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April 2021

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Should You Intervene?

Staging an Intervention to Streamline Coverage Disputes

By Elizabeth F. Ahlstrand, Heather L. McCoy, and Elizabeth O. Hoff

Given the right circumstances, interventions offer insurers opportunities to maximize efficiency, reduce litigation costs, and prevent inconsistent verdicts.

Declaratory judgment actions are the tried-and-true mechanism for resolving coverage disputes. Particularly where the coverage issue presents solely questions of law for the court and the material facts are undisputed, stipulated, or limited to the allegations stated in the complaint, the process is effective, relatively streamlined, and, generally speaking, not overly time consuming or financially burdensome. However, where facts critical to the coverage issue are disputed, and will not or may not be developed and/or decided in the underlying litigation, declaratory judgment actions, while still effective, are markedly less efficient.

A useful but underused strategy for streamlining resolution of the coverage dispute in these circumstances is to stage an intervention. That is, to file a motion to intervene in the underlying litigation for limited purposes, specifically to submit special interrogatories, verdict forms, or declarations to the jury. Both the federal and state court rules provide a mechanism for insurers to intervene, and many (albeit not all) courts permit insurers to intervene for just such purposes. Yet, intervention is rarely pursued.

In failing to pursue or even consider intervention, insurers are leaving on the table real opportunities to reduce litigation costs, prevent inconsistent verdicts, and foster judicial economy. Thus, when defending un-

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der a reservation of rights, insurers and their counsel should think critically about intervening in the underlying litigation.

How to Stage an Intervention

In most jurisdictions, intervention is governed by statute. Rule 24 of the Federal Rules of Civil Procedure provides the framework for a motion to intervene in federal court and two avenues for intervening in the underlying litigation—intervention as of right and permissive intervention. While each state's rules vary, they typically have similar rules.

Specifically, Rule 24. Intervention provides, in relevant part:

a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
   1) is given an unconditional right to intervene by a federal statute; or
   2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

b) Permissive Intervention.
   1) *In General.* On timely motion, the court may permit anyone to intervene who:
      A. is given a conditional right to intervene by a federal statute; or
      B. has a claim or defense that shares with the main action a common question of law or fact.
      ***
   2) *Delay or Prejudice.* In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

Thus, as to intervention as of right, an applicant must meet four requirements: "(1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately by the parties to the action." *Floyd v. City of New York*, 770 F.3d 1051, 1057 (2d Cir. 2014); *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 637 (1st Cir. 1989). Failure to satisfy *any one* of these requirements is sufficient grounds to deny the application.

The timeliness of a Rule 24 motion "defies precise definition." *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 198 (2d Cir. 2000). Factors considered by the court will include:

> (a) the length of time the applicant knew or should have known of its interest before making the motion; (b) prejudice to existing parties resulting from the applicant's delay; (c) prejudice to the applicant if the motion is denied; and (d) the presence of unusual circumstances militating for or against a finding of timeliness.

Id. District courts are afforded broad discretion in assessing the timeliness of a motion to intervene. *Id.*

With respect to the second requirement, an "interest" in the context of a Rule 24(a) intervention must be "significantly protectable" and "direct, as opposed to remote or contingent." *Restor–A–Dent Dental Labs.*, 725 F.2d 871, 874 (2d Cir. 1984). "An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule." *United States v. Peoples Benefit Life Ins. Co.*, 271 F.3d 411, 415 (2d Cir.

2001), *but see Purnell v. City of Akron,* 925 F.2d 941, 948–950 (6th Cir. 1991) (finding a right to intervention under Rule 24(a) even where the interests of those parties may be characterized as contingent).

As for the third requirement, a court must look at whether, "as a practical matter," the proposed intervenors' legitimate interest will be impaired as a result of the underlying litigation. *North River Insurance Co. v. O&G Industries, Inc.*, 315 F.R.D. 1, 5 (D. Conn. 2015).

