

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

THE OHIO BUREAU OF WORKERS'
COMPENSATION,

Plaintiff,

Case No. 2:05-cv-00673

v.

Judge Graham

MDL ACTIVE DURATION FUND, LTD.,
et al.,

Magistrate Judge Kemp

Defendants.

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO JACOBSON EXCAVATING &
CONTRACTING INC.'S MOTION TO INTERVENE

The Court should deny the motion of Jacobson Excavating & Contracting Inc. ("Applicant") to intervene in this action because it involves claims pertaining to contracts and investments to which Applicant is not and has not been a party, in which Applicant has no legally cognizable interest, and regarding which Applicant has no right of recovery or even capacity to recover. Applicant cannot fulfill the requirements for intervention set forth in Rule 24 of the Ohio Rules of Civil Procedure for several reasons.

First, both the Constitution of Ohio and the Ohio Revised Code provide and the Supreme Court of Ohio has held that the Workers' Compensation State Insurance Fund (the "Fund") does not belong to Ohio employers and, therefore, employers (including Applicant) have no legal interest in the Fund. Thus, Applicant has no interest in an action that relates solely to investment transactions of the Fund and is brought solely to achieve recovery on behalf of the Fund. Applicant also lacks any interest in this action because the claims that Applicant proposes to assert do not seek any recovery for

Applicant but rather only for the Fund. Applicant seeks to restate claims that are identical to those already stated by Plaintiff The Ohio Bureau of Workers' Compensation (the "Bureau")—claims that belong to the Bureau.

Second, Applicant lacks standing to litigate its proposed claims. Applicant is not a real party in interest to the claims it seeks to assert, all of which pertain to agreements and transactions to which Applicant is not and has not been a party and from which Applicant had no ability to benefit. Moreover, the Ohio Revised Code mandates that only the Bureau has standing to pursue claims on behalf of the Fund. Applicant should not be permitted to intervene as a plaintiff in an action involving claims that Applicant cannot pursue.

Third, the outcome of this action, whatever it may be, will not affect any legal interest of Applicant. Applicant's stated justifications for intervening in this action—a professed fear that the outcome of this case might have some impact on future workers' compensation premiums—presents the Court with a political controversy and theories of contingent future events, neither of which is justiciable. This action will not be and cannot be dispositive of the future of workers' compensation premiums in the State of Ohio. Applicant would have no way of affecting the cost of future premiums merely by participating in this case. For all of these reasons, the Court should deny Applicant's motion to intervene.

I. APPLICANT HAS NO INTEREST RELATING TO THE SUBJECT MATTER OF THIS ACTION.

A. Applicant Has No Legal Interest in the State Insurance Fund.

Although section 4123.30 of the Ohio Revised Code recites that the state insurance fund constitutes a trust fund for the benefit of employers and employees, it is in fact injured workers and their dependents (and not employers) who are the beneficiaries of the Fund. Thus, the Supreme Court of Ohio has held that the Fund does not belong to employers.

[T]he state insurance fund does not belong to the employers, but to the injured workmen and their dependents; and under Section 35 Article II of the Constitution the fund is to be "administered by the state, determining the terms and conditions upon which payment shall be made therefrom."

Rudd v. Indus. Comm'n, 116 Ohio St. 67, 75 (1927) (emphasis added).

Once an employer has paid a premium into the fund, the premium becomes the property of the State of Ohio to be held in trust for the payment of compensation to injured workers. Williams v. Indus. Comm'n, 116 Ohio St. 45, 51 (1927). It is for this same reason that any claim by an employer that the State's use of the Fund constitutes a taking of property without due process would fail: "[T]he state insurance fund does not belong to the employer. Such being the fact, due process is not available to the employer, for his property is not taken." Id. at 55. Further demonstrating that employers relinquish any interest in their premiums once paid into the Fund and have no legally protected interest in the Fund is that employers receive something in return for their payments in the workers' compensation system.

The employer, having paid his premium to the state, has acquired not only insurance, but has also obtained immunity from suit—has obtained his

quid pro quo—meanwhile the fund is held in trust by the state, solely for the benefit of injured workmen and their dependents.

