights of a party flow to the intervener. Thus, rights to make motions, take discovery, present evidence, cross examine, and to demand a jury trial theoretically accrue to the intervener of right.\footnote{119} Of course if the intervention of right has not been timely, and the court could therefore deny intervention altogether, the court should be able to condition even intervention of right upon the waiver of some of these procedural rights on the theory that the intervener accrues to these rights only at the particular stage of the litigation at which he enters and must be bound by the proceedings to date. Similarly, where the intervention is permissive only, even if timely, the court should have the power to condition the entry upon waiver of some procedural rights which would unduly lengthen the proceedings.


\footnote{117} Note, Amicus Curiae Participation—At the Court's Discretion, 55 Ky. L.J. 864 (1967).

\footnote{118} Shapiro, supra note 84, at 752-56; see note 164 infra.

\footnote{119} It might be argued that intervention is historically an equitable remedy and that the intervener has no right to demand a jury trial, cf. note 122 infra; \textit{but see Dairy Queen, Inc. v. Wood}, 369 U.S. 469 (1962).

The Advisory Committee Note to the 1966 Amendment of Rule 24(a) indicates that intervention of right is subject to court regulation:

An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.
Under proper circumstances, the defendant intervener's demand for a jury trial may be denied by conditioning the intervention upon his waiver of the right to jury trial.\textsuperscript{120} Where an insurance company moves to intervene as subrogated plaintiff, the court may limit the scope of intervention to exclude its appearance before the jury.\textsuperscript{121} It has been held that a party cannot demand a jury trial as to claims of interveners who have been permitted to come in to take the benefit of a judgment in a class suit where the issues have been fully tried as between the original parties without a jury.\textsuperscript{122}

Another case shows, however, that once intervention has been allowed, the original parties may not stipulate away the rights of the intervener.\textsuperscript{123} Similarly, an order of dismissal against the original plaintiff for its refusal to obey a discovery order, cannot apply to an intervening plaintiff who has no control over the discoverable documents.\textsuperscript{124} The opportunity to use discovery weapons may be one of the significant procedural consequences causing dispute over the right to intervene in the first place.\textsuperscript{125}

**VIII. Applicant's Rights to Appeal**

As a general rule, unless an order fits within one of the exceptions for interlocutory decisions,\textsuperscript{128} a decision of a district court

\textsuperscript{120} United States ex rel. Brown & Bryan Lumber Co. v. Massachusetts Bonding and Ins. Co., 303 F.2d 823 (3rd Cir. 1962) (counsel for original defendant surety was also counsel for proposed intervener defendant contractor and was guilty of dilatory tactics in holding his motion for intervention until case was marked ready for trial).

\textsuperscript{121} Harris v. General Coach Works, 37 F.R.D. 343 (E.D. Mich. 1964) (workmen's compensation carrier moving to intervene in employee's tort suit against third party; decided by referral to Michigan practice).

\textsuperscript{122} Dickinson v. Binke, 11 FED. RULES SERV. 24c.31, Case 1 (S.D.N.Y. 1948). The court said that "It would be preposterous to try the basic issues of this case all over again," aff'd, (in opinion of Judge Clark) Dickinson v. Burnham, 197 F.2d 973, 981 (2d Cir. 1952), cert. denied, 344 U.S. 875 (1952), stating: "Left only was the question of 'essentially supervisory jurisdiction over the distribution among the class' of those entitled to the fund. . . . Nor was there any right to a jury in the fixing of rights inter se in this device coming straight from equity."


\textsuperscript{124} Societe Internationale v. McGranery, 111 F. Supp. 435 (D.C. Cir. 1953) (dictum) (suit by Swiss holding company as plaintiff to recover seized property; intervention by stockholders as plaintiffs).

\textsuperscript{125} Cf. Note, The Real Party In Interest Rule Revitalized: Recognizing Defendant's Interest in the Determination of Proper Parties Plaintiff, 55 CALIF. L. REV. 1452 (1967) (emphasizing the discovery weapons available against persons designated as "parties" as opposed to "persons").

must be “final” in order to be appealable.\textsuperscript{127} Under this standard, it is clear that a district court order allowing intervention is not a final order and is not appealable as such.\textsuperscript{128} It would appear that the converse should also be true: that an order denying intervention is appealable since it finally excludes the applicant from participation in the litigation and is thus a final order as to him. However, the cases do not support this conclusion. Rather, a jurisdictional rule has arisen under which an order denying intervention is appealable if intervention was a matter of right;\textsuperscript{129} but if intervention is permissive only, the order denying intervention is appealable only if the court has abused its discretion.\textsuperscript{130}

