

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

SUNNARUN KEO, et al.,)
)
 Plaintiffs)
)
 v.)
)
 H. ROLLIN IVES, et al.,)
)
 Defendants and)
 Third-Party)
 Plaintiffs)
)
 v.)
)
 LOUIS W. SULLIVAN, M.D.,)
 Secretary, United States)
 Department of Health &)
 Human Services,)
)
 Third-Party)
 Defendant)

Civil No. 90-0051 P

**MEMORANDUM DECISION ON MOTION TO INTERVENE
AS A PARTY DEFENDANT**

Coastal Economic Development ("CED") and Western Maine Community Action ("WMCA"), two private agencies, seek to intervene in the instant lawsuit challenging Maine's operation of education and training programs for recipients of Aid to Families with Dependent

Children ("AFDC").¹ The plaintiff AFDC beneficiaries complain that Maine violates a federal requirement that state AFDC programs be administered by a single state agency. *See* Complaint & 1. Specifically, the plaintiffs contend that the state defendants violate federal law governing the Additional Support for People in Retraining and Education ("ASPIRE") program. *Id.* The plaintiffs seek, *inter alia*, to require the defendants "to recoup funds illegally expended." *Id.* CED and WMCA petition to intervene as of right under Fed. R. Civ. P. 24(a)(2) or permissively under Fed. R. Civ. P. 24(b)(2). Because I have recommended dismissal of the plaintiffs' original complaint on the ground of lack of subject-matter jurisdiction, *see* Recommended Decision on Motion of Third-Party Defendant to Dismiss, and have upon reconsideration denied the plaintiffs' motion to amend their complaint, *see* Memorandum Decision on Motions for Reconsideration and for Leave to File Amended Complaint, I deny the instant motion to intervene. Alternatively, I deny for the reasons discussed below.

I. PROCEDURAL REQUISITES

Fed. R. Civ. P. 24(c) requires would-be intervenors to serve motions upon the parties stating the grounds for intervention, "accompanied by a pleading setting forth the claim or defense for which intervention is sought." CED and WMCA failed to accompany their motion with the required pleading, leaving the court and parties to divine the nature of their defense and to speculate about the possibility that they might assert a claim. While such a procedural default does not necessarily justify

¹ CED and WMCA's motion to intervene originally was granted. *See* Endorsement dated 12/7/90 to Motion to Intervene as a Party Defendant. The state defendants then filed a motion for reconsideration, which I granted. *See* Endorsement dated 1/2/91 to State Defendants' Motion for Reconsideration and Incorporated Memorandum.

denial of the petitioners' motion, *see, e.g., Central Me. Restaurant Supply v. Omni Hotels Management Corp.*, 73 B.R. 1018, 1021 (D. Me. 1987), it weakens the foundations of their case.

II. INTERVENTION OF RIGHT

To qualify for intervention of right under Fed. R. Civ. P. 24(a)(2), a prospective intervenor must (1) submit a timely application; (2) claim "an interest relating to the property or transaction which is the subject of the action"; (3) be "so situated that the disposition of the action may as a practical matter impair or impede [the applicant's] ability to protect that interest"; and (4) show that the would-be intervenor's interest is not "adequately represented by existing parties." All four preconditions must be met. *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 637 (1st Cir. 1989). The would-be intervenor bears the burden of demonstrating compliance. *International Paper Co. v. Inhabitants of Town of Jay*, 887 F.2d 338, 342 (1st Cir. 1989). No one contends that the motion of CED and WMCA is untimely. I therefore proceed to consider the remaining three factors.

A. Interest in Property or Transaction

An intervenor must show that its interest in the subject matter of the action is "direct, substantial, and legally protectible." *Dingwell*, 884 F.2d at 638 (quoting *Flynn v. Hubbard*, 782 F.2d 1084, 1092 (1st Cir. 1986) (Coffin, J., concurring)). CED and WMCA fail to establish a sufficient nexus between their interests and the plaintiffs' lawsuit. The plaintiffs allege that Maine unlawfully delegated ASPIRE duties to the Maine Department of Labor as well as to the Department of Human Services ("DHS"). *See, e.g.,* Complaint §§ 30-31. The Department of Labor in turn allegedly illegally contracted this work to third parties, such as private agencies. *See, e.g., id.*, Prayer for Relief & D. The complaint, as I read it, challenges the legality of ASPIRE contracts between the Department

of Labor and private agencies but not between DHS and private agencies. CED and WMCA contracted with DHS to provide ASPIRE services. Memorandum in Support of Motion to Intervene ("Intervenors' Memorandum") at 2. Inasmuch as appears, the instant lawsuit does not implicate the contracts of CED and WMCA.