Id. (emphasis added); see also 1–1 Ohio Worker's Compensation Law §1.5 (Matthew Bender 2004) ("The trust fund does not belong to employers but to injured workers and their dependents. Once the employer had paid the premium into the fund, the fund becomes the property of the state and is held in trust.").

Because the Fund does not belong to employers and exists solely for the benefit of injured workers and their dependents, Ohio employers have no property rights in the Fund, no legally recognized interest in the Fund, and no entitlement to participate in administration of the Fund. Although employers may be "interested" in how the State administers the Fund and may be concerned in how administration of the Fund might affect future premiums, as a matter of law employers have no legally cognizable interest in the Fund that would allow them to pursue claims for the protection or benefit of the Fund or that would permit them to intervene in this action.

B. Applicant Is Neither a Party to Nor a Beneficiary of the Contracts and Transactions at Issue in This Action.

Applicant does not have any interest in the property or transactions that are the subject of this action because Applicant was not a party to or an intended beneficiary of any of those transactions. To qualify for intervention of right, the applicant must have an interest (for itself) relating to the property or transaction that is the subject of the action. Ohio R. Civ. P. 24(A)(2). To qualify for permissive intervention, the applicant must present a claim (for itself) that has a question of law or fact in common with the claim or defense of the main action. Id. at 24(B)(2).

A comparison of the Bureau's complaint with Applicant's proposed complaint makes it apparent that Applicant is not seeking to assert any new claim for itself and has no claim of its own that has anything in common with the Bureau's claims. Rather, Applicant is seeking to re-allege and litigate the Bureau's claims. Applicant's proposed claims are identical to the Bureau's claims in terms of the allegations and the relief sought.¹ Applicant has done nothing more than insert its name alongside the Bureau's name, seeking to create the illusion that Applicant has interests identical to those of the Bureau. Most revealing is that, for every claim that Applicant proposes to assert, relief would be granted to the Bureau and not to Applicant if the claims were to succeed. Applicant does not stand to directly benefit or be injured by the outcome of this case and is not, therefore, a real party in interest.

The fraud, negligent misrepresentation, conspiracy, and aiding and abetting claims asserted in this action pertain to false, misleading, and/or negligent misrepresentations made by Defendants to the Bureau, which misrepresentations the Bureau relied upon and which misrepresentations were material to the Bureau's investment decisions. Indeed, Applicant was not and does not claim to have been on the receiving end of any fraudulent or negligent communications. The fraud and negligence at issue in this case were perpetrated upon the Bureau—not Applicant. Therefore, those are claims that only the Bureau may pursue and in which Applicant has no interest. By seeking to intervene, Applicant is doing nothing more than

¹ Applicant proposes to assert one additional claim—Count XI: Negligence/Gross Negligence/Wanton and Willful Misconduct. However, that Count XI and its allegations merely repeat what is stated in the separate claims of negligence and breach of fiduciary duty. Applicant's proposed Count XI would allege nothing new and is inserted only for the purpose of trying to make Applicant's proposed complaint look different from the Bureau's complaint.

attempting to litigate the Bureau's fraud, negligence, conspiracy, and aiding and abetting claims for the Bureau.

Likewise, the various claims made in this action under the Ohio Securities Act are based upon Defendants having made untrue statements of material fact and omitting to state material facts to the Bureau in connection with Defendants' selling securities and providing investment advice to the Bureau. To assert a securities fraud claim, one must have purchased securities or received investment advice. Applicant did not purchase securities or receive investment advice regarding any securities that are the subject matter of this litigation. Again, Applicant is merely trying to litigate the Bureau's claims for it.

In mimicking the Bureau's breach of fiduciary duty claim, the Applicant cannot avoid conceding that the alleged violation of fiduciary duty pertains to Defendants' failures to disclose information to the Bureau (not the Applicant). (Applicant's Proposed Compl. ¶ 117.) Applicant states that those nondisclosures affected the Bureau's investment decisions—not any decision of the Applicant. (Id. at ¶ 118.) The activities that underlie the breach of fiduciary duty claim occurred between Defendants and the Bureau, and Applicant may not seek to pursue that claim for the Bureau.