Finally, with respect to the adequacy of representation, "[w]here there is an identity of interest between a putative intervenor and a party, adequate representation is assured." *Washington Elec. Co-op., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 98 (2d Cir. 1990). While there is generally a "presumption of adequacy" in intervention cases, "evidence of collusion, adversity of interest, nonfeasance, or incompetence may suffice to overcome the presumption." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 180 (2d Cir. 2001).

District courts are afforded broader discretion in deciding requests for permissive intervention under Rule 24(b). *Washington Elec. Co-op., Inc.*, 922 F.2d at 98. In exercising its discretion, however, a district court must consider whether intervention "will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). It also must consider whether the intervenor has an independent jurisdictional basis for its claim. That is, can the intervenor demonstrate diversity of citizenship and potential damages in excess of $75,000? If not, permissive intervention will not be available. *See, e.g., United States v. Mitchell*, No. 1:07CV150, 2008 WL 11454765, at *2 (S.D. Ohio July 22, 2008). Additional relevant factors include:

> [1] the nature and extent of the intervenors' interests, [2] the degree to which those interests are adequately represented by other parties, and [3] whether parties seeking intervention will significantly contribute to [the] full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.

Delaware Trust, N.A. v. Wilmington Trust, N.A., 534 B.R. 500, 509 (S.D.N.Y. 2015) (quotations omitted).

A number of states have enacted statutes that are either identical to, or closely track, Fed. R. Civ. P. 24. For example, Alabama, Massachusetts, Rhode Island, Ohio, and South Carolina have adopted the federal rule verbatim or nearly so. Other states have taken slightly different approaches, although most state intervention statutes still embody many of the same principles as the federal rule.

Where to Stage an Intervention

Given the discretionary nature of intervention, there is no definitive majority or minority approach on the state or federal level. Indeed, even within jurisdictions the authority is often mixed.

However, courts in a variety of jurisdictions, including Alabama, Arizona, Minnesota, Mississippi, New Jersey, Nevada, Ohio, Pennsylvania, Tennessee, and Vermont, have permitted or noted approval of insurer intervention for the limited purpose of submitting special interrogatories and/or verdict forms to the jury. *See, e.g., Employers Mutual Cas. Co. v. Holman Building Co., LLC, et al.*, 84 So.3d 856 (Ala. 2011); *Anderson v. Martinez*, 762 P.2d 645, 650 (Ariz. Ct. App. 1988); *Schubitzke v. Country Mut. Ins. Co.*, No. CV 11-3574 (DWF/LIB), 2012 WL 13026739, at *4 (D. Minn. Sept. 12, 2012); *Brown v. Elton Park, LLC, et al.,* Civ. Action No. 251–11–702, slip op. at 1 (Cir.Ct. Hinds Cty. Miss. Apr. 16, 2013); *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, No. CV 01-3061 (MLC), 2005 WL 8176261, at *2 (D.N.J. June 10, 2005); *Fid. Bankers Life Ins. Co. v. Wedco, Inc.*, 102 F.R.D. 41, 45 (D. Nev. 1984); *Mitchell*, No. 1:07CV150, 2008 WL 11454765, at *1; *Butterfield v. Giuntoli*, 670 A.2d 646, 658 (Pa. Super. 1995); *Pharmacists Mut. Ins. Co. v. Myer*, 993 A.2d 413, 419–20 (Vt. 2010).

In granting intervention, these courts have generally recognized that intervention promotes judicial economy, minimizes the possibility of multiple actions and inconsistent verdicts, and, when used appropriately, does not prejudice the rights of original parties.

For example, in *Thomas v. Henderson*, 297 F.Supp.2d 1311, 1323–27 (S.D.Ala. 2003), the District Court for the Southern District of Alabama granted Old Republic Insurance Company's ("Old Republic") motion to intervene in a suit brought by the buyer of an "unairworthy" aircraft against the seller and Old Republic's insureds who inspected the subject aircraft. Old Republic was providing its insureds with a defense subject to a reservation of rights and sought to intervene for the limited purpose of submitting special interrogatories and/or a special verdict form to the court for its consideration. *Id.* at 1323–24.

