

# **EXHIBIT E**

FORM 990	OTHER CHANGES IN NET ASSETS OR FUND BALANCES	STATEMENT	2
DESCRIPTION			AMOUNT
UNLOCATED			955.
TOTAL TO FORM 990, PART I, LINE 20			955.

FORM 990	OTHER EXPENSES			STATEMENT	3
DESCRIPTION	(A) TOTAL	(B) PROGRAM SERVICES	(C) MANAGEMENT AND GENERAL	(D) FUNDRAISING	
STORAGE	4,658.		4,658.		
ADVERTISING AND MARKETING	8,957.			8,957.	
PROMOTIONS	714.			714.	
FUNDRAISING	12,812.			12,812.	
TAXES	1,213.	4.	1,209.		
AUTO	5,862.		5,862.		
MISC.	2,128.		2,128.		
TOTAL TO FM 990, LN 43	36,344.	4.	13,857.	22,483.	

FORM 990	STATEMENT OF ORGANIZATION'S PRIMARY EXEMPT PURPOSE PART III	STATEMENT	4
EXPLANATION			
PROMOTING & PUBLISHING TEXTBOOKS PRESENTING A CHRISTION PERSPECTIVE OF ACAD			

FORM 990	OTHER INVESTMENTS	STATEMENT	5
DESCRIPTION	VALUATION METHOD		AMOUNT
MISC.	COST		405.
TOTAL TO FORM 990, PART IV, LINE 56, COLUMN B			405.

# **EXHIBIT F**

2004 U.S. Dist. LEXIS 23078, \*

LEXSEE 2004 U.S. DIST. LEXIS 23078

**AMS CONSTRUCTION COMPANY, INC. d/b/a AMS STAFF LEASING, et al.,  
Plaintiff v. RELIANCE INSURANCE COMPANY, (In Liquidation) Defendant.**

**CIVIL ACTION No. 04-CV-2097**

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF  
PENNSYLVANIA**

*2004 U.S. Dist. LEXIS 23078*

**November 15, 2004, Decided**

**DISPOSITION:** Florida Guaranty's motion for leave to intervene permissively granted.

**LexisNexis(R) Headnotes**

**COUNSEL:** [\*1] For AMS CONSTRUCTION COMPANY, INC., doing business as AMS STAFF LEASING, BRECKENRIDGE ENTERPRISES, INC., Plaintiffs: GEORGE M. VINCI, JR., PETER A. VONMEHREN, SPECTOR GADON & ROSEN, PC, PHILADELPHIA, PA.

For RELIANCE INSURANCE COMPANY IN LIQUIDATION, Defendant: WILLIAM E. MAHONEY, JR., STRADLEY, RONON, STEVENS & YOUNG, PHILA, PA.

For FLORIDA WORKERS COMPENSATION INSURANCE GUARANTY ASSOCIATIONS, Defendant, Counter Claimant: CARLOS L. DEZAYAS, LYDECKER & WADSWORTH, LLC, MIAMI, FL. EDWARD G. BIESTER, III, H. BRUCE HANSON, DUANE MORRIS LLP, PHILADELPHIA, PA.

**JUDGES:** LAWRENCE F. STENGEL, J.

**OPINIONBY:** Lawrence F. Stengel

**OPINION:** STENGEL, J.

On May 14, 2004, Texas corporations AMS Construction Company, Inc., and Breckenridge Enterprises, Inc. ("Plaintiffs") filed a complaint in this court against Reliance Insurance Company ("Defendant"), an insolvent Pennsylvania corporation, n1

for breach of contract and declaratory relief pursuant to 28 U.S.C. § § 2201-02. Florida Workers' Compensation Insurance Guaranty Association ("Florida Guaranty"), a non-profit Florida corporation, has filed a motion pursuant to *Federal Rule of Civil Procedure ("Fed.R.Civ.P.") 24(a)(2)* [\*2] requesting the court to allow it to intervene as of right as a defendant/counterplaintiff in this action, or in the alternative, for leave to intervene permissively pursuant to *Fed.R.Civ.P. 24(b)*. For the reasons discussed in this opinion, I will grant Florida Guaranty's motion for leave to intervene permissively.

n1 On October 3, 2001, an order of liquidation was entered by the Commonwealth Court of Pennsylvania, adjudicating Defendant to be insolvent. On the same day, the Honorable M. Diane Koken, Pennsylvania Commissioner of Insurance, was appointed statutory liquidator of Defendant, with power to resolve its insolvent estate.

**BACKGROUND**

In the 1990's, Plaintiffs entered into an insurance program with Defendant from whom they purchased a series of workers' compensation policies. In 1998, Breckenridge Enterprises purchased a Philadelphia Life Insurance Company accident insurance policy (the "Reinsurance Policy") that reinsured a certain amount of the [\*3] risk covered by the workers' compensation policies making up the Defendant's program.

This case stems from a Settlement, Release and Joint

Prosecution Agreement (the "Agreement") entered into on May 29, 2003 between the parties to an action in the United States District Court for the Northern District of Texas. (Breckenridge Enterprises, Inc., et al. v. Philadelphia Life Insurance Company, et al.) The Agreement was a contract that controlled the joint effort of Plaintiffs and Defendant to recover money owed under the Reinsurance Policy. Pursuant to the Agreement, Defendant received approximately \$ 15 million made up of amounts recovered under the Reinsurance Policy and of collateral specifically held by Southwest Underwriters to secure Plaintiffs' obligation to fund or reimburse claims paid under Defendant's workers' compensation and general liability programs.

In their complaint, Plaintiffs allege that Defendant breached its obligations under the Agreement by failing to reimburse Plaintiffs for Defendant's portion of litigation fees and costs related to the Texas action. Plaintiffs also claim that Defendant waived its right to seek deductible reimbursements under the express [\*4] language of the Agreement. Plaintiffs seek a declaration from the court holding that they do not have an obligation to reimburse Defendant for the deductibles under the policies.

Defendant filed an answer, affirmative defenses, and a four-count counterclaim asserting breach of contract, unjust enrichment, equitable subrogation, and a request for declaratory relief in connection with the Agreement.