The breach of contract claim in this action pertains to contracts to which the Bureau was a party and/or an intended third-party beneficiary. Applicant was not a party to those contracts, nor does it claim to be. Applicant does not seek recovery for the Defendants' misconduct and breaches under a third-party beneficiary theory because Applicant is not seeking any recovery for itself. Applicant purports to allege that the Defendants' contract breaches damaged Applicant; yet, the remedy that

Applicant requests—recission of the sale and purchase of Fund shares—is a remedy that could flow only to the Bureau (for the benefit of the Fund). The same is true of Applicant's proposed claim of unjust enrichment in which Applicant alleges that the "wrongful benefit and enrichment of each Defendant was at the expense of the Bureau" and not Applicant. (Id. ¶ 138.) Once again, Applicant is not trying to assert any claim for itself but is trying to interfere in the Bureau's prosecution of its claims.

Applicant's proposed claims allege nothing new and allege nothing that could result in a recovery for Applicant. No legal rights of Applicant hinge on the outcome of this case. Applicant is seeking to allege claims for which the Bureau is the real party in interest and in which Applicant has no interest that would permit it to intervene.

II. APPLICANT LACKS STANDING TO PURSUE ITS PROPOSED CLAIMS.

A. Applicant Is Not a Real Party in Interest.

In Ohio courts, an action must be brought in the name of the party who possesses the substantive right being asserted under applicable law. Rule 17(A) of the Ohio Rules of Civil Procedure provides, in pertinent part, that "[e]very action shall be prosecuted in the name of the real party in interest." Ohio R. Civ. P. 17(A).

To be a real party in interest, a claimant must be "one who has a real interest in the subject matter of the litigation, and not merely an interest in the action itself, i.e., one who is directly benefited or injured by the outcome of the case." Voinovich v. Ferguson, 63 Ohio St. 3d 198, 209 (1992) (emphasis added). To determine whether a claimant is a real party in interest, "courts must look to the substantive law creating the right being

sued upon to see if the action has been instituted by the party possessing the substantive right to relief." Shealy v. Campbell, 20 Ohio St. 3d 23, 25 (1985).

Under Ohio law, one does not have a substantive right to recover under a theory of fraud² unless a representation (or concealment of fact) was directed to the claimant with the intent to mislead the claimant, the claimant relied upon the representation, and injury has already resulted to the claimant as a result of the representation. Williams v. Aetna Fin. Co., 83 Ohio St. 3d 464, 475 (1998). One does not have a substantive right to recover under a theory of negligent misrepresentation unless the claimant has been supplied with false information for the guidance of the claimant in his business transactions. Delman v. Cleveland Heights, 41 Ohio St. 3d 1, 4 (1989).

There is no substantive right to recovery for a breach of fiduciary duty without the existence of a duty arising from a fiduciary relationship. A "fiduciary" is "a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking." Strock v. Pressnell, 38 Ohio St. 3d 207, 216 (1988). Additionally, even if one can demonstrate that he is a third-party beneficiary to a contract, there is no substantive right to recovery for a breach of the contract unless that third-party has suffered damage as a result of the breach. There is no substantive right to recovery under the theory of unjust enrichment unless the claimant has conferred a benefit upon the defendant to which the defendant was not entitled and the claimant has already suffered damage as a result. Liberty Mut. Ins. Co. v. Indus. Comm'n, 40 Ohio St. 3d 109, 111 (1988).

² The fraud claim underlies the claims of conspiracy and aiding and abetting.

Applicant could not have a substantive right to recovery on the claims in this action (even the one purportedly new claim it proposes to add), is not a real party in interest, and has no standing to intervene.³ Most notably, Applicant has not itself been damaged as a result of any of Defendants' actions. Rather, Applicant seeks to intervene on the proposition that it potentially, in the future, could suffer some indirect harm that might be brought about, in part, by the outcome of this case. That is insufficient to make Applicant a real party in interest to the claims presented in this action and is insufficient to create a substantive right of recovery.

B. The Right to Seek Recovery on Behalf of the Fund Is Reserved to the Bureau.

Applicant also lacks standing to bring the claims contained in Applicant's proposed complaint because the entitlement and jurisdiction to pursue such claims is expressly reserved to the Bureau under the Ohio Revised Code. Although each of Applicant's proposed claims recites an allegation that Applicant has been "damaged" by Defendants' actions, the damage that Applicant's claims actually seek to remedy is damage suffered by the Bureau and by the Fund. Applicant's claims seek to recover nothing for Applicant.