Today, it is difficult to find a wholly consistent rationale for this rule. One justification is that an order denying intervention is not final and appealable when the applicant has open to him other adequate means of protecting his right.\textsuperscript{131} This theory might


\textsuperscript{131} See Edmondson v. Nebraska \textit{ex rel} Meyer, 383 F.2d 23 (8th Cir. 1967); Lipsett v. United States, 359 F.2d 703 (2d Cir. 1966); Fox v. Glickman Corp., 355 F.2d 161 (2d Cir. 1965), cert. denied, 384 U.S. 960 (1966); Mendenhall v. Allen, 346 F.2d 326 (7th Cir. 1965); Levin v. Ruby Trading Corp., 333 F.2d 502 (2d Cir. 1964); Flight Engineers' Int'l Ass'n v. National Mediation Bd., 338 F.2d 280 (D.C. Cir. 1964); Rosenblum v. United States, 300 F.2d 843 (1st Cir. 1962); Schockett v. Bromley, 193 F.2d 257 (10th Cir. 1952); Pennington v. Missouri Pac. R.R., 239 F.2d 352 (5th Cir. 1956); Clark v. Sandusky, 205 F.2d 915 (7th Cir. 1953).
have been sufficient at an earlier stage when intervention of right was generally equivalent to the absence of an alternative remedy, and when, on the other hand, permissive intervention generally covered situations where the petitioner had an alternative remedy. But with the modern expansion of intervention of right into areas where the applicant has an alternative remedy, the theory becomes inadequate to explain the rule. In any event, the rule tends to be a fictional barrier insofar as it pretends to restrict appellate jurisdiction. Since the rule makes the initial question of jurisdiction turn on the merits of the question being raised, i.e., whether there was intervention of right or an abuse of discretion, as a practical matter, the appellate court must decide the merits whether it dismisses the appeal, affirms, or

132 See Credits Communication Co. v. United States, 177 U.S. 311 (1900); Comment, Federal Practice: Appealability of an Order Denying Intervention, 11 Okla. L. Rev. 80 (1958) (defining intervention of right in terms of the degree of finality if the application for intervention is denied).

133 See Levin v. Ruby Trading Corp., 333 F.2d 592 (2d Cir. 1964).

134 See also the related theory in Bankruptcy proceedings that certain rulings lie solely within the discretion of the trial court and are reviewable only for an abuse of that discretion, 2 Collier on Bankruptcy ¶24.38, 24.39, 24.40 (14th ed. by Moore & Oglebay 1968).

135 It is possible that the appellate courts' expansion of the absolute right to intervene was a reaction to the narrow scope of appealability and reviewability of denials of the permissive right to intervene. See Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 Harv. L. Rev. 751 (1968).

136 See Sam Fox Publishing Co. v. United States, 366 U.S. 683, 687-88 (1961) ("[T]he controlling question on the issue of jurisdiction, the answer to which also determines the merits of this appeal, is whether the appellants were entitled to intervene in those proceedings as 'of right'; appeal dismissed in an eleven page opinion."); See Fox v. Glickman Corp., 355 F.2d 161 (2d Cir. 1965) (affirming denial of intervention).
reverses\textsuperscript{137} the lower court's decision. The appropriate solution, therefore, should be to treat all denials of intervention as final orders, but to reverse only where there was intervention of right or an abuse of discretion in denying permissive intervention.\textsuperscript{138}

The appeal procedure that existed prior to 1937 has been changed by the Federal Rules.\textsuperscript{139} In the usual case where the appeal is to a court of appeals, the applicant for intervention whose petition has been denied files a notice of appeal, and further proceeds in accordance with the Federal Rules of Appellate Procedure.\textsuperscript{140} If the appellate court finds that intervention was properly denied, it may either dismiss the appeal or affirm the order on the merits; cases may be found where each course has been taken. Whichever disposition is made, the practice has been for the court to examine the record and not summarily to dismiss the appeal.\textsuperscript{141}

It has generally been the rule that if the appeal in the main proceeding goes directly to the Supreme Court, an appeal from an order denying intervention will also go to the Supreme Court.\textsuperscript{142} But in \textit{Shenandoah Valley Broadcasting, Inc. v. Ameri-}

\textsuperscript{137} See \textit{Levin v. Ruby Trading Corp.}, 333 F.2d 592 (2d Cir. 1964), where Judge Friendly states:

Where the sole ground urged for reversal of an order denying permissive intervention is abuse of the trial judge's discretion, we would be reluctant to permit the fragmentation and delay that would result from allowing such orders to be appealed, at least so long as the applicant has other means of asserting his rights. . . . On the other hand, it is settled law that if an applicant is entitled to intervene as of right an order denying intervention is appealable. . . . Since this makes appealability turn on the merits, it is not a very effective or useful limitation of appellate jurisdiction; the propriety of the denial by the district judge must be examined before the appellate court knows whether it has jurisdiction, and the only consequence of the restriction on appealability is that on finding the district judge was right, it will dismiss the appeal rather than affirm. . . . \textit{Id.} at 594.