Florida Guaranty exists pursuant to Florida's enactment of the Uniform Insurer Liquidation Act, *Chapter 631 of the Florida Statutes*, which provides a mechanism for the prompt payment of workers' compensation claims incurred by insolvent insurers. Its main purpose is to avoid financial loss to injured Florida workers due to the insolvency of any workers' compensation insurer. Pennsylvania has also adopted such a statute. *See 40 P.S. § 211-221.63*. Prior to its insolvency, Defendant wrote workers' compensation coverage in Florida. At the time of the order of liquidation, there were unpaid claims of injured Florida workers whose employers were insured by Defendant. Since the order of liquidation, new workers' compensation claims have been brought and are being paid by Florida Guaranty. [\*5]

Florida Guaranty seeks leave to intervene in this matter in order to assert and protect its statutorily-granted right to recover from Plaintiffs' insurance policy deductible reimbursements due pursuant to Plaintiffs' obligations under the workers' compensation policies issued by Defendant. Florida Guaranty contends that Plaintiffs are trying to extinguish Florida Guaranty's right to the deductible reimbursements by claiming that

Defendant waived, settled, discharged, and/or released Plaintiffs' deductible reimbursement obligations pursuant to the Agreement. In their responses, Plaintiffs vehemently oppose the motion, and Defendant supports it indicating that Florida Guaranty's participation in the case would be appropriate and beneficial.

## DISCUSSION

Motions to intervene are governed by *Fed.R.Civ.P.* 24. In this case, Florida Guaranty seeks to intervene under *Rule 24(a)(2)*, which provides that intervention shall be permitted as of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical [\*6] matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." *Fed.R.Civ.P.* 24(a)(2). The Third Circuit has interpreted *Rule 24(a)(2)* to include four requirements for intervention as of right: (1) the intervention must be timely; (2) the intervenor must have a sufficient interest relating to the subject of the action; (3) the action must potentially impede the applicant's ability to protect its interest; and (4) the existing parties must not adequately represent the applicant's interest. *Mountain Top Condominium Ass'n v. Dave Stabbert Master Builder, Inc.*, 33 V.I. 311, 72 F.3d 361, 366 (3d Cir. 1995) (quoting *Harris v. Pernsley*, 820 F.2d 592, 596 (3d Cir. 1987)).

Whether a moving party claims intervention as of right or permissively, *Rule 24* requires that the application be timely, a determination to be made from all the circumstances. *NAACP v. New York*, 413 U.S. 345, 365-366, 37 L. Ed. 2d 648, 93 S. Ct. 2591 (1973). There are three factors which must be considered in evaluating the timeliness of a motion to intervene: [\*7] 1) how far the proceedings have gone when the movant seeks to intervene; 2) prejudice which resultant delay might cause to other parties; and 3) the reason for the delay. *Pennsylvania v. Rizzo*, 530 F.2d 501, 506 (3d Cir. 1976).

Here, the case was filed in this court in May 2004; Plaintiffs' response to Defendant's counterclaim was filed in August 2004; the motion itself was filed in October 2004; discovery is not set to finish until November 2004; and there has been no ruling from the court which has affected the interest of the other parties. Moreover, Florida Guaranty does not seek to add new issues to the case which even at this early stage might result in prejudice to the other parties. As a reason for its slight delay in filing this motion, Florida Guaranty claims that its status as a real party in interest was only recently

clarified when the Pennsylvania Legislature signed 40 P.S. § 221.23a into law on June 28, 2004. Thus, this motion to intervene is timely, and satisfies the first requirement of *Rule 24(a)(2)*.

Next, by having a sufficient interest relating to the subject of this action, Florida Guaranty also satisfies the second [\*8] requirement of the rule. An intervenor's interest is sufficient if it is "significantly protectable." *Donaldson v. United States*, 400 U.S. 517, 531, 27 L. Ed. 2d 580, 91 S. Ct. 534 (1971). A "significantly protectable" interest is "a legal interest as distinguished from interests of a general and indefinite character." *Harris v. Pernsley*, 820 F.2d at 601. Accordingly, a mere economic interest in the outcome of a particular litigation is insufficient to support a motion to intervene. *United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1185 (3d Cir. 1984). An intervenor's interest in a specific monetary fund, however, is sufficient to render intervention proper in a case affecting that fund. *Mountain Top*, 72 F.3d at 366 (funds deposited with district court were assets of an express trust, of which the individual intervenors are the intended beneficiaries).

Here, Florida Guaranty has demonstrated a particular interest in the specific funds at issue in this case, rather than a general economic interest in its outcome. Having paid workers' compensation claims of Plaintiffs' employees, Florida Guaranty claims a "direct and non-contingent" [\*9] interest in the deductible reimbursements that are at issue here. In their response to this motion, Plaintiffs concede that Florida Guaranty has an existing statutory right to obtain its fair share of any funds collected by the receiver under 40 P.S. § § 221.23a(f) and (g). These two statutory provisions provide that the receiver must reimburse state guaranty associations for claims payments within a deductible amount from any money collected from collateral and/or a deductible reimbursement policy. A policyholder's deductible reimbursements under policies issued by an insolvent insurer, such as the deductible reimbursements here, as well as the collateral provided to secure such policyholder's reimbursement obligations, never become assets of the estate of the insolvent insurer, and are payable to the guaranty associations if the guaranty associations paid claims under the policies. As discussed above, the Reinsurance Policy funded the \$ 15 million payment to Defendant pursuant to the Agreement. Under this set of facts, Florida Guaranty has a sufficient interest in the subject of the action, and thus satisfies the second requirement of the rule.

Nevertheless, [\*10] it is at the third and fourth requirements of *Rule 24(a)(2)* that the success of Florida Guaranty's application becomes doubtful. As stated

above, the action must potentially impede Florida Guaranty's ability to protect its interest. Proposed intervenors must demonstrate that their interest might become affected or impaired, as a practical matter, by the disposition of the action in their absence. *United States v. Alcan Aluminum, Inc.*, 25 F.3d at 1185 n.15.

Florida Guaranty insists that it is so situated that the disposition of this case may as a practical matter impair or impede its ability to protect its interest in the deductible reimbursements. Hypothesizing that if this court were to rule that Defendant waived its right to receive the deductible reimbursements *retrospectively and/or prospectively*, Florida Guaranty is concerned that its ability to be reimbursed for claims would likely be impaired without its being heard. For example, if Florida Guaranty were to bring an independent action against Plaintiffs to collect its fair share of the reimbursements, Plaintiffs could argue that Florida Guaranty's case was somehow precluded by the outcome of the instant [\*11] case.