CED and WMCA likewise run afoul of the requirement that they demonstrate legally protectible interests. They apparently have little, if any, protectible interest in continued performance.

DHS reserved the right to terminate their contracts "whenever for any reason the Contract Administrator shall determine that such termination is in the best interest of the Department." State Defendants' Memorandum in Support of Objections to Motions to Intervene ("Defendants' Memorandum") at 3; Appendix 1 to Defendants' Memorandum (Standard Agreement, Rider B) & 17.

CED and WMCA arguably have a legally protectible interest in retaining money for services rendered. Such an interest could be implicated by the plaintiffs' demand that the state recoup money illegally expended. *See* Complaint, Prayer for Relief & D. CED and WMCA allude to this interest but fail to explain how it is legally protectible in these circumstances.

B. Impairment of Ability to Protect Interest

CED and WMCA offer a conclusory argument that the instant lawsuit would impair or impede their interests. *See* Intervenor's Memorandum at 3. Presumably, the would-be intervenors are worried that the *stare decisis* effects of an adverse decision would undermine their ability to defend their contractual interests in a later lawsuit. Such concerns are legitimate, particularly in a case presenting questions of first impression. *International Paper*, 887 F.2d at 344-45. Nonetheless, the magnitude of the *stare decisis* problem is greatly diminished when existing parties adequately represent the prospective intervenor's position. *Id.* at 345. Such is the case here.

C. Adequacy of Representation

The failure of CED and WMCA to file a pleading outlining their defenses and/or claims complicates assessment of whether their interests are adequately represented. CED and WMCA presumably seek to intervene for the purpose of defending against the plaintiffs' narrow legal claims. They appear to share "the same ultimate goal" as the state defendants, a situation in which adequacy of representation is presumed. *Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979). To overcome the presumption, would-be intervenors "ordinarily must demonstrate adversity of interest, collusion, or nonfeasance." *Id.* CED and WMCA attempt to show adversity of interest (or possibly nonfeasance) in that DHS shares neither their economic interests nor their potential exposure to loss through possible recoupment of funds. Intervenor's Memorandum at 4. CED and WMCA suggest that "D.H.S. may advocate in this action, either in litigation or negotiation, to expand or otherwise alter its current role in delivering A.S.P.I.R.E. services." *Id.* They cite *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972), for the proposition that all they

need do is show that existing representation may be inadequate. *Id.* The Court of Appeals for the First Circuit has suggested that *Trbovich* does not obviate a petitioner's need to "produce something more than speculation as to the purported inadequacy" *Moosehead*, 610 F.2d at 54. CED and WMCA offer mere speculation that their economic interests would lead to a qualitatively different legal defense than that of the defendants.

III. PERMISSIVE INTERVENTION

A court may permit intervention under Fed. R. Civ. P. 24(b)(2) if a petition is timely and asserts claims or defenses that have "a question of law or fact in common" with the main action. A court must also "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." The First Circuit imposes an additional threshold requirement that the petitioner demonstrate independent jurisdictional grounds for the claims or defenses, including standing to assert them. *International Paper*, 887 F.2d at 345-46.

For the reasons stated in analyzing the petitioners' interest for purposes of intervention as of right, they fail to carry their burden of demonstrating the existence of common questions of law or fact. From all that appears, their contracts with DHS are not implicated by the instant lawsuit. Further, CED and WMCA neglect to present jurisdictional grounds for permissive intervention. Because the petitioners failed to file the requisite pleading of claims and defenses, I cannot tell whether they anticipate pressing state contractual claims in this court. If so, they have not delineated any independent basis for federal jurisdiction.

IV. CONCLUSION

For the foregoing reasons, I *DENY* the motion of CED and WMCA to intervene in the instant action.

Dated at Portland, Maine this 3rd day of April, 1991.

David M. Cohen
United States Magistrate Judge