In its motion, Old Republic explained that its proposed interrogatories or verdict form would ask the jury, in the event of a verdict in the plaintiff's favor, "to specify the claim or claims forming the basis for the verdict" and "to itemize any damage award in terms of compensatory damages for economic losses, mental anguish, and any other injury alleged, and punitive damages." *Id.* at 1324. It also stressed that it would not participate in the trial, the jury would not be informed of the intervention or the existence of the policy, its intervention would not require additional discovery, and it would not delay trial. *Id.*

The district court granted Old Republic's motion over the plaintiff and defendant seller's objections, holding that Old Republic satisfied the criteria for permissive intervention under Federal Rule 24(b), in that Old Republic's proposed intervention had questions of fact in common with the pending action, and there was no showing that intervention would delay the trial or prejudice the parties to the action. Further, the court indicated that once Old Republic filed its proposed special verdict form or interrogatories, all parties would have an opportunity to be heard before the court ruled on whether such documents would be used. *Id.* at 1326. Finally, the court noted that Old Republic had filed a separate declaratory judgment action, and absent an itemized verdict in the subject case, resolution of the coverage issues in the declaratory judgment action could be complicated considerably and there would be no way to distinguish among the types of claims and damages embraced by any damages award the jury might render. The court further noted that avoiding relitigation of the same issues weighed in favor of intervention and that any risk of prejudice and/or delay could be obviated or at least mitigated by the court's own procedural safeguards. *Id.* at 1327; *see also Schmidlin v. D & V Enterprises*, No. 76287, 2000 WL 709039, at *1, 6 (Ohio Ct. App. June 1, 2000) (reversing the trial court's denial

of the insurer's motion to intervene for the purpose of submitting jury interrogatories and/or jury instructions, holding that such limited intervention "represented the only efficient way to obtain a complete and consistent adjudication of the parties' various claims and there is no indication that any party would have been prejudiced").

Similarly, in *ADT Servs. AG v. Brady*, No. 10-2107, 2014 WL 4415955, at *3 (W.D. Tenn. Sept. 8, 2014), the District Court for the Western District of Tennessee granted Scottsdale Insurance Company's ("Scottsdale") motion to intervene for purposes of proposing jury interrogatories at the close of evidence and outside the presence of the jury. Prior to seeking intervention, Scottsdale had filed a declaratory judgment action that the defendants conceded shared common questions of fact with the subject action, including whether the insured defendants' conduct was willful, intentional, deliberate, false, or malicious. *Id.* at *1–*2. Although the defendants also conceded that Scottsdale's motion was timely, they argued against intervention on grounds of prejudice. Specifically, the defendants argued that it would create a conflict of interest for their attorneys—who while selected by the defendants were being paid by Scottsdale, subject to a reservation of right. *Id.* at *2.

The court rejected this argument and granted Scottsdale permissive intervention under Federal Rule 24(b), finding that the defendants did not face a substantial risk of prejudice or interference with their defense if Scottsdale was permitted to intervene for the purposes stated in its motion because all parties would be given a chance to be fully heard outside the presence of the jury, Scottsdale was represented by different counsel than the defendants, and Scottsdale was "not seeking to sit at counsel's table, be introduced to the jury, or conduct any arguments in the jury's presence…." *Id.* at *3.