However, the disposition of this case should have no effect on Florida Guaranty's right to reimbursement from the already-existing fund which Defendant received as a result of the Agreement. A review of the language of Pennsylvania's statute establishes that a scheme is in place whereby the Pennsylvania Commissioner, as receiver, has the primary duty to collect unpaid deductible amounts from a policyholder under Pennsylvania law:

With respect to claim payments made by any guaranty associations, the receiver shall promptly provide the guaranty associations with a complete accounting of the receiver's deductible billing and collection activities, including but not limited to copies of the policyholder billings when rendered, the reimbursements collected, the available amounts and use of collateral for each account and any proration of payments when it occurs. The receiver's costs of accounting shall be included with expenses referred to under this subsection and, together with other reasonable actual expenses, be subject to the overall limit called for by this subsection. **If the receiver fails to make a good faith effort within one hundred twenty days of receipt of [\*12] claims payment reports to collect reimbursements due from a policyholder under a deductible agreement based on claims payments**

made by one or more guaranty associations, then after such one-hundred-twenty-day period such guaranty associations may pursue collection directly on the same basis as the receiver and with the same rights and remedies and will report any amounts so collected from each policyholder to the receiver. To the extent that guaranty associations pay claims within the deductible amount but are not reimbursed by either the receiver under this section or by policyholder payments from the guaranty association's own collection efforts, the guaranty association shall have a claim in the insolvent insurer's estate for such unreimbursed claims payments.

40 P.S. § 221.23a(i)(2)(emphasis added).

This statutory scheme provides a mechanism for the prompt payment of a guaranty association's fair share of deductible reimbursements. It further delineates the rights and remedies of a guaranty association in pursuing its own claims should the receiver not make a good faith effort to collect the reimbursements. Here, Florida Guaranty [\*13] concedes that in order to assert its rights to the deductible reimbursements, Florida Guaranty may either assert them here or in an independent action. Florida Guaranty has not alleged that the Pennsylvania Commissioner, as receiver, has failed to make a good faith effort to collect deductible amounts from Plaintiffs. It also has not alleged that, in following the scheme, it submitted claims for payment but was unsuccessful. In fact, Plaintiffs represent in their response that the Pennsylvania Commissioner has vigorously pursued collections efforts against Plaintiffs and has collected millions of dollars in deductible and reinsurance payments.

Florida Guaranty has established a sufficient interest in these funds as the subject of this case. However, Florida Guaranty has not established that the case would potentially impede its ability to protect that interest. Whatever the ultimate outcome of this case is, Florida Guaranty would still be able to follow successfully Pennsylvania's statutory mechanism for reimbursement.

The final requirement of *Rule 24(a)(2)* is also not satisfied. The burden, however minimal, is on Florida Guaranty to show that its interests are not adequately represented [\*14] by the existing parties. *Hoots v. Pennsylvania*, 672 F.2d 1133, 1135 (3d Cir. 1982). This burden may be discharged by Florida Guaranty showing: (1) that although its interests are similar to those of one

of the parties, they diverge sufficiently that the existing party cannot devote proper attention to Florida Guaranty's interests; (2) that there is collusion between the representative party and the opposing party; or (3) that the representative party is not diligently prosecuting the suit. Id. (emphasis added).

A party charged by law with representing the interests of the absent party will usually be deemed adequate to represent the absentee. *Delaware Valley Citizens' Council for Clean Air, et al. v. Commonwealth of PA, et al.* 674 F.2d 970, 973 (3d Cir. 1982). As discussed above, the Pennsylvania Commissioner, as receiver, has the statutory right and obligation to represent all state insurance guaranty associations in connection with deductible amounts owed by policyholders. Florida Guaranty has not shown that the Pennsylvania Commissioner will not exercise her statutory rights or perform her statutory obligations. Besides suggesting [\*15] that the Pennsylvania Commissioner might not be as motivated to collect deductible reimbursements as Florida Guaranty itself would, Florida Guaranty has made no allegation of collusion between the existing parties.

Furthermore, to its motion, Florida Guaranty attached a proposed answer, affirmative defenses, and counterclaims in the event its application were successful. These proposed pleadings are almost identical to Defendant's pleadings, with the exception of Florida Guaranty's additional affirmative defense based on 40 P.S. § 221.23a, and Florida Guaranty's deletion of Defendant's counterclaim based on breach of contract against Plaintiffs. These interests do not diverge sufficiently to suggest that Defendant would not devote proper attention to Florida Guaranty's interests.

Thus, because I find that Florida Guaranty has not satisfied the requirements of *Rule 24(a)(2)*, I will deny its request to intervene as of right.

However, Florida Guaranty also moves, in the alternative, for leave to intervene permissively pursuant to *Fed.R.Civ.P. 24(b)*. A denial of intervention as of right does not automatically mandate [\*16] a denial of permissive intervention. *McKay v. Heyison*, 614 F.2d 899, 906 (3d Cir. 1980). *Fed.R.Civ.P. 24(b)* provides that upon "timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common." The rule also provides that 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."

As discussed above, Florida Guaranty shares both its claims and defenses with Defendant in this case; and the delay or prejudice at this stage of the case is minimal. There being common issues of law and fact with minimal delay or prejudice, I will grant Florida Guaranty's motion to intervene permissively pursuant to *Fed.R.Civ.P. 24(b)(2)*.

An appropriate order follows.

**ORDER**

**STENGEL, J.**

**AND NOW**, this 15th day of November, 2004, upon

consideration of Florida Workers' Compensation Insurance [\*17] Guaranty Association's Motion to Intervene (Document No. 11), and the parties' responses thereto,

**IT IS HEREBY ORDERED** that, pursuant to *Federal Rule of Civil Procedure 24(b)*, said Motion is **GRANTED**. The Clerk of Court shall amend the caption to reflect Florida Workers' Compensation Insurance Guaranty Association as Defendant/Counterplaintiff.

BY THE COURT:

Lawrence F. Stengel, J.