\textsuperscript{138} Shapiro, \textit{Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators}, 81 HAV. L. REV. 751 (1968); Comment, \textit{Federal Practices: Appealability of an Order Denying Intervention}, 11 OKLA. L. REV. 80 (1958). Professor Shapiro also suggests that in order to blunt frivolous appeals, the trial and appellate courts could continue the pre-trial proceedings, pending the appeal.

\textsuperscript{139} For prior practice, see 4 Moore \texttt{\$24.15}.

\textsuperscript{140} Effective July 1, 1963, replacing \textit{Fed. R. Civ. P. 73-76}. The Supreme Court Rules govern the procedure on appeals to the Supreme Court, 5 \textit{BENDER'S FEDERAL PRACTICE FORMS 1} (1967).

\textsuperscript{141} See \textit{Sam Fox Publishing Co. v. United States}, 366 U.S. 683 (1961); \textit{Fox v. Glickman Corp.}, 355 F.2d 161 (2d Cir. 1965); \textit{Levin v. Ruby Trading Corp.}, 333 F.2d 592 (2d Cir. 1964), quoted in note 137 supra.

\textsuperscript{142} \textit{Sam Fox Publishing Co. v. United States}, 366 U.S. 683 (1961). See \textit{Local 283, UAW v. Scofield}, 382 U.S. 205 (1965) (where proceedings were (Continued on next page)
Society of Composers, Authors and Publishers, the Supreme Court routed the appeal (from the order denying intervention) to the Court of Appeals. In 1962, a group of television broadcasters made application to the Southern District of New York under an antitrust consent decree. They asked the court to order the American Society of Composers and Authors (ASCAP) to grant them a certain kind of license. The application was denied on the grounds that the consent decree did not give them a right to this type of license, and that since they were not parties, they could not petition for a change in the consent decree. The applicants took simultaneous appeals, the first to the Supreme Court, and the second to the Court of Appeals. The Supreme Court dismissed the first appeal "for want of jurisdiction" without further explanation. The Court of Appeals, dismissed the second appeal, believing, according to the traditional rule, that the Supreme Court had exclusive jurisdiction over the applicants' appeal, since it had jurisdiction over appeals from final judgments in the main proceeding. But the applicants applied for certiorari, and the Supreme Court summarily reversed and remanded to the Court of Appeals. The Supreme Court explained:

The dismissal that we heretofore entered was based on our unexpressed view that the appeal from an ancillary order of this type was not within the Expediting Act. Direct appeals to this Court are authorized by that Act only from final judgments where the United States is a complainant. The purpose of the Act is to expedite litigation of 'great and general importance' where the Government is the aggrieved party. See 36 Cong. Rec. 1979 (1903). The controversy which is disposed of by the District Court's order is entirely between private

(Footnote continued from preceding page)

brought in courts of appeals to review and enforce orders of the National Labor Relations Board, and the courts of appeals rejected unions' applications to intervene, the applicants could petition the Supreme Court for certiorari to reverse the denials of intervention under 28 U.S.C. § 254(1) (1964), providing that cases in the courts of appeals may be reviewed by writ of certiorari granted upon the petition of any "party" to any civil case.)

147 Terminal R.R. Ass'n v. United States, 266 U.S. 17 (1924) (Supreme Court had jurisdiction over ruling on a collateral issue subsequent to the final decree in an anti-trust suit).
148 317 F.2d 90 (2d Cir. 1963).
parties and is outside the mainstream of the litigation in which the Government is directly concerned. Compare *Terminal R. R. Assn. v. United States*, 266 U.S. 17; *Aluminum Co. of America v. United States*, 302 U.S. 230. In these circumstances, and the order being final rather than interlocutory, we believe that the appeal does lie under 28 U.S.C. § 1291. The petition is therefore granted and the judgment is reversed and the cause remanded to the Court of Appeals for consideration on its merits.\(^{150}\)

On remand, the Court of Appeals found that the appeal was timely,\(^{151}\) and affirmed the district court’s denial of the application on the merits.\(^{152}\) It should be noted that this case did not involve a routine intervention but rather an application under the terms of a specific consent decree. However, the analogy is very close.\(^{153}\) In future cases where the appeal in the main proceeding lies directly to the Supreme Court,\(^{154}\) the argument may now be made that the denial of intervention, while concededly a final order, should be considered an ancillary order “outside the mainstream” of the direct appeals statute, and thus should be appealed to the Court of Appeals under 28 U.S.C. § 1291.\(^{155}\)