Other courts, however, have either expressly or implicitly rejected similar efforts by insurers to intervene. Specifically, courts in California, Connecticut, Florida, Illinois, Maine, Massachusetts, Mississippi, New Mexico, New York, Nebraska, Rhode Island, South Carolina, Texas, and Wyoming have traditionally been unreceptive to insurer efforts to intervene in underlying litigation for the purpose of transposing special interrogatories and/or verdict forms. *See, e.g., Hinton v. Beck*, 176 Cal. App. 4th 1378, 1383 (3d Dist. 2009); *Kuperstein v. Superior Court*, 204 Cal. App. 3d 598 (4th Dist. 1988); *Nationwide Mut. Ins. Co. v. Pasiak,* 173 A.3d 888, 913 (Conn. 2017); *Houston Specialty Ins. Co. v. Vaughn*, 261 So.3d 607 (Fla. 2d. Dist. Ct. App. 2018), *review denied*, 2019 WL 1349266 (Fla. 2019); *Sachs v. Reef Aquaria Design Inc.*, No. 06 C 1119, 2007 WL 2973841, *4 (N.D. Ill. Oct. 5, 2007); *Dingwell*, 884 F.2d at 641; *Donna C. v. Kalamaras*, 485 A.2d 222, 225 (Me. 1984); *J.T. Shannon Lumber Co. v. Gilco Lumber, Inc.*, No. CIV. A. 2:07-CV-119, 2008 WL 4553048, at *1 (N.D. Miss. Oct. 7, 2008); *Navajo Nation v. Urban Outfitters, Inc.*, No. CV 12-195 BB/LAM, 2016 WL 7437149, at *1 (D.N.M. Sept. 6, 2016); *John Wiley & Sons, Inc., et al. v. Book Dog Books, LLC, et al.*, 315 F.R.D. 169 (S.D.N.Y. 2016); *Restor-A-Dent Dental Labs, Inc.*, 725 F.2d at 875–76; *High Plains Co-op. Ass'n v. Mel Jarvis Const. Co.*, 137 F.R.D. 285, 290–291 (D. Neb. 1991); *Baxendale v. Martin*, No. PC94-2303, 1999 WL 138768 (R.I. Super. Feb. 10, 1999); *State Farm Fire & Cas. Co. v. Taylor*, 706 S.W.2d352 (Tex. App. 1986), *writ refused* NR (Sept. 10, 1986); *State Farm Mut. Auto. Ins. Co. v. Colley*, 871 P.2d 191, 195–198 (Wyo. 1994).

While the rationale varies from case to case, most trial judges who have exercised their discretion to deny intervention have done so for one or more of the following reasons: (1) the motion was untimely and/or would cause delay; (2) intervention violates state rules prohibiting the proffer of evidence of insurance and/or joint trials of insurance coverage issues and tort claims against the insured; (3) the additional issues to be decided by the jury will or may: a) unduly complicate and/or delay discovery; b) cause confusion, possibly resulting in an inconsistent verdict or deadlocked jury; and c) may prejudice the prosecution or the defense of the plaintiff's claim, forcing the insured to take steps to assure coverage of claims rather than defend all claims; and (4) intervention will or could exacerbate defense counsel's conflict of interest and/or deter settlement.

By way of example, in a recent decision the Supreme Court of South Carolina affirmed the denial of several insurers' motions to intervene in the underlying construction defect matter under Rule 24 of the Carolina Rules of Civil Procedure, which closely parallels the federal rule. *Ex Parte Builders Mut. Ins. Co.*, 847 S.E.2d 87 (S.C. 2020). In *Builders Mutual*, the insurers were providing their insured contractors with a defense through independent counsel, subject to a reservation of rights under commercial general liability (CGL) policies, to contest later whether the damages awarded in the action were covered by the CGL policies. Three years after the underlying action commenced and at the tail end of discovery, the insurers sought to intervene and to be permitted to submit either a special verdict form or a general verdict with special interrogatories to the jury to determine what amount of any damages awarded against their insureds might be covered, thereby obviating the need for a subsequent declaratory judgment action. *Id.* at 89–90. The trial court refused to allow the insurers to intervene either as of right or permissibly.

