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APPELLATE LAW

Appellate Intervention

By Aaron S. Bayer

High court allowed intervention after judgment

CAN NEW PARTIES intervene after judgment has entered? Can an appeals court allow intervention or joinder of new parties when it determines that there was no jurisdiction from the outset of the litigation?

■ *Intervention to take an appeal.* Although intervention under Fed. R. Civ. P. 24 is not typically allowed after judgment (see C. Wright, A. Miller, M. Kane, Federal Practice and Procedure § 1916 at 561-63 (2007)), in certain circumstances it is frequently granted. "Post-judgment intervention is often permitted...where the prospective intervenor's interest did not arise until the appellate stage" and where "intervention would not unduly prejudice the existing parties." *Acree v. Republic of Iraq*, 370 F.3d 41, 50 (D.C. Cir. 2004).

The clearest example is intervention to take an appeal "where no existing party chooses to appeal the judgment of the trial court." *Acree*, 370 F.3d at 50; see Wright & Miller, § 1916, at 571-79. Intervention in this situation is often granted as of right under Rule 24(a). Though any intervention must be "timely" under Rule 24, courts "should be more reluctant to deny an intervention motion on grounds of timeliness if it is intervention as of right than if it is permissive intervention." *U.S. v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980). See also Wright & Miller, § 1916, at 531.

A motion to intervene is generally deemed to be "timely" if the person seeking to intervene in order to take an appeal acted promptly when it became clear that his interests were no longer protected and moved within the time period allowed for taking an appeal.

In *United Airlines Inc. v. McDonald*, 432 U.S. 385 (1977), for example, final judgment was entered in favor of the plaintiffs, who decided not to appeal the court's earlier denial of class certification.

The Supreme Court allowed class members to intervene in order to appeal the denial of class certification because, "in view of all the circumstances," they moved "promptly after the entry of final judgment." Id. at 396. Although *McDonald* involved members of a class, the court noted that "[p]ost-judgment intervention for the purpose of appeal has been found to be timely even in litigation that is not representative in nature." Id. at 396 n. 16.

In a frequently cited opinion, the 5th U.S. Circuit Court of Appeals in *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977), rejected any " 'absolute' measures of timeliness," noting that "whether the request for intervention came before or after the entry of judgment was of limited significance," and focused instead on whether intervention would "prejudice the rights of the existing parties" or "substantially interfere with the orderly processes of the court." Id. at 266. Using that analysis, the court found timely an intervention motion filed by employees a few weeks after entry of a consent judgment that affected their employment rights. Id. at 267-69.

Similarly, in *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001), the court allowed tribal officers to intervene when the U.S. government had been representing their interests but decided not to appeal an adverse judgment. "Prior to the entry of judgment, the appellants[']...interests were adequately represented by the Government" and the " 'potential inadequacy of representation came into existence only at the appellate stage.' " Id. at 471. See *Acree*, 370 F.3d at 50 (allowing U.S. government to intervene two weeks after judgment where it caused no prejudice and the government's interest in appealing the court's jurisdiction over claims against Iraq raised important foreign policy concerns).

■ *Intervention during appeal.* Courts have also allowed parties to intervene while an appeal is pending when judicial economy, and often some other strong public interest, warrants it and there is no prejudice to other parties. In *Bates v. Jones*, 127 F.3d 870, 873-74 (9th Cir. 1997), for example, the 9th Circuit allowed 20 state legislators and voters to intervene on appeal as plaintiff-appellees in order to defend a judgment holding California's legislative term limits unconstitutional.

The court emphasized that the "need for uniformity" in upcoming elections warranted intervention to allow "as many parties as possible who seek to run for office contrary to the term limits provision of Proposition 140 to be bound by our decision." Id. at 872. In *Hurd v. Illinois Bell Tel. Co.*, 234 F.2d 942, 944 (7th Cir. 1956), the 7th Circuit allowed a member of a

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"spurious" class to intervene on appeal *during oral argument*, explaining that permissive intervention was warranted and it would not "in any way prejudice [the defendants'] rights." See also *Drywall Tapers & Pointers of Greater New York, Local Union 1974 of I.U.P.A.T., AFL-CIO v. Nastasi & Assocs. Inc.*, 488 F.3d 88, 94 (2d Cir. 2007) (recognizing "authority for granting a motion to intervene in the Court of Appeals").