IX. APPRAISAL AND SUGGESTED CHANGES

A. Procedure

The mechanical provisions of Rule 24 (c) do not present great

\(^{150}\) 375 U.S. 39, 40-41 (1963). As indicated in the quote, the Supreme Court first remanded for consideration on the merits. However, since the appeal had been taken 58 days after entry of the order, there was thus an issue as to whether the appeal was untimely as governed by the 60 day period for ordinary appeals, or whether it was timely as within the 60 day period governing appeals in suits in which the United States is a party. The Court therefore, on rehearing, modified its remand to read “for further proceedings in conformity with this opinion.” 375 U.S. 994 (1964).

\(^{151}\) See this issue described in note 150 supra.

\(^{152}\) 331 F.2d 117 (2d Cir. 1964).

\(^{153}\) With the parties arguing this analogy, the Court of Appeals originally speculated that the Supreme Court’s dismissal “for want of jurisdiction” may have been similar to an order denying intervention as of right and was therefore an order dismissing the appeal, 317 F.2d 90, 93-94 (2d Cir. 1963).

\(^{154}\) It should be noted that direct appeal to the Supreme Court in this case lay under § 2 of the Expediting Act (1903), 32 Stat. 823, as amended, 15 U.S.C. § 29 (1964), 49 U.S.C. § 45 (1964), but the policy expressed by the Supreme Court in *Shenandoah* should be equally applicable to other areas of direct appeal jurisdiction. See note 150 supra.

\(^{155}\) Compare the *Shenandoah* case, 375 U.S. 39 (1964), with the *El Paso Natural Gas*, case 386 U.S. 129 (1967), where direct appeal to the Supreme Court was allowed, without discussion of *Shenandoah*, presumably because the United States in *El Paso* was vigorously contesting the intervention.
difficulty, nor do they show a need for change. However, one theoretical question might be raised. Rule 24 (c) requires that the motion for intervention “be accompanied by a pleading setting forth the claim or defense for which intervention is sought.” The result is that the intervener must generally identify himself either as a plaintiff or as a defendant in his pleading and proceed to claim, answer, cross-claim, counterclaim, implead or reply. However, these traditional plaintiff-defendant pleadings are sometimes a difficult straitjacket to impose upon the intervener whose claim is basically opposed to both of the original parties. Perhaps Rule 24 (c) in the future might be amended to recognize that the intervener can simply claim against one or both of the original parties without choosing to categorize himself as a defendant or as a plaintiff. However, such an amendment would be unwise without correlating it to the rules on counterclaims, cross-claims and party alignment. Further, past decisions under present Rule 24 (c) have alleviated most theoretical objection. For, as we have seen, in disputes over adequacy of representation, where the intervener's position is identical to a party already in the suit, the courts have been lenient in delaying the requirement that the intervener present a pleading. In other three-way type disputes, the concept “claim or defense” has been broad enough to include whatever unique interest the intervener may wish to assert, even though the intervener might have to choose whether to enter as

156 Federal Rule of Appellate Procedure 15(d), effective July 1, 1968, has no requirement of a pleading and provides simply that a person who desires to intervene in an agency review proceeding shall file a motion for leave to intervene, and that “the motion shall contain a concise statement of the interest of the moving party and the grounds upon which intervention is sought.” Cf. 4 Moore ¶24.02 n.1.

A good review of intervention in administrative review proceedings is contained in Local 283, UAW v. Scofield, 382 U.S. 205 (1965). Under Section 10(f) of the National Labor Relations Act, actions may be brought in the Court of Appeals to review orders of the National Labor Relations Board. 61 Stat. 148, as amended, 29 U.S.C. § 160(f) (1964). The Supreme Court held that the Act, though silent on the subject, must be read as intending to confer an absolute right of intervention in the Court of Appeals on the party who was successful in the proceeding before the Board. Chief Justice Warren, in giving an extensive analysis of the reasons supporting intervention, grounded the decision on the policy of avoiding multiple appeals. That is, if the successful party in the proceeding before the Board were denied participation in the appellate review, and the Court of Appeals were to reverse the Board's decision, the excluded party might later be able to raise a subsequent appeal. Since the rationale of the decision is based on the prevention of multiple appeals, the rule announced covers all successful parties to the proceedings before the Board, whether they are successful charged parties, or successful charging parties.