In affirming, the court first held that the insurers were not real parties in interest to the construction defect action and therefore were not entitled to intervene as of right. *Id.* at 90–91. The court then considered permissive intervention and held that the record was replete with facts rationally supporting the trial court's denial of the insurer's motion for permissive intervention. *Id.* Specifically, the court agreed that allowing intervention would "(1) unnecessarily complicate the construction defect action, including altering the [plaintiff's] burden of proof and possibly delaying the trial; and (2) create a conflict of interest for the insureds' counsel, who were supplied to them by the insurers." Notably, in opposing the motion, plaintiff's counsel relayed that the parties had already conducted in excess of forty depositions wherein questions relevant to the special verdict or special interrogatories were not asked. *Id.* at 92. Likewise, counsel for several of the defendants argued that the special verdict form would force them to alter their presentation of evidence to shunt as much of the plaintiff's damages as possible into covered, consequential damages, thereby conceding that the insureds had, in fact, created faulty workmanship in the first place. *Id.*

The court went on to reaffirm that the proper mechanism for determining what portion of any verdict rendered against the insureds would be covered under the CGL policies was a subsequent declaratory

judgment action, wherein the insurers and insureds would be able either to agree on a framework for allocating damages or use the default approach of allocating damages on a percentage basis where the amount of covered and non-covered damages cannot be precisely determined. *Id.* at 95–96.

In another recent decision, the Massachusetts Supreme Court discussed at length the propriety of insurer intervention. *Commerce Ins. Co. v. Szafarowicz*, 131 N.E.3d 782 (Mass. 2019). In *Szafarowicz*, the underlying action at issue arose out of a bar fight during which the Commerce Insurance Company's ("Commerce") insured struck and killed the decedent with his motor vehicle following a prior altercation. The decedent's estate commenced an action against the insured and Commerce provided him with a defense under a reservation of rights, acknowledging that it had a duty to pay $20,000 in compulsory insurance, but reserving its rights to deny coverage regarding $480,000 in "optional insurance" if it was determined the decedent's death was caused by the insured's "intentional act" and, therefore, was not an accident. *Id.* at 786–87.

Three weeks before trial, Commerce filed an emergency motion to intervene because, based on the summary of evidence proffered by the prosecutor at the insured's criminal plea hearing, the insured appeared to have been waiting in his vehicle in the bar's parking lot and, upon seeing the decedent, drove near him. After the decedent gestured toward the insured, the insured "then accelerated his vehicle and ran over [the decedent], dragging him for forty to fifty feet, killing him." *Id.* at 787. In the wrongful death action, however, the estate's attorneys had presented a different description of events, consistent with a theory of negligence. Thus, Commerce argued that it should be permitted to intervene because neither the estate, nor its insured, had any incentive to offer evidence tending to show that the incident was not an accident because all parties "would prefer that insurance coverage exist for [the] loss." *Id.* at 788.

The trial court denied Commerce's motion to intervene, acknowledging that although the insurer had reason to be concerned about the risk of "underlitigation" in the wrongful death action, the same needed to be balanced with the rights of the insured. On the one hand, the court noted the "legitimate interest" of a liability insurer in preventing improper underlitigation of tort claims and recognized that it would be "patently unfair" to require Commerce to be bound by a jury's negligence finding in the wrongful death action if it were denied the means to challenge the validity of that finding. *Id.* On the other hand, the court noted that the insured's ability to defend himself would be "severely" compromised if Commerce were permitted to participate in trial and to offer evidence that the insured intentionally struck the decedent, and Commerce's participation would alert the jury to insurance considerations. *Id.*