# **EXHIBIT G**

1997 U.S. Dist. LEXIS 14171, \*

LEXSEE 1997 U.S. DIST. LEXIS 14171

**NATIONAL RAILROAD PASSENGER CORPORATION, Plaintiff, v.  
COMMONWEALTH OF PENNSYLVANIA PUBLIC UTILITY COMMISSION  
and TOWNSHIP OF TREDYFFRIN, Defendants.**

**CIVIL ACTION NO. 86-5357**

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF  
PENNSYLVANIA**

*1997 U.S. Dist. LEXIS 14171*

**September 9, 1997, Decided  
September 10, 1997, Filed, Entered**

**DISPOSITION:** [\*1] Motion of the Commonwealth of Pennsylvania, Department of Transportation to Intervene as a Defendant Under Rule 24 DENIED.

**LexisNexis(R) Headnotes**

**COUNSEL:** For NATIONAL RAILROAD PASSENGER CORP: Dennis M. Moore, Washington, D.C.

For NATIONAL RAILROAD PASSENGER CORP: James M. Brogan, Piper & Marbury L.L.P., Philadelphia, PA.

For TWP. OF TREDYFFRIM: WILLIAM H. LAMB, ESQ, LAMB, WINDLE & MCERLANE, P.C., John D. Snyder, Esq, Vincent M. Pompo, Esq, WEST CHESTER, PA.

For PA. PUBLIC UTILITY COMMISSION: JOHN J. GALLAGHER, ESQ, RICHARD S. HERSKOVITZ, ESQ, PA. PUBLIC UTILITY COMMISSION, David A. Salapa, Susan D. Colwell, HARRISBURG, PA.

**JUDGES:** Clarence C. Newcomer, J.

**OPINIONBY:** Clarence C. Newcomer

**OPINION:**

**MEMORANDUM**

Sept. 9, 1997

Before this Court are the Motion of the Commonwealth of Pennsylvania, Department of Transportation ("Department") to Intervene as a Defendant Under Rule 24, and plaintiff National Railroad Passenger Corporation's ("Amtrak") response thereto. For the following reasons, this Court will deny the Department's motion.

**I. Background**

This case was originally initiated by a complaint filed by Amtrak, on September 10, 1986, seeking equitable and declaratory relief to prevent the [\*2] enforcement of defendant Pennsylvania Public Utility Commission's ("Commission") order dated June 13, 1986, directing Amtrak to pay approximately twenty percent of the cost of replacing a bridge situated in Tredyffrin Township, Pennsylvania. The Commission order which was being challenged by Amtrak allocated the remaining eighty percent of the cost to defendant Tredyffrin Township which, in turn, would be reimbursed by the Commonwealth of Pennsylvania. The Commission also ordered Amtrak to assume certain maintenance costs of the proposed new bridge and adjoining pedestrian walkway.

On June 30, 1987 this Court entered an Order permanently enjoining the Commission from assessing costs against Amtrak for the maintenance of the Cassatt Avenue bridge structure. *National Railroad Passenger Corp. v. Commonwealth of Pennsylvania Public Utility Comm'n*, 665 F. Supp. 402 (E.D. Pa. 1987), aff'd, 848 F.2d 436 (3d Cir. 1988), cert. denied, 488 U.S. 893, 109 S. Ct. 231, 102 L. Ed. 2d 220 (1988). This Court found

that "Title 45 of the United States Code section 546b exempts Amtrak from the payment of special assessments such as that imposed by the [Commission]." 665 F. Supp. at 412. [\*3] Accordingly, the Commission was permanently enjoined from assessing Amtrak for costs associated with the design, construction or maintenance of the Cassatt Avenue bridge. The Department did not attempt to intervene in this action before the issuance of the permanent injunction.

On July 3, 1990, the Commission entered an order imposing on Amtrak the costs of maintaining the substructure and superstructure of the Cassatt Avenue Bridge. Amtrak subsequently filed a motion to enforce the permanent injunction previously issued in the Order of June 30, 1990. The Department then filed a motion to intervene in this litigation pursuant to *Federal Rule of Civil Procedure 24(a)(2)*. By Order of January 2, 1991, this Court permanently enjoined the Commission from imposing on Amtrak any costs of maintenance of the Cassatt Avenue Bridge structure under its July 3, 1990 Order.

On January 4, 1991, this Court denied the Department's motion to intervene. The Commission was not permitted to intervene because (1) the motion was untimely, by approximately six years, (2) the Department could not demonstrate how it would be prejudiced by a denial of an opportunity to intervene, and (3) the Department interests [\*4] were found to be adequately represented by the Commission.

Amtrak presently moves this Court to modify this Court's Order of January 2, 1991. By this motion, Amtrak requests this Court to broaden the permanent injunction to include any assessment of responsibility to Amtrak for the repair, maintenance or replacement of highway bridges in the Commonwealth of Pennsylvania. Amtrak argues that a recent decision of the Commonwealth Court in *City of Philadelphia v. Pennsylvania Public Utility Comm'n*, 676 A.2d 1298 (Pa. Cmwlth.), petition for allowance denied, 546 Pa. 657, 684 A.2d 558, (1996), cert. denied, U.S. , 117 S. Ct. 1334 (1997), and statements made by the Commission that it is bound by the decision of the Commonwealth Court, create the imminent prospect that the Commission will attempt to impose responsibility for bridge maintenance on Amtrak in the still-ongoing Commission proceedings concerning the Cassatt Avenue Bridge and in numerous other Commission proceedings involving highway bridges over Amtrak's right-of-way. Amtrak argues modification of this Court's Order of January 2, 1991 is therefore necessary to protect Amtrak's rights under federal [\*5] law and to fulfill the original purpose of this Court's declaratory judgment and injunctions. Defendants, of

course, oppose any modification of this Court's Order of January 2, 1991.

Amtrak's present motion to modify this Court's Order of January 2, 1991 has prompted the Department to move, once again, to intervene in this action pursuant to *Federal Rule of Civil Procedure 24*. Amtrak opposes such intervention.

## II. Discussion

Under Rule 24(a)(2), a person is entitled to intervene if: (1) the application for intervention is timely; (2) the applicant has sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation. See *Harris v. Pernsley*, 820 F.2d 592, 596 (3d Cir. 1987) (citations omitted). Even though "these requirements are intertwined, each must be met to intervene as a right." *Id.* (citations omitted). A strong showing that one of the requirements is met may result in requiring a lesser showing of another requirement. *Id.* at 596 n.6 (citing *United States v. Hooker Chemicals & Plastics Corp.*, [\*6] 749 F.2d 968, 983 (2d Cir. 1984)). Because the Department cannot satisfy the first, second and fourth requirements for Rule 24(a)(2) intervention, the Court denies the Department's motion.

