Michigan Law Review

Volume 40 | Issue 1

1941

TRADE RESTRAINTS - ANTITRUST LAWS - CONSENT DECREES - RIGHT OF INTERVENTION WHERE DECREE REOPENED

Gerald M. Lively
University of Michigan Law School

TRADE RESTRAINTS — ANTITRUST LAWS — CONSENT DECREES — RIGHT OF INTERVENTION WHERE DECREE REOPENED — In 1935, the Attorney General brought a suit in equity to enforce the antitrust laws, charging Columbia Gas & Electric Corporation and its controlled instrumentality, Columbia Oil & Gasoline Corporation, and individual defendants, with having conspired for the benefit of Columbia Gas to shut out operation in the Indiana-Ohio-Michigan area by the Panhandle Eastern Pipe Line Company, which had built a natural-gas pipe line from the Texas fields to the border of Indiana. Panhandle was an offspring of Missouri-Kansas Pipe Line Company, or Mokan, which at the time of the suit owned half its stock and half its junior debt. Columbia Gas, to maintain a practical monopoly of natural gas in this market which Panhandle desired to enter, had acquired through Columbia Oil half of Panhandle's stock, half its junior debt, and its whole senior debt, thus stifling its potential competition, rendering it insolvent, and forcing Mokan into receivership. The suit resulted in a consent decree providing inter alia that Panhandle might become a party to the suit on application, so that it could protect its interests secured under the decree.[1] In 1939, the government deemed the terms of the decree inadequate for its purposes and reopened the proceedings; modifications were proposed in a plan, the terms of which were alleged to

[1] Section IV of the decree sets out in what respects Panhandle was to be protected. Section V provides the remedy: "That jurisdiction of this cause and of the parties hereto is retained for the purpose of giving full effect to this decree and for the enforcement of strict compliance herewith and the punishment of evasions hereof, and for the further purpose of making such other and further orders and decrees or taking such other action as may from time to time be necessary to the carrying out hereof; and that Panhandle Eastern, upon proper application, may become a party hereto for the limited purpose of enforcing the rights conferred by Section IV hereof." Principal case, 61 S. Ct. 666 at 668, note 2.

defeat the free enterprise of Panhandle, namely in the extension of its operations to sales in Detroit, an extension explicitly provided for in the decree. Mokan, on behalf of Panhandle, moved to intervene but was denied leave. *Held*, that since Panhandle had a formal status in the decree, its power to intervene was not left to the court's discretion, the general doctrines of intervention not touching the problem, and Mokan through Panhandle must be given the absolute right to intervene.[2] Justice Roberts dissented. *Missouri-Kansas Pipe Line Co. v. United States*, 312 U. S. 502, 665, 61 S. Ct. 666 (1941).

Though the consent decree is not a new procedural device in anti-trust regulation, its importance and use are increasing.[3] This has been due mainly to the mechanical simplicity of the creation of such a decree and the antitrust division's lack of facilities, making prohibitive the use of expensive litigation normally connected with such regulation. When a change or modification of such a decree is required, however, the problems increase.[4] The principal case illustrates one of these important new problems, i.e., what should be done with third parties who desire to have a voice in the change or modification. Under rule 24 of the Federal Rules of Civil Procedure [5] intervention may be of right or it may be but permissive.[6] There are two possible cases for intervention of right under the rule: (1) when applicant's interest in the suit [7] would be inadequately represented by existing parties and applicant would be bound by the judgment in the action; or (2) when applicant would be adversely affected by a disposition of property in the custody of the court or its officer.[8] The first

[2] "The sole question before us is whether there was standing to make the claim before the district court. We hold there was such standing. To enforce the rights conferred by Section IV was the purpose of the motion. Therefore, the codification of general doctrines of intervention contained in Rule 24(a) does not touch our problem." Principal case, 61 S. Ct. 666 at 668.

[3] On the general problem of the use of consent decrees in anti-trust enforcement, see Isenberg and Rubin, "Antitrust Enforcement Through Consent Decrees," 53 HARV. L. REV. 386 (1940); Katz, "The Consent Decree in Antitrust Administration," 53 HARV. L. REV. 415 (1940).

[4] On the general problem of modification of consent decrees in anti-trust regulation, see Donovan and McAllister, "Consent Decrees in the Enforcement of Federal Anti-Trust Laws," 46 HARV. L. REV. 885 (1933).

[5] See note in 28 U. S. C. A. (1941) following section 723c.