Pursuant to section 4121.13 of the Ohio Revised Code, the Bureau has the sole authority to investigate and pursue remedies on its own behalf and as necessary to carry out the functions and operation of the workers' compensation system.

The administrator of workers' compensation shall:

³ For the same reason, Applicant's proposed complaint fails to state any claim upon which relief can be granted to Applicant.

(F) Investigate all cases of fraud or other illegalities pertaining to the operation of the workers' compensation system and its several insurance funds and for that purpose, the administrator has every power of an inquisitorial nature granted to the industrial commission in this chapter and Chapter 4123 of the Revised Code;

(G) Do all things convenient and necessary to accomplish the purposes directed in section 4101.0 to 4101.16 and 4121.01 to 4121.28 of the Revised Code.

Ohio Rev. Code Ann. § 4121.13(F), (G) (2005). "The administrator of workers' compensation shall . . . [s]erve as representative of the state insurance fund. Id. § 4121.39(D). Additionally, the Ohio Attorney General, upon the Bureau's request, has exclusive authority and oversight in pursuing actions pertaining to workers' compensation and for the recovery of money for the Fund.

Upon the request of the industrial commission or the administrator of workers' compensation, the attorney general, or under his direction the prosecuting attorney of any county in cases arising within the county, shall institute and prosecute the necessary actions or proceedings for the enforcement of this chapter, or for the recovery of any money due the state insurance fund.

Id. § 4123.92 (emphasis added).

Applicant states in its motion to intervene that its purpose in seeking to intervene and the intent of its claims is to seek recovery for the Fund, protect the financial interests of the Fund, and serve as a "watchdog" over the Bureau's litigation efforts. Applicant also seeks to intervene because it does not trust the Bureau or its representatives. Applicant's stated mistrust and political accusations are irrelevant and a red herring for the question of whether Applicant has standing to pursue its proposed claims and whether Applicant may properly intervene. Regardless of Applicant's mistrust of the Bureau, the Ohio General Assembly has given the Bureau and no one else the power to recover money due to the Fund and the power to serve as the

representative of the Fund. For this reason, Applicant has no standing to assert claims that seek recovery on behalf of the Fund.

III. APPLICANT'S PROFESSED FEAR REGARDING THE FUTURE OF WORKERS' COMPENSATION PREMIUMS DOES NOT JUSTIFY INTERVENTION.

The only interest Applicant claims to justify its attempted intervention in this action is that Applicant is concerned about the future solvency of the Fund. Applicant professes to be fearful that, if the Bureau would fail to recoup monies in this action, the solvency of the Fund might be jeopardized and the Bureau might at some unspecified future time need to increase premiums. (Mot. to Intervene at 8.)

Generally, a claim is not ripe for adjudication or justiciable if the claim rests upon "future events that may not occur as anticipated, or may not occur at all." Texas v. U.S., 523 U.S. 296, 300 (1998). "Until the parties can come forward with a specific factual setting, without strictly resorting to hypotheticals and speculation, this cause does not present a justiciable controversy. This court is not inclined to decide cases on entirely hypothetical facts and render purely advisory opinions." White Consol. Indus. v. Nichols, 15 Ohio St. 3d 7, 9 (1984).

The text of Applicant's proposed claims contains no reference whatsoever to any potential future events that would demonstrate that Applicant has a purported legal interest that would justify intervention. Applicant fails to answer (because it cannot answer) the question of how Applicant's fear of future premium increases could possibly serve to create a legal interest in this action. Nonetheless, Applicant's arguments regarding why it should be permitted to intervene unquestionably rest upon hypothetical future events (premium increases) that cannot be affected by the outcome of litigation.