With respect to the first requirement, this Court finds that the Department's motion to intervene is untimely by a mere ten years. In *United States v. McDonald*, 432 U.S. 385, 395, 97 S. Ct. 2464, 2670, 53 L. Ed. 2d 423 (1977), the Supreme Court stated that, in considering the appropriate disposition of a motion to intervene, the "critical inquiry . . . is whether in view of all the circumstances the intervenor acted promptly." When a party moves to intervene at such a late stage in the proceedings, "the test for timeliness is whether the proposed intervenor knew or should have known of the pendency of the action at an earlier time, and therefore should have acted to protect [its] interest sooner." *Mack v. General Electric Co.*, 63 F.R.D. 368, 369 (E.D. Pa. 1974), aff'd, 533 F.2d 1247 (3d Cir. 1976).

In the Order of January 4, 1991, this Court found that the Department knew of or reasonably should have known of this litigation as early as 1986 and had failed to provide any reason why [\*7] it had not tried to intervene earlier when the merits of the injunction were being decided and appealed. Instead, the Department waited until over two years after the matter was affirmed on appeal to file its 1990 motion to intervene. Because the proper time for intervention was before this Court issued its injunctive order, the Department's motion was untimely.

Now, six years after this Court denied its 1990 motion to intervene, the Department again asks to intervene in this litigation and actually has the audacity to argue that its motion is timely because it is was filed within the time frame allowed for the response to Amtrak's motion. Interestingly, the Department has not provided the Court with any authority to support its novel position that a motion to intervene shall be deemed timely if it is filed within the time frame allowed for a response to a motion in the litigation in which the intervenor wishes to intervene. If the Department's position was correct, then a motion to intervene would always be considered timely as long as it was filed within the response period for the motion that the intervenor wishes to challenge or join. This simply is not the test for timeliness. [\*8]

Rather, as stated above, the standard for assessing the timeliness of a motion to intervene is whether the proposed intervenor knew or should have known of the pendency of the action at an earlier time, and therefore should have acted to protect its interest sooner. The focus is thus on having knowledge of the entire action, not just a particular motion in the action. Under this standard, it is clear that the Department's motion is untimely. The Department's motion to intervene was untimely six years ago, and it is even more untimely now.

As this Court held in 1991, there is no prejudice to the Department if its motion to intervene is denied. *National Railroad Passenger Corp. v. Commonwealth of Pennsylvania Public Utility Comm'n*, 1991 U.S. Dist. LEXIS 114, No. CIV.A.86-5357, 1991 WL 993 (E.D. Pa. Jan. 4, 1991). The Department simply has no separate interest that has not been addressed in the litigation, and therefore there is no prejudice to deny it the opportunity to intervene.

The Department next claims to have a sufficient interest in this litigation to justify its intervention because it has responsibility for the maintenance of certain highway bridges and its share of the cost of maintaining [\*9] those bridges is increased because of Amtrak's statutory exemption. "According to the Supreme Court, an intervenor's interest must be one that is 'significantly protectable.'" *Mountain Top Condominium Ass'n v. Dave Stabbert Master Builder, Inc.*, 33 V.I. 311, 72 F.3d 361, 366 (3d Cir. 1995) (citation omitted). The Third Circuit, in an attempt to define the contours of this interest, has held that, "the interest must be a legal interest as distinguished from interests of a general and indefinite character." \* \* \* The applicant must demonstrate that there is a tangible threat to a legally cognizable interest to have the right to intervene." *Harris*, 820 F.2d at 601 (citations omitted). The interest has been identified "as

one belonging to or being owned by the proposed intervenor." Id. (citations omitted). Thus, the question posited here is whether the Department is a real party in interest.

Upon reviewing the Department's purported interests, the Court finds that the Department does not have a sufficient interest in the litigation. "In general, a mere economic interest in the outcome of litigation is insufficient to support a motion to intervene." Id. Thus, the fact that [\*10] the Department has a generalized economic interest in this litigation -- in that, the Department may have to bear increased costs as a result of Amtrak's exemption -- is irrelevant for the purposes of determining whether the Department has a sufficient interest for Rule 24(a)(2) intervention. Rather, as noted above, the Department must demonstrate a tangible threat to a legally cognizable interest to have the right to intervene.

The Department simply cannot demonstrate that there exists a tangible threat to a legally cognizable interest. The subject matter of this litigation is the scope of Amtrak's exemption from state and local taxes granted to Amtrak by 49 U.S.C. § 23401(l), formerly codified at 45 U.S.C. § 546b, as it applies to the responsibility for the maintenance of highway bridges. The only entity with a legal interest in that question is the Commission, which is the only entity with the authority to impose these costs on Amtrak. While the Department may have a generalized economic or governmental interest in this case, the Department does not have a legally cognizable interest in the subject matter of this litigation. See *New Orleans Public Service, Inc. v. United Gas [\*11] Pipe Line Co.*, 732 F.2d 452, 466 (5th Cir. 1984) (holding that the economic interest implicated therein was not a legal interest); *Harris*, 820 F.2d at 600 (holding that the generalized governmental interest implicated therein was not a legal interest as required by Rule 24(a)(2)).

Finally, the Court finds that the Department's interests are adequately represented by the other parties to this litigation. In the Order of January 4, 1991, this Court held that the Department has "failed to demonstrate any compelling reasons why the PUC does not represent adequately all of the Commonwealth's interests . . . ." *National Railroad*, 1991 U.S. Dist. LEXIS 114, 1991 WL 993, at \*3. Today the Department fails no better in advancing its argument that it has a sufficiently different interest than the interests of the defendants.