The trial court judge ultimately adopted Maryland's solution as recognized by its highest court in *Allstate Ins. Co. v. Atwood*, 572 A.2d 154 (Md. 1990), which concluded that where there is a risk of underlitigation, it is not appropriate to allow the "insurer to intervene in the trial of the tort suit against its insured." *Id.* Yet, leaving an insurer with no legal avenue to challenge a potentially collusive damages award would be contrary to "considerations of public policy and fairness." *Id.* Therefore, an insurer "should be able to bring a post-tort trial declaratory judgment action" where the judge "would first determine, as a legal matter, whether the issue, which was resolved in the tort trial and which determines insurance coverage, was fairly litigated in the tort trial." *Id.* at 788–89. If the judge were to determine that it was fairly litigated, then there would be no relitigation of the issue in the declaratory judgment action. However, if the judge were to determine that it was not fairly litigated, "then the insurer should be permitted to relitigate the matter in the declaratory judgment action." *Id.* at 789. The Maryland Supreme Court noted its approval of the motion court's rationale, stating: "the judge who denied Commerce's motion to intervene protected Commerce from the risk that it would be unfairly prejudiced by a finding of negligence in the wrongful death action by allowing Commerce to ask the court for a determination whether that issue was fairly litigated in the wrongful death action." *Id.* at 792.

In sum, before moving to intervene, the insurer needs to evaluate the status of the law in the subject jurisdiction critically, appropriately posture the motion, and proactively address the concerns expressed by the courts that have denied intervention.

The Set-Up for Success

As noted above, the law is unsettled, and the standard is discretionary. Thus, an insurer should not assume its motion will be granted as a matter of course. Nonetheless, there are a number of things an insurer and its counsel can do to posture the motion for its best chance of success.

Preliminarily, it should go without saying that the motion must be filed by separate coverage counsel. Defense counsel hired by the insured should not be involved in drafting or filing the motion, due to the conflict of interest between the insurer and insured. Moreover, before defense counsel is even retained to represent the insured, the reservation of rights letter issued to the insured must be carefully drafted to identify for the insured the specific coverage issues, explain why these issues should be addressed through special interrogatories and/or the verdict form, and apprise the insured that the insurer may seek to intervene in the underlying litigation for the purpose of submitting the same.

Second, given the fact-specific nature of the inquiry and the differing law between the various jurisdictions, the governing precedent needs to be critically evaluated to determine which factors/criteria the court will focus on in deciding the motion so that they can be proactively addressed in the papers supporting the motion.

Third, the motion must be timely made. Indeed, in most jurisdictions, the motion should be made at the earliest possible moment in advance of trial, and, if the insurer intends to participate in discovery or submit any pretrial motions, it should be made well before the deadlines for same expire. *Compare Gadley v. Ellis*, No. 3:13-17, 2015 WL 3938543 at *5 (W.D. Pa. 2015) (denying a motion to intervene as untimely when filed on the eve of trial and after the close of discovery), and *Gilco Lumber, Inc.*, No. CIV. A. 2:07-CV-119, 2008 WL 4553048, at *1 (N.D. Miss. Oct. 7, 2008) (a motion to intervene made ten months after the insurer agreed to provide a defense under a reservation of rights was found untimely), with *Napoli v. City of Brunswick*, No. 1:08CV02985, 2009 WL 805140 at *2 (N.D. Ohio Mar. 26, 2009) (a motion

made two months after the complaint was filed and before discovery began was held timely). Otherwise, if discovery is complete and dispositive motions have already been filed, it is unlikely the motion will be granted. In fact, in most cases, seeking to participate actively in discovery and/or file dispositive motions that inject new issues into the case will work against the insurer.

Fourth, where possible, the motion should be accompanied by the draft verdict form and/or interrogatories that the insurer will ultimately seek to submit to the jury. Such exemplary verdict forms and/or interrogatories should be narrowly tailored and devoid of any inflammatory language. The motion should also attach a copy of the insurance policy. *See High Plains Co-Op. Ass'n*, 137 F.R.D. at 290.

Additionally, to undercut an argument by the insured that knowledge of insurance may result in an inflated jury verdict, the insurer should consider requesting that the court submit these items to the jury only after a verdict in favor of plaintiff and that it instruct the jury that it cannot change the amount of its initial verdict. Likewise, if possible, the motion should be made on consent or with a stipulation of no-contest from the claimant and/or the insured.