157 See note 20 supra.
a plaintiff with a complaint and cross-claim, or as a defendant with an answer, counterclaim and cross-claim.¹⁵⁸

**B. The Power to Intervene**

The main thrust of the 1966 amendments focused on Rules 19 and 23.¹⁵⁹ Once their revision was accepted, the revision of Rule 24 was a necessary consequence. But there were also two specific criticisms of old Rule 24: that its res judicata test was too rigid and that its “property” dichotomy was irrelevant. Thus amended Rule 24 of 1966 reflects three themes: (1) the theory and language of the Rule should be correlated with new Rules 19 and 23; (2) there should be no artificial distinction between property and non-property cases; (3) the basic test should be the degree to which the intervener will be practically affected and not whether he will be bound under doctrines of res judicata.

It is too early to evaluate the operation of the new Rule. However, a theoretical criticism may be raised that the amendment of Rule 24 did not remain totally faithful to the revision theory of new Rules 19 and 23.¹⁶⁰ That theory is that the rules should express factors for decision rather than definitional categories.¹⁶¹ It

¹⁵⁸ See note 87 supra.
¹⁶¹ The Advisory Committee’s Notes to the 1966 Amendments of Fed. R. Civ. P. 19, 23, and 24 reflect this theme, see Kaplan, supra note 159, at 364-71, 380-86; see also text, Part IV B, supra. The views of Judge Jerome Frank may also be appropriate here. In summing up his plea for realism in the supervision of the trial judge, he states:

Let us revise many (perhaps not all) of the substantive legal rules which are now worded in such a way that they create the illusion of excluding all judicial discretion. Let us reword them so that they will become on their face what in truth they now often are, i.e. but general guides for trial judges in deciding specific law suits. The ‘sovereignty’ of the trial judge, now largely concealed, would be acknowledged. An upper court would have the power it now has on an appeal from a decision involving a rule which now expressly confers discretion on the trial judge; i.e. the upper court, in addition to correcting important procedural errors, would reverse for any ‘abuse’ of discretion.

I confess that, when I write down that tentative suggestion I grow frightened, so strong in me is the traditional lawyer’s attitude. J. Frank, Courts on Trial 156 (1949).
is submitted that further revision ought to follow the following lines: 162

1. Distinctions between intervention of right and permissive intervention are artificial and have led to a precedential tangle of analytical distinctions. 163 The Rule ought to recognize simply that intervention is in the discretion of the trial judge and ought to elaborate the factors that he should weigh in making that decision. Just as the 1966 amendment of Rule 24 abolished the artificial dichotomy between property and non-property cases, a new revision should rid us of the permissive-absolute distinction.

2. The apparent dilemma between total intervention and total non-intervention should be broken by having the Rule explicitly recognize the judge's creative power to grant intervention under reasonable restrictions as to the procedural consequences of the intervention. 164 At the same time, the judge should also have the power, when he denies intervention, to impose reasonable conditions upon the original parties either as to their representation of the applicant's interest or as to the impact the decision will have upon the interest of the absent applicant. Rules 19 and 23, and Rule 42 already recognize these types of powers in the trial judges. The same powers should explicitly be extended to intervention cases. 165

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162 Professor Robert Shapiro has made an excellent analysis of new Fed. R. Civ. P. 24, and has drafted a specific proposal for its revision; Shapiro, supra note 138, at 761-63. The suggestions following in the text would substantially support his proposed revision.

163 See Part III A, supra, describing different results that supposedly correlate with the distinction: appealability, reviewability, ancillary jurisdiction, and status as a party. It should also be noted that Equity Rule 37, which governed intervention prior to the Federal Rules, made no distinction between intervention of right and permissive intervention, 4 Moody 24.05, 24.07[15].

164 Professor Shapiro's proposed revision contains a paragraph entitled "Limited Intervention." See Shapiro, supra note 138, at 762.

Consider also the new options of a member of a class under Rule 23(b)(2) to (1) do nothing and be bound, (2) to exclude himself by opting out, or (3) to enter an appearance through counsel. Professor Kaplan suggests that this "special appearance" in option (3) is not the same as intervention under Rule 24, but that the significance may not be great since both the appearance and full intervention should be subject to court limitation, Kaplan, supra note 159, at 392 n.137; 403 n.178, and Shapiro, supra note 138, at 731 n.45.