In its brief, the Department argues that no other party other than itself is in the best position to protect the interest of the Commonwealth "in the preservation and protection of [its funds] for highway projects." However, this argument is simply without merit because Tredyffrin

Township has an identical interest in minimizing the costs by imposing a share of the responsibility for [\*12] highway maintenance on Amtrak. Thus, the arguments advanced by Tredyffrin in support of its position will perform lend support to the Department's position. Indeed, the arguments advanced by the Department in the brief it wishes to submit to this Court merely mimic the arguments that are contained in Tredyffrin's brief, and for that matter, in the Commission's brief. The Court thus concludes that the Department has not demonstrated that its interests are not adequately protected by the defendants in this litigation.

Because the Department has failed to satisfy all of the requirements contained in Rule 24(a)(2), the

Department's motion to intervene in this action is denied.

An appropriate Order follows.

Clarence C. Newcomer, J.

**ORDER**

AND NOW, this 9th of September, 1997, upon consideration of the Motion of the Commonwealth of Pennsylvania, Department of Transportation to Intervene as a Defendant Under Rule 24, and plaintiff National Railroad Passenger Corporation's response thereto, it is hereby ORDERED that said Motion is DENIED.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.

# **EXHIBIT H**

LEXSEE 2004 U.S. DIST. LEXIS 17730

**FEDERAL TRADE COMMISSION, Plaintiff, v. MERCURY MARKETING OF DELAWARE, INC., & NEAL D. SAFERSTEIN, Defendants.**

**CIVIL ACTION NO. 00-3281**

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

*2004 U.S. Dist. LEXIS 17730; 34 ELR 20079*

**August 25, 2004, Decided  
August 25, 2004, Filed; August 26, 2004, Entered**

**SUBSEQUENT HISTORY:** Later proceeding at *FTC v. Mercury Mktg. of Del., Inc., 2004 U.S. Dist. LEXIS 23707 (E.D. Pa., Nov. 22, 2004)*

**DISPOSITION:** [\*1] Proposed intervenor's motion to intervene of right denied. Proposed intervenor's motion for permissive intervention granted.

**LexisNexis(R) Headnotes**

**COUNSEL:** For FEDERAL TRADE COMMISSION, Plaintiff: BRENDA W. DOUBRAVA, LEAD ATTORNEY, FEDERAL TRADE COMMISSION, CLEVELAND, OH.

**JUDGES:** CLIFFORD SCOTT GREEN, S.J.

**OPINIONBY:** CLIFFORD SCOTT GREEN

**OPINION:**

**MEMORANDUM / ORDER**

**Green, J.**

Presently pending before this court is the Motion to Intervene of Proposed Intervenor Mercantile Capital, L.P., Mercantile Holdings, L.L.C. and MC Real Estate Partners I, L.P. ("Mercantile"); the Response in Opposition by Plaintiff Federal Trade Commission ("FTC"); and Mercantile's Reply thereto. Mercantile is an asset-based lending and discount factoring firm based in Wynnewood, Pennsylvania. Beginning in March 2000, Mercantile claims to have extended to Defendants over \$

17 million, including more than \$ 2 million to finance its operations, make refunds to consumers and to acquire several properties after this Court concluded that there was clear and convincing evidence that defendants purposely misled consumers.

Mercantile moved to intervene either of right or through permissive intervention pursuant to *Federal Rule of Civil Procedure 24* [\*2] . A party may intervene as of right pursuant to *Fed. R. Civ. P. 24(a)(2)* when: (1) the request is timely; (2) there is sufficient interest by the applicant; (3) those interests may be impaired by the disposition of this action; and (4) the current parties do not represent those interests. See *Harris v. Pernsley, 820 F.2d 592 (3d Cir. 1987)*; *Mountain Top Condominium Assoc. v. Dave Stabbert Master Builder, Inc., 33 V.I. 311, 72 F.3d 361, 365-66 (3d Cir. 1995)*.

Mercantile contends that it may intervene of right as it satisfies the criteria of the Federal Rule Mercantile argues that its request is timely because they seek to intervene at the point where they knew or should have known the litigation may directly affect their rights. Prior to this court's December 2003 order and the FTC's Motion to Re-establish the Security Deposit, Mercantile acknowledges that it was merely a third-party lender incapable of intervening as they had a mere economic interest insufficient to satisfy the second prong. See *Mountain Top, 72 F.3d at 366*. Mercantile argues that now, in addition to being a third party lender, Mercantile is participating in management and is developing [\*3] a salvage plan (the "Workout Agreement") so that the business can thrive in order to pay them back the 17 million in loans that Mercantile has made to GoInternet. Secondly, Mercantile argues that its interest is directly

# **EXHIBIT I**

LEXSEE 2002 U.S. DIST. LEXIS 18110

**JOHN HAYMOND HAYMOND NAPOLI DIAMOND, P.C. v. MARVIN LUNDY v. JOHN HAYMOND, ROBERT HOCHBERG, HAYMOND NAPOLI DIAMOND, P.C.**

**CIVIL ACTION No. 99-5048**

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

*2002 U.S. Dist. LEXIS 18110*

**September 26, 2002, Decided  
September 26, 2002, Filed; September 27, 2002, Entered**

**SUBSEQUENT HISTORY:**

[\*1] As Amended October 1, 2002 *Affirmed by Lundy v. Hochberg, 2003 U.S. App. LEXIS 21699* (3d Cir. Pa., Oct. 22, 2003)

**PRIOR HISTORY:** *Haymond v. Lundy, 2002 U.S. Dist. LEXIS 15770* (E.D. Pa., Aug. 23, 2002)

**DISPOSITION:** Wachovia Bank's motion to intervene and supplement court's August 23, 2002 final judgment/distribution denied.

**LexisNexis(R) Headnotes**

**COUNSEL:**

MARTIN HELLER, SPECIAL MASTER, Pro se, PHILA, PA.

For ROBERT HOCHBERG, MOVANT: HOWARD M. KLEIN, WILLIAM J. O'BRIEN, CONRAD, O'BRIEN, GELLMAN & ROHN, P.C., PHILA, PA USA.

For HAYMOND NAPOLI & DIAMOND, PLAINTIFF: PETER J. HOFFMAN, MC KISSOCK & HOFFMAN, P.C., PHILA, PA USA. M MELVIN SHRALOW, WHITE AND WILLIAMS, PHILA, PA USA.

For JOHN HAYMOND, PLAINTIFF: M [\*2] MELVIN SHRALOW, WHITE AND WILLIAMS, PHILA, PA USA.