[6] At the Cincinnati Conference held December 10, 1938, on the new Federal Rules of Civil Procedure, Professor Edson R. Sunderland said: "Intervention of right is therefore allowed where the applicant would be bound by the judgment, as in the case of a representative suit, or adversely affected by the disposition of property in the custody of the court or its officer.

"Permissive intervention is allowed, by the same analogy, on the court's order when convenience in adjudication would be served on account of the presence of a question of law or fact common to the intervener's claim and the main action." Conference Report, 13 UNIV. CIN. L. REV. 1 at 91 (1939).

[7] The petitioner must have a specific interest in the suit and this means something more than a mere "vital interest." Ex parte Leaf Tobacco Board of Trade of City of New York, 222 U. S. 578, 32 S. Ct. 833 (1911).

[8] Rule 24(a)(2), (3).

case requires that there be representation,[9] and that the issues asserted by the movants be exactly the same as those involved in the main suit so that a judgment in that action would bind them.[10] In the second case the movants must have some property right in a res in the custody of the court, the disposition of which would adversely affect the applicants. These cases are strictly construed in order to prevent the chaos which would result if every stranger were permitted the absolute right to intervene.[11] It is clear that a corporation has no property right in its own outstanding stock, and that an order requiring termination by a competitor of control over such stock is not an order "adverse" to that corporation.[12] Hence, a corporation in the position of Panhandle in the principal case would have no absolute right of intervention under the federal rules. To obtain permissive intervention the applicant must make a claim or defense which has a question of law or fact in common with the main action, and this intervention must not unduly delay or prejudice the adjudication of the rights of the original parties.[13] As its title implies, permissive intervention lies within the discretion of the court. It contemplates a situation where the intervenor will assert the same issues as raised in the main suit and where no issues outside the scope of these will be introduced.[14] The applicant is permitted a range of activity as extensive as, but no greater than, that allowed by the original parties to the suit.[15] On the facts of the principal case, at least the district court and Justice Roberts seemed to feel a corporation in the position of Panhandle should have no permissive right of intervention were the federal rules alone to govern the case. But the principal case does not present the normal situation as to intervention,[16] for by section V of the decree, Panhandle was given the right to

[9] United States v. Columbia Gas & Electric Corp., (D. C. Del. 1939) 27 F. Supp. 116, appeal dismissed sub nom. Missouri-Kansas Pipe Line Co. v. United States, (C. C. A. 3d, 1939) 108 F. (2d) 614, certiorari denied sub nom. Missouri-Kansas Pipe Line Co. v. Columbia Gas & Electric Corp., 309 U. S. 687, 60 S. Ct. 887 (1940).

[10] United States v. Radio Corporation of America, (D. C. Del. 1933) 3 F. Supp. 23.

[11] Some protection is given in the right to appeal an order denying the absolute right to intervene directly to the Supreme Court under the Expediting Act, 32 Stat. L. 823, § 2 (1903), 15 U. S. C. (1934), § 29. This has resulted in a denial of any jurisdiction in the circuit courts of appeals to review these orders. United States v. California Co-operative Canneries, 279 U. S. 553, 49 S. Ct. 423 (1929).

[12] United States v. Columbia Gas & Electric Corp., (D. C. Del. 1939) 27 F. Supp. 116.

[13] Rule 24(b)(2).

[14] United States v. Columbia Gas & Electric Corp., (D. C. Del. 1939) 27 F. Supp. 168.

[15] United States v. Columbia Gas & Electric Corp., (D. C. Del. 1939) 27 F. Supp. 116.

[16] "We are not here dealing with a conventional form of intervention, whereby an appeal is made to the court's good sense to allow persons having a common interest with the formal parties to enforce the common interest with their individual emphasis. . . . where the enforcement of a public law also demands distinct safeguarding of private interests by giving them [interested outsiders] a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion." Principal case, 61 S. Ct. 666 at 667-668.

become a party on application, so that it might enforce rights conferred by section IV of the decree. The court was thus enabled to find an absolute right to intervene under the terms of the decree without regard to rule 24. But the case is unusual in this respect, and it is suggested that its application will be limited. It would seem that the decree will be construed strictly; that the only permissible purpose of intervention is to protect those precise rights secured under the decree. Here the modification, going to the whole of the decree, affected those rights secured under it, and so intervention was properly granted of right. However, if the case cannot fall within this narrow situation, then rule 24 should be controlling.

Gerald M. Lively