165 Lederleitner & Nolan, Criteria For Intervention, 1967 U. Ill. L.F. 299, 304. The authors urge that consolidation or severance presents the same question as intervention or nonintervention and that the two areas must be developed on a consistent basis. For one such basis, see Schwartz, Severance—A Means of Minimizing the Role of Burden and Expense in Determining the Outcome of Litigation, 20 Vand. L. Rev. 1197 (1967). See also Note, The Litigant and the Absentee in Federal Multiparty Practice, 116 U. Pa. L. Rev. 555, concluding that (Continued on next page)
3. All denials of intervention should be made final and appealable. Appealability and reviewability are now confused with a welter of distinctions based on permissive and absolute intervention. As a practical matter, despite this legal flack, the unsuccessful applicant can receive some sort of review and thus cause trial delay and appellate burden. The solution is to abolish the distinction between permissive and absolute intervention, place the decision in the discretion of the trial judge, make all denials final, appealable orders, make the standard for appellate review "abuse of discretion," and give the trial judge power to continue pre-trial proceedings pending review.168

4. Where procedural convenience dictates that the intervener's claim should be tried with the original controversy, then modern theories of pendent and ancillary jurisdiction should be used to sustain federal jurisdiction. Barriers that are thought to exist here under Rule 82 are barriers that are sometimes based on old procedural limitations.167 But, as they disappear, it should be possible for the constitutional, congressional and judicial standards of the past to be re-evaluated to yield results dictated by common sense.168 Of course, since jurisdiction is ultimately a political question, it is necessary for Congress to make the molar movements,169 but even with its failure to act, the judiciary should be able to make some molecular progress.170

5. The factors for the judge to consider in granting or denying

(Footnote continued from preceding page)

FRED. R. CIV. P. 23 and 24 in the future must be made to provide greater protection of the practical interest of absentees, or that otherwise, court rulings will continue to favor the absentee at the expense of the litigant.166 See text, Part VIII, supra.

166 See discussion by Judge Clark in Lesnik v. Public Industrials Corp., 144 F.2d 968, 973-74 (2d Cir. 1944).

168 Compare Hurn v. Ourler, 289 U.S. 238 (1933), relating pendent jurisdiction to analytical distinction between one or two causes of action, with United Mine Workers v. Gibbs, 383 U.S. 715 (1966), relating pendent jurisdiction to practical considerations of judicial administration.

169 Such action might be founded on The American Law Institute's proposals for revision of the Judicial Code to deal with the problem of multiparty, multi-jurisdiction litigation. These proposals are predicated upon the constitutional permissibility of "minimal diversity" as a jurisdictional base, see State Farm & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967). Professor Shapiro, supra note 138, at 764, proposes the following amendment of 28 U.S.C. § 1332 (1964):

In the determination of jurisdiction with respect to any civil action under this section, the citizenship or other status of any intervener shall not be considered, if his intervention is properly regarded as part of the same case or controversy as the original action.

170 It is unfortunate that existing doctrine was thought to require the retraction of Judge Luongo's novel theories. See notes 108, 110 supra.
intervention should be explicitly stated in the Rule. Present Rule 24(a) and (b) articulate some of the factors, but only in an implicit, historical way. These factors should be stated in terms of the concrete referents around which modern party rules should be built: (1) the interests of the intervener; (2) the interests of the original parties; and, (3) the interests of the court in efficient judicial administration. By focusing the attention of the judge on such referents, the Rule should aid him in deciding whether it is best to dispose of the whole controversy with intervention, to allow multiplicity by denying intervention, or to compromise these two extremes by creating limited intervention. Such factors would include:

(1) The nature of the applicant's interest.\footnote{The identity and status of the applicant in relation to the substantive law will define the interest of the applicant. It may be that the substantive law will be interpreted to grant the applicant the absolute, unconditional right to intervene as a matter of law without regard to the other factors subsequently listed. On the other hand, the relevant substantive law may define the interest as one which should be protected by intervention only if the other factors are satisfied. In any event, the express inclusions in present Fed. R. Civ. P. 24(a)(b) of the absolute and conditional statutory rights to intervene are superfluous and should be eliminated. Cf. criticism of a similar statutory provision of Fed. R. Civ. P. 17(a) in Atkinson, The Real Party In Interest Rule: A Plea for Its Abolition, 32 N.Y.U.L. Rev. 926, 957-58 (1957), but see, Shapiro, supra note 138, at 757-59, 761, proposing to retain express provision for statutory intervention.}

(2) The representation of the applicant's interest by the original parties and their attorneys.\footnote{Some of the considerations under this factor are set out in note 69 supra. Other considerations would be the interests and objectives of attorneys, see note 3 supra.}

(3) The effectiveness of the remedies the applicant will have if intervention is denied.\footnote{This factor is a restatement of the present requirement that the intervener of right be "so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest." See Note, Federal Civil Procedure: Intervention of Right Granted Private Party in Government Antitrust Suit Under New Rule 24(a)(2), 1968 Duke L. J. 117, 124 and text, Part VI supra.}

(4) The nature of the interest of the original parties.\footnote{Again, the identity and status of the original parties in relation to the relevant substantive law will define the nature of their interest. This factor of necessity must be analyzed in conjunction with an analysis of the applicant's interest, see factor number (1), note 171 supra.}