For MARVIN LUNDY, DEFENDANT: L. LEONARD LUNDY, KAPLIN, STEWART, MELOFF, REITER AND STEIN, P.C., BLUE BELL, PA USA. PAUL R. ROSEN, BRUCE L. THALL, SPECTOR, GADON AND ROSEN, P.C., PHILA, PA USA. ALAN B. EPSTEIN, SPECTOR GADON & ROSEN, PHILA, PA USA.

For DONALD F. MANCHEL, MOVANT: ROBERT C. DANIELS, ROBERT C. DANIELS, LTD, PHILADELPHIA, PA USA.

For WACHOVIA BANK, MOVANT: GLENN P. GALLAHAN, McCARTER & ENGLISH LLP, PHILADELPHIA, PA USA.

**JUDGES:**

Norma L. Shapiro, S.J.

**OPINIONBY:**

Norma L. Shapiro

**OPINION:**

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

September 26, 2002

FACTS

Wachovia Bank, National Association, formerly known as First Union National Bank (the "Bank"), moves under Federal Rules of Civil Procedure 24 and 59(e), for leave to intervene and supplement the court's August 23, 2002 Order, Final [\*3] Judgment/Distribution regarding the distribution of the assets of the now defunct firm of Haymond & Lundy, LLP ("H&L"). This distribution followed a jury finding in favor of John Haymond ("Haymond") on his claims for breach of the H&L partnership agreement against Marvin Lundy ("Lundy"). The August 23, 2002 Final Judgment/Distribution addressed distribution of all the assets and liabilities of H&L accruing on or before January 31, 2002, and relied on the written recommendation the court-appointed receiver, Martin Heller, Esq. ("Receiver"), provided to the court on January 31, 2002 and February 28, 2002, respectively.

As part of the initial Final Judgment/Distribution, H&L's capital was to be distributed first to third parties, "including the bank debt and the loan made to the

partnership by Hochberg." See Order dated August 23, 2002. The Final Judgment/Distribution Order was amended to delete reference to the Bank debt as a debt owed by H&L, and does not purport to deal with it. See Order on September 6, 2002.

The Bank made a loan to H&L in the original principal amount of \$ 650,000 on February 18, 1999. The loan was secured by a pledge of H&L's assets, as set forth in a [\*4] Security Agreement, also dated February 18, 1999. H&L granted the Bank, a security interest in, *inter alia*, all of its accounts, contract rights, and other rights of H&L for payment for services rendered. The security interest of the Bank was perfected by the filing of Uniform Commercial Code-1 Financing Statements with the Secretary of the Commonwealth and the Prothonotary of Philadelphia County.

The Bank now claims a priority interest in any H&L funds constituting pledged collateral or the proceeds thereof. The Bank also claims a secured interest under the loan documents, not only in principal and interest but also "all costs and expenses incurred by Bank to obtain, preserve, perfect and enforce the security interest" and the "payment and performance of the Promissory Note."

As of September 3, 2002, the following amounts are allegedly due and payable:

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"Principal	\$ 602,887.72
Interest	5,986.96
Attorneys' Fees	334,000.00

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With interest accruing at the per diem rate of \$ 129.78." The Bank seeks to intervene in this action to obtain an amendment to this court's Final Judgment/Distribution reflecting the total amount allegedly [\*5] due and owing to the Bank under the terms of the H&L loan documents.

On March 28, 2000, the Bank filed judgments by confession against Marvin Lundy, John Haymond and Marvin Lundy t/a Haymond & Lundy, LLP, docketed at Court of Common Pleas of Philadelphia County, March Term 2000, numbers 0699 and 3386 respectively. n1 Marvin Lundy filed Petitions to Strike or Open the Confessed Judgments in his individual capacity and as a partner of Haymond & Lundy, LLP. On September 15, 2000, the Court of Common Pleas entered orders granting the petitions to open the confessed judgments in both actions.

n1 The Bank also filed a judgment by confession against John Haymond on the same date. That judgment by confession has allegedly never been challenged and remains in effect.

Lundy claims that the Bank failed to investigate and discover that his partner, Hochberg, the general partner and a signatory to the loan, had been disbarred in Connecticut and Massachusetts. The Bank claims it has no legal obligation, business policy, [\*6] or procedure requiring it to perform background and/or credit checks on general partners of a prospective borrower. It also denies that either "standard industry practice" or the Fair Credit Reporting Act required the Bank and its predecessors to do anything more than they did in making and modifying the loan to H&L. The Bank

asserts that Lundy could just as easily form his own judgment, or conduct a search of public records, as to his former partner, Hochberg. In support of its position, the Bank relies on this court's findings that Lundy enjoyed at least constructive notice of the Hochberg conviction resulting in disbarment prior to the formation of H&L, and that Lundy is collaterally estopped from raising this issue. See *Haymond v. Lundy*, 2000 U.S. Dist. LEXIS 8585, C.A. No. 99-5015 at pp. 5, 7, 14 and 18. The court expresses no view on the merits of this issue for reasons stated below.

Prior to the orders opening the confessed judgments, the Bank obtained writs of execution and garnished H&L funds at Sun National Bank in an amount slightly in excess of the principal of its debt. The lien remains in effect; a separate escrow account established by a Stipulation entered into by the Bank with all parties [\*7] provides for distribution in accordance with the state court adjudication of the Bank's claims against H&L. This court's Amended Order did not provide for distribution of those funds in escrow not under control of the court's Receiver.

#### ARGUMENT

*Federal Rule of Civil Procedure 24(a)* provides:

(a) Intervention of Right - Upon timely application anyone shall be permitted to intervene in an action (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 24 (a) (2) requires the applicant seeking intervention as of right to prove four elements: (1) a timely application for leave to intervene; (2) a sufficient interest in the litigation; (3) a threat that the interest will be impaired or affected, as a practical matter, by the disposition of the action; and (4) inadequate representation of the prospective intervenor's interest by existing parties to the litigation. [\*8] *Kleissler v. United States Forest Serv.*, 157 F.3d 964, 969 (3d Cir. 1998).

The Bank argues that because the present parties to this prolonged litigation, debtors of the Bank, possess

interests adverse to the Bank, n2 they are unable to provide adequate representation. The Bank is correct in this assertion. The Bank's interests cannot be adequately represented by the present parties.

n2 Marvin Lundy and Wachovia are litigating issues regarding this debt in the Philadelphia Court of Common Pleas.