In the alternative, appellate courts may remand to allow the district court to address a motion to intervene (e.g., *Hobson v. Hansen*, 44 F.R.D. 18, 21 (D.D.C. 1968) (D.C. Circuit held appeal in abeyance and remanded to allow district court to consider intervention motions filed during the appeal)), or they may remand with directions to permit intervention (e.g., *Atkins v. State Bd. of Ed. of North Carolina*, 418 F.2d 874, 876 (4th Cir. 1969)).

Intervention can create unusual procedural thickets. In *Drywall*, for example, the parties settled the case and the district court entered judgment while a motion to intervene was pending. The party seeking to intervene then filed an appeal, depriving the district court of jurisdiction to act on the motion to intervene. The 2d Circuit was compelled to dismiss the appeal, because the would-be intervenor had not yet intervened and therefore was not a party. The 2d Circuit "cut through this appellate Catch-22" by remanding to the district court to rule on the intervention motion, making it clear that it could reinstate the appeal if intervention was granted. 488 F.3d at 95.

■ *Intervention when no jurisdiction exists*. The general rule, unsurprisingly, is that intervention cannot create jurisdiction where none exists (see *Wright & Miller,* § 1917), and an intervenor "will not be permitted to breathe life into a 'nonexistent' law suit" (*Fuller v. Volk*, 351 F.2d 323, 328 (3d Cir. 1965)). But the rule is not absolute. Courts have recognized that, when the intervenor has an independent basis for jurisdiction and therefore could file a new suit, it may make sense to permit intervention in the existing suit if it will not prejudice other parties and if denying intervention would require the parties to relitigate the same issues that have already been adjudicated.

In *Hackner v. Guaranty Trust Co. of New York,* 117 F.2d 95 (2d Cir. 1941), for example, the 2d Circuit held that the demands of the original plaintiffs could not be aggregated to satisfy the jurisdictional amount requirement and therefore there was never diversity jurisdiction.

Intervention during appeal may be permitted when judicial economy and some other strong public interest warrant it.

But the court permitted the claims of a plaintiff who had been added to the suit to go forward, to avoid "the delay and expense of a new suit, which at long last will merely bring the parties to the point where they now are." Id. at 98. *Hackner* dealt with joinder of a party under Rule 21, but it is often cited in intervention cases for the principle it established. See, e.g., *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 95, 105 (2d Cir. 1990) (citing *Hackner* in permitting the district court on remand to consider claims of a party that had intervened, even though all of the original plaintiffs' claims were dismissed for lack of jurisdiction).

Intervention in school desegregation cases

While judicial efficiency and fairness to the parties are the key factors, cases allowing intervention when jurisdiction is otherwise lacking often have other public policy concerns favoring intervention. School desegregation cases are a prime example. Recognizing the "intense interest of parents in the education of their children," the 4th Circuit allowed parents of schoolchildren to intervene in a desegregation case, even though the original plaintiff lacked standing and therefore there never was jurisdiction over the action. *Atkins*, 418 F.2d at 876. See also *Fuller v. Volk*, 351 F.2d at 329 (dismissing claims of original plaintiffs in school desegregation case but remanding to determine if individuals seeking to intervene have an independent jurisdictional basis, to avoid the "senseless delay and expense" of a new suit).

■ *Rule 21 as an alternative to cure jurisdictional defects*. In related procedural contexts, courts have relied on the same principles—judicial economy and the absence of prejudice to other parties—to add or remove parties on appeal in order to cure a jurisdictional defect. The Supreme Court in *Mullaney v. Anderson*, 342 U.S. 415 (1952), allowed two new plaintiffs to be added under Rule 21, while the appeal was before the Supreme Court, when it became clear that the original plaintiffs lacked standing to maintain the suit. Noting that "Rule 21 will rarely come into play at this stage of a litigation," the court held that requiring the new plaintiffs to start over "would entail needless waste and runs counter to effective judicial administration." Id. at 417.

Appellate courts may also drop a dispensable party under Rule 21 in order to salvage jurisdiction. *Newman-Green Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989). The court acknowledged that "[a]ppellate-level amendments to correct jurisdictional defects may not be the most intellectually satisfying approach," but "practicalities" sometimes warranted permitting such jurisdictional corrections on appeal. Id. at 836-37.

The driving force in cases involving jurisdictional repair on appeal, whether it be intervention under Rule 24 or joinder under Rule 21, seems to be the courts' willingness to focus on "practicalities" and to avoid compelling parties to relitigate a case that has already been adjudicated. NLJ