Finally, the motion and accompanying memorandum of law should explain in detail how the submission of jury interrogatories and/or the verdict form requested does not simply benefit the insurer, but rather is in the best interest of the claimant and the insured and will foster judicial economy and consistency. For example, a good cautionary tale for insureds and claimants is the matter of *Uvino v. Harleysville Worcester Insurance Company*, No.13 Civ. 4004 (NRB), 2015 WL 925940, *aff'd*, 708 Fed. Appx. 16 (2d Cir. 2017), where the insurer Harleysville Worchester Insurance Company ("Harleysville"), sought to intervene in the underlying suit against its insured, a building and construction advising company, to submit special interrogatories to the jury to allocate between those damages to the repair and replacement of its insured's work, which it contended would not be covered, versus damages to other property, which could be covered. The insured successfully contested the motion, and the claimant took no position. The jury later entered verdict against the insured for $317,840 in general damages and $83,788 in consequential damages. Thereafter, the claimant filed a declaratory judgment action against Harleysville, seeking a declaration that the damages awarded were covered under the commercial general liability policy issued by Harleysville. The district court granted summary judgment in favor of Harleysville because the claimant failed to present an intelligible method of separating those damages awarded to them by the jury that the policy covered and those that it did not. The Second Circuit affirmed on appeal.

In sum, if the motion is timely filed, limited to submitting a narrowly tailored verdict form/interrogatories to the jury, the insurer will have a strong argument that there is no delay, undue complication, or prejudice and that the insurer's participation benefits all parties in that the verdict will be binding on the insurer and resolve or at the very minimum simplify resolution of the coverage issues.

Things to Consider Before Making Your Move

Before seeking to intervene in the underlying litigation, a few things warrant careful consideration. First, could a separate declaratory judgment action be filed in a more favorable venue? Second, considering the specific facts and circumstances at issue, would the insurance company be better served by filing a separate declaratory judgment action so that it can maintain full control over how the evidence and issues are submitted to the judge and/or jury? Likewise, is the insurer prepared to be bound by any decision in the underlying action, or would it rather preserve the opportunity to relitigate critical issues? In many jurisdictions, even if the jury returns a negligence verdict, the insurer in a separate declaratory judgment action will have the opportunity to develop and submit evidence of intentional injury by the insured.

Third, considering the jurisdiction, will the development of certain facts, the submission of special interrogatories, and/or a verdict form by the insurer open the insurer up to an argument that it has placed its financial interests above those of its insureds and therefore violated its duty of good faith and fair dealing? Where the insured will bear the burden of proof on the coverage issue, this is less of a concern. In fact, in such instances, defense counsel may have an affirmative duty (after fully disclosing the conflict of interest) to request that a special verdict form or jury interrogatories be submitted.

Finally, it bears noting that where the defense is being provided under a reservation of rights but is still controlled by the insurer, intervention can or may exacerbate the potential conflict of interest for defense counsel. The insurer needs to be mindful of this heightened conflict in all of its interactions with defense counsel, so that there is no appearance of undue influence or impropriety.

To be sure, simply because intervention may be granted, does not mean it will be. Nevertheless, the mere filing of the motion alerts the court to the coverage issues and the need for and benefit of special interrogatories or verdict forms.

Conclusion

Given the broad discretion afforded the courts in deciding motions to intervene and the fact-specific nature of the analysis, outcomes will undoubtably be mixed, even in those jurisdictions where insurer intervention is accepted and encouraged. To be sure, simply because intervention may be granted, does not mean it will be. Nevertheless, the mere filing of the motion alerts the court to the coverage issues and the need for and benefit of special interrogatories or verdict forms. Thus, even if intervention is denied or discouraged, the court may still ultimately require the parties to submit special interrogatories or verdict forms. In sum, when used judiciously, intervention can be a real asset to the insurer and should not be disregarded. FD