(5) The prejudice to the interests of the original parties if intervention is allowed.\footnote{This factor is a restatement of the provision in Fed. R. Civ. P. 24(b) that the judge must consider "whether intervention will unduly delay or prejudice the adjudication rights of the original parties." See 4 Moore \[24.10[4].}
(6) The impact on the jurisdiction of the court if intervention is allowed.\(^{176}\)

(7) The time at which the application is made.\(^{177}\)

(8) The impact on the fair and efficient administration of justice if intervention is allowed or denied.\(^{178}\)

(9) The possibility of making orders subjecting the applicant to reasonable conditions if intervention is granted, or in subjecting the original parties to reasonable conditions if intervention is denied.\(^{179}\)

Some obvious shortcomings can be identified in the approach outlined above:

(1) Eliminating the distinction between permissive and ab-

\(^{176}\) Where the presence of the applicant might defeat jurisdiction, or where his claim might not lie within the subject matter jurisdiction of the court, the judge would justify or reject intervention in conjunction with the practical policies supporting ancillary or pendent jurisdiction. Under this provision he would not be invited to choose between intervention of right and permissive intervention in a vacuum from the jurisdictional consequences, and would be urged to square his decision with results under FED. R. Civ. P. 18, 19, 20 and 23.

\(^{177}\) This factor is in part a restatement of the present requirement that all motions for intervention be made "[u]pon timely application." However, in addition to this possibility of acting as a total bar to intervention, time should also be expressly considered as one of the factors in defining the status of the intervenor if intervention is allowed. 4 Moore \(^{424.18[1]}\). See also the possibility of delaying intervention until the trial stage at which representation becomes inadequate, notes 27, 74 supra.

\(^{178}\) The judge here could properly consider all relevant policies of judicial administration as they relate to unique factors about the case before him, e.g., the role of burden and expense in determining the outcome of litigation, Schwartz, supra note 2; the avoidance of multiplicity, Kaufman v. Societe Internationale, 349 U.S. 156 (1952); non-interference with government litigation and settlement process, note 28 supra; elimination of wasteful and dilatory appeal practice, note 38 supra; recognition of public interest in the litigation and promotion of public confidence in the judicial system, note 46 supra; unified solution of controversy consistent with efficiency and due process, text at note 48 supra; prevention of strategic creation of inconsistency and confusion in judicial outcomes, note 63 supra; elimination of conflicts of interests in legal representation, note 69 supra; regulation of attorney's fees in relation to real contribution to client and the court, note 74 supra; maximization of judicial resources, text at note 82 supra; regulation of discovery devices, note 125 supra; prevention of fragmented appellate review, note 137 supra; prevention of trial delay, note 138 supra; channeling of appeals to appropriate courts, text at note 150 supra; prevention of multiple appeals, note 156 supra.

Thus, the above factor should be read to incorporate the principle that FED. R. Civ. P. 24(a) is not "a comprehensive inventory of the allowable instances for intervention." Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, 505 (1941).

\(^{179}\) The judge would be expressly authorized and encouraged to experiment with discretionary devices evolved from experience with "big" cases and multi-party, multi-issue litigation under other rules, e.g., class suits, consolidation, severance, discovery, and pre-trial orders. See note 164 supra, and discussion of administrative agency practice in Shapiro, supra note 138, at 752-56.
absolute intervention will unravel the correlative consequences of that distinction, namely: appealability, reviewability, ancillary jurisdiction and full status as a party. This objection is answered by pointing out that each correlative consequence should be evaluated on the basis of its own rationale, and not on the basis of a definitional distinction.

(2) A second objection is that eliminating absolute intervention and placing all intervention in the discretion of the trial judge may decrease the frequency of intervention in situations where it ought to be increased. This fear is exaggerated. The discretion of the Equity and Admiralty courts was the original source of intervention prior to any definition of a right to intervene. Further any denial of present “right” would also be an “abuse of discretion.”

(3) A third criticism is that the creation of limited intervention statutes will lead to difficulty in administering standards of appealability and reviewability. For, if intervention is granted on a restricted basis, there will still be a question whether the applicant should be able to appeal immediately on the ground that his rights to intervene and participate fully have been denied. On the other hand, if an appeal is not immediately granted, the question still remains whether the creation of a restricted intervention status by the judge will create a great potential for reversible error as an abuse of discretion by the trial judge. The

180 See text Part III A supra; see also note 184 infra, discussing distinction in relation to res judicata and failure to intervene.


182 4 *Moore* ¶24.03.