However, the Bank has failed to establish that its interest in the litigation is sufficient or that the court's disposition will impede or impair that interest. The principal sum of the loan made by the Bank to the present parties is in escrow, in an interest-bearing account. The Bank claims this will not cover the "costs and expenses incurred by Bank to obtain, preserve, perfect and enforce" the repayment of the loan, but the obligation to pay costs and expenses is the subject of litigation pending in [\*9] the Philadelphia Court of Common Pleas; it has jurisdiction to reassess damages. n3 There is nothing to prevent the Bank from executing on any final judgment by garnishment or otherwise nor is there any evidence that any signatory to the loan is judgment-proof, so its interest will not be impeded or impaired by the inability to obtain a pre-judgment supplemental attachment in this litigation.

n3 The Philadelphia Court of Common Pleas, by Order dated December 21, 2001, denied the Bank's Petition to Reassess Damages as premature, without prejudice. Therefore, the Bank is free to raise the issue at trial or thereafter if the prevailing party.

The Bank also fails to demonstrate that its interest in the litigation is sufficient. The August 23, 2002, Final Judgment/Distribution of this court has no practical effect on the Bank's interest; the forthcoming adjudication of the state court litigation regarding the loan obligations will. The Court of Appeals has made it clear that "a mere economic interest in the outcome [\*10] of litigation is insufficient to support a motion to intervene." *Mountain Top Condominium Ass'n v. Dave Stabbert Master Builder, Inc.*, 33 V.I. 311, 72 F.3d 361, 366 (3d Cir. 1995). Not only is the Bank's alleged interest in recovering the loan principal and related expenses clearly economic in nature, it is also qualified. The Bank's ability to recover additional monies related to its efforts to secure repayment is contingent on the outcome of the state court litigation. If and when the Court of Common Pleas determines the Bank is entitled to the sum held in

escrow, the Bank may petition that Court to increase the amount of the judgment by the additional costs and expenses it claims.

Finally, and most importantly, the Bank's Motion to Intervene is untimely. Whether a motion to intervene is timely is decided in light of the totality of the circumstances. See *NAACP v. New York*, 413 U.S. 345, 366, 37 L. Ed. 2d 648, 93 S. Ct. 2591 (1973). The determination of the timeliness of a motion to intervene is in the sound discretion of the court. *Halderman v. Pennhurst State School and Hospital*, 612 F.2d 131, 134 (3d Cir. 1979).

In *Commonwealth of Pennsylvania v. Rizzo*, 530 F.2d 501, 506 (3d Cir. 1979), [\*11] the Court of Appeals listed three factors that inform the inquiry regarding timeliness of an intervention motion: (1) How far the proceedings have gone when the movant seeks to intervene, ... (2) prejudice which resultant delay might cause to other parties, ... and (3) the reason for the delay. (citations omitted). None of these factors support the Bank's intervention.

First, "There is considerable reluctance on the part of the courts to allow intervention after the action has gone to judgment ... ." 7C C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1916, at 444. Post-judgment intervention is justified only under "extraordinary circumstances." *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 674 F.2d 970, 974 (3d Cir. 1982). In Delaware Valley, the Court rejected the appellant's contention that modifications to the consent decree rendered the motion to intervene timely: "While appellants may be correct that entry of a consent decree is not an absolute bar to intervention (citation omitted), appellants have not demonstrated any extraordinary circumstances sufficient to overcome the presumption against intervention at this [\*12] late date." 674 F.2d at 974; but see *Rapp v. Cameron*, 2001 U.S. Dist. LEXIS 17046, at \*4 (Oct. 18, 2001) (insurance company allowed to intervene 17 days after the jury's verdict because court found no evidence of prejudice to the existing parties or substantial interference with the orderly processes of the court).

Here, the Bank waited for two weeks after the court's Final Judgment/Distribution Order to file its motion despite knowledge of its potential risk for more than two years. The Bank essentially moves to intervene to prevent distribution of funds already distributed by court order.

Second, were the Bank permitted to intervene, other parties would suffer prejudice. The Bank's claim against H&L regarding the repayment of the principal loan is already the subject of state court litigation. Accordingly,

the state court should decide the contingent issue of expenses related to the collection of that loan; it has only denied the Bank's Petition to Reassess Damages without prejudice. Having agreed with the parties that the Court of Common Pleas would be the forum to decide its claims, the Bank cannot now attempt to bring those same claims in [\*13] this court to secure payment beyond the sum in escrow.

When a proposed intervenor knew or should have known of the pendency of a lawsuit at an earlier time, but failed to act at that time to protect its interests, that inaction will weigh heavily against the timeliness of the motion. *Delaware Valley Citizens' Council for Clean Air*, 674 F.2d at 975; see also *In re Fine Paper Antitrust Litigation*, 695 F.2d 494, 501 (3d Cir. 1982) ("Although appellants knew or should have known long before settlement that their interest was not protected, they failed to take the necessary steps... . They presented no reason for their delay... ."). With full knowledge of this action, the Bank filed state court confessions of judgment in March, 2000; received Orders dated September 15, 2000, opening the judgments against H&L; and, chose to pursue its claims in the Court of Common Pleas by the Stipulation holding in escrow the funds then adequate to secure the debt. At no time during the adjudication of this action did the Bank move to intervene. The Bank has not established it is entitled to intervention of right.

The Federal Rules of Procedure also allow for permissive [\*14] intervention:

Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

*Fed. R. Civ. P. 24(b)*. Here the applicant's claim or defense may have a question of law or fact in common: Lundy's knowledge of Hochberg's disbarment. But, following the court's pretrial rulings and the jury verdict, there are no more questions of law or issues of fact pending before this court. The effects of the federal rulings on the state court litigation must be decided by the state court judge. Most importantly, permissive intervention is only permitted "upon a timely application." The application for permissive intervention is no more timely than the application for intervention of right. This court declines to exercise its discretion to allow intervention.

Accordingly, the court denies the Bank's Motion to

Intervene; the Bank has failed to demonstrate that it is entitled to intervention of right or permissive intervention. Consistent with this denial, the Bank's

Motion to Supplement the [\*15] Court's August 23, 2002 Final Judgment/Distribution is also denied. An appropriate Order follows.