Applicant does not participate in administration of the Fund and, therefore, does not know whether a negative outcome in this action would result in premium increases. In fact, the losses that the Bureau seeks to recoup in this action have already been reflected in previous financial results, meaning that they can have no direct impact on future premiums. The success of Fund investments and the outcome of litigation pursued for the benefit of the Fund do not, alone, control the calculation of premiums. Some other factors include the nature of the employer's business, classification of hazard for the employer's industry, and costs of injuries of that employer's employees during the proceeding year, the payroll trend of the individual employer and employers as a group, medical inflation, and frequency and severity of claims. Additionally, the Fund is involved in investments other than those that are the subject of this action. Future increases in premiums would be a possibility even if the Bureau's claims in this action are successful. Thus, such a contingency is too speculative to give Applicant any cognizable interest sufficient to intervene in this action.

Applicant further argues that the Bureau does not adequately represent the interests of Applicant and other employers simply because Applicant does not trust the Bureau. Applicant cites a host of news reports and makes various accusations regarding past conduct of Bureau representatives in an attempt to demonstrate that the Bureau does not adequately represent Applicant's interests. Applicant uses political controversy and its disagreement with the Bureau's policy choices in an attempt to justify intervention. Such controversies raise political questions that are not properly addressed in a court of law. "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value

determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986).

Regardless of Applicant's mistrust, the political history that preceded this action, or what Applicant reads in the newspapers, the Bureau alone has the constitutional mandate to pursue these claims. Article II, Section 35 of the Constitution of Ohio provides that the Fund is to be "administered by the state" and that laws may be passed "for the purpose of providing compensation to workmen and their dependents." The Ohio General Assembly has enacted workers' compensation statutes pursuant to Ohio's constitution. Those statutes provide that the Bureau is to serve as the sole representative on behalf of the Fund and that the Bureau shall prosecute actions for the recovery of money due to the Fund. Ohio Rev. Code Ann. §§ 4121.39(D), 4123.92 (2005). Unless and until the Ohio General Assembly would see fit to alter these statutes, no one other than the Bureau may pursue claims for the benefit of the Fund

If Applicant or a class of employers were permitted to pursue their proposed claims, that would not remove the Bureau from this action. There would be two plaintiffs pursuing the exact same claims for the exact same remedies. Those plaintiffs would be incurring the legal expenses of two sets of attorneys working for the same outcome. Assuming that Applicant's counsel intend to collect attorney fees in a manner typical of class-action plaintiffs' attorneys—a portion of the recovery—one cannot help wonder if payment of Applicant's attorney fees are intended to be made out of the very amounts

that Applicant professes to be so desperate to see returned to the Fund.⁴ It would be impractical and inefficient (and wasteful) to permit two plaintiffs to separately prosecute the same claims when one of those plaintiffs can adequately represent the interests of the Fund and has a constitutional mandate to be that representative.

Practically speaking, as between a class of employers and the Bureau, the Bureau is in the best position to pursue these claims against Defendants. The Bureau was a party to the transactions at issue, has more knowledge regarding the issues in dispute, can more readily access relevant evidence and witnesses, and is in a better position to identify relevant evidence and witnesses. Applicant has none of these advantages. The Bureau was the victim of Defendants' wrongdoing. The Bureau has expertise and experience regarding the Fund and regarding investments related to the Fund. Thus, if the Court would weigh Applicant against the Bureau to decide which is better able to represent the interests of the Fund, the Bureau should win by a landslide.

⁴ Also, one cannot help but question why there is a need for a class action when none of the potential class members stands to recover anything. Indeed, the only persons who could possibly benefit from pursuit of a class action in this situation are the class' attorneys.

IV. CONCLUSION

For any one of these many reasons, Applicant cannot meet the prerequisites for either intervention of right or permissive intervention under Rule 24 of the Ohio Rules of Civil Procedure. The Court, therefore, should deny Applicant's motion to intervene.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Plaintiff's Memorandum in Opposition to Jacobson Excavating & Contracting Inc.'s Motion to Intervene was served on the other parties to this action and on Jacobson Excavating & Contracting Inc. by sending a copy of it to each of the following by first class United States mail, postage prepaid, on the 11th day of July 2005 under the caption of and as filed in the Franklin County, Ohio Court of Common Pleas, Case No. 05-CVH-0-6357, and was served again under the caption of this Court and in the form attached hereto by sending it to each of the following either by electronically filing it with the Clerk of Court using the Court's CM/ECF system or by sending a copy of it by first class United States mail, postage prepaid, this 14th day of July 2005.

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