183 See comments on *Textile Workers Union v. The Allendale Co.*, 226 F.2d 765 (D.C. Cir. 1955), where the Court reversed a denial of intervention and held intervention was a matter of right. One criticizes the result and adds that the decision tends to make permissive intervention almost a matter of right. 24 Geo. W. L. Rev. 347, 350 (1956). The other agrees with the result, but says the decision should have been based on permissive rather than absolute right. 41 *Va. L. Rev.* 1118, 1121 (1955). But see 4 *Moore* ¶24.15 at n.5 indicating reversals for abuse of discretion are rare.
latter objection is answered by pointing to the many similar procedural rulings which ordinarily must be saved until the end of the trial and must be reviewed under the general standard of abuse of discretion.

(4) A fourth criticism is that the creation of a limited intervention status will create problems for the application of due process and res judicata doctrines. More precisely, the question will arise whether a limited intervener will be bound as a party to the litigation when his procedural rights to participate in the litigation have not been fully recognized. This objection is in part answered by asserting that res judicata is properly a question for the second court to determine in the context of a subsequent litigation and the changing concepts of due process of law.184

X. CONCLUSION

The evolution of intervention practice found its historical bases in Roman law, civil law, ecclesiastical courts, admiralty,

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184 It is also interesting to note the possibility that a failure to intervene, when a person had an opportunity to do so, may bind him to a judgment just as if he had intervened as a party. However, in the past, at least as to permissive intervention, "[t]he rule is general that persons who might have made themselves parties to a litigation between strangers, but did not, are not bound by the judgment." Gratiot State Bank v. Johnson, 249 U.S. 246, 249 (1919), discussed in Moore 41918.-3. Nevertheless, the Supreme Court, in a recent dictum, raised the possibility that deliberate failure to intervene of right might bind the person as if he had been a party. In Provident Bank & Trust Co. v. Patterson, 390 U.S. 102, 114 (1968), the Supreme Court reversed an appellate court for finding that Dutcher was an absent, indispensable party under new Fed. R. Civ. P. 19, and stated:

If, as has happened, the three plaintiffs obtain a judgment against the insurance company on the permission issue, Dutcher may still claim that as a nonparty he is not estopped by that judgment from relitigating the issue. At that point it might be argued that Dutcher should be bound by the previous decision because, although technically a nonparty, he had purposely bypassed an adequate opportunity to intervene. We do not now decide whether such an argument would be correct under the circumstances of this case. If, however, Dutcher is properly foreclosed by his failure to intervene in the present litigation, then the joinder issue considered in the Court of Appeals vanishes, for any rights of Dutcher's have been lost by his own inaction.

If Dutcher is not foreclosed by his failure to intervene below, then he is not 'bound' by the judgment in favor of the insurance company and, in theory, he has not been harmed.

Consider also, the possible new evolution under Rule 19 allowing defendant to force joinder of an additional plaintiff injured in the same accident as original plaintiff. Davila Mendez v. Vatican Shrimp Co., 43 F.R.D. 294 (S.D. Tex 1967), discussed in Semmel, Collateral Estoppel, Mutuality and Joinder of Parties, 63 Col. L. Rev. 1457, 1480-81 (1968). Professor Semmel concludes that emerging (Continued on next page)
equity, possessory legal actions, bankruptcy reorganizations, class suits and administrative hearings. Modern problems of intervention in judicial proceedings are now occurring in the context of rapid changes in other areas of substantive and procedural law. Thus the expansion of constitutional concepts of standing, the lowering of political question barriers, the free use of the declaratory judgment, and the creation of new equitable remedies, all tend to push the courts out of narrow judicial function molds into broader legislative and administrative activity. At the same time, this trend toward expanded remedial rights is evolving under a national commitment to provide legal representation for fundamental individual interests previously ignored. On other fronts, the increasing complexity and interlocking dependency of modern transactions continues to supply the impetus for multiparty, multi-issue court litigation in many new areas—areas which develop rapidly before legislative regulation can delimit or delegate them back to administrative processes. In this context, the 1966 amendments of Rules 19, 23 and 24 emphasize the factors for the judge to consider in joining all persons materially interested in litigation, or in the alternative, the practical means by which he may protect absent persons who are not joined. The result has been that the private power of the initial parties' attorneys to control their lawsuit under common law adversary assumptions has yielded to the common good of all interested persons and the demands of efficient judicial administration. This shift has placed more discretionary power in the trial judge to determine the appropriate parties to the litigation and the terms under which their attorneys will participate. In this context, the trend of decisions under Rule 24 will emphasize the decisional factors common to all party rules and their correlation to questions of intervention. Future amendments of Rule 24 will hopefully continue to simplify and unify these fundamental policies of efficiency and fairness.

(Footnote continued from preceding page)

principles of res judicata should play a role in achieving the objective of modern party rules to bring in all "persons materially interested in the subject of the action."