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Time for an Intervention Direct Liability Carrier Participation in Underlying Tort Lawsuits

Introduction

Whether an insurance company has liability coverage for a claim or lawsuit often will turn on the resolution of certain key facts. The "expected or intended" exclusion in a commercial general liability policy, for example, may remove coverage for a bodily injury or property damage suit if the injury was expected or intended from the standpoint of the insured. While alternative liability theories sounding in negligence and intentional tort may be litigated in the underlying lawsuit in that situation, American courts traditionally had not allowed insurance companies to intervene in the suit to participate in these factual determinations. Some courts continue to maintain this position. *See Ex parte Builders Mutual Insurance Company*, 847 S.E.2d 87, 90-94 (S.C. 2020).

Nonetheless, many courts around the country are starting to recognize the inefficiencies and potential for collusion in such a system. For these reasons, the legislature in one state (Missouri) granted liability insurers the right to intervene in any liability suit within thirty days of the insured entering into certain covenant-not-to-collect agreements with the plaintiff. See Mo. Rev. Stat. § 537.065 (2017). Missouri appellate courts, however, have strictly enforced the thirty-day deadline against liability carriers, resulting in carriers losing the right to intervene when they fail to intervene in a lawsuit within the allotted time (even if no suit was pending within that time frame). *See Britt v. Otto*, 577 S.W.3d 133 (Mo. App. W.D. 2019); *Aguilar v. GEICO Casualty Co.*, 588 S.W.3d 195 (Mo. App. W.D. 2019). They also have allowed the insured to effectively defeat the insurer's intervention right in at least one instance using a private arbitration. *See Knight by and Through Knight v. Knight*, 609 S.W.3d 813 (Mo. App. W.D. 2020).

Nevertheless, an increasing number of states have allowed liability insurers to intervene in the underlying tort actions against their insureds to promote the efficient resolution of insurance coverage issues and to prevent the entry of collusive tort judgments. An examination of the divergent approaches to insurer intervention follows.

Intervention Not Allowed

American courts traditionally have not allowed liability insurance companies to intervene as a matter of right in underlying lawsuits against their insureds and have expressed several reasons for this prohibition. For example, many courts decline intervention out of concern that it would introduce evidence of the insured's insurance coverage into the tort litigation. As an Indiana appellate court explained, "Clearly the policy of the law is to keep the issue of insurance out of personal injury litigation." *Cromer v. Sefton*, 471 N.E.2d 700, 704 (Ind. Ct. App. 1984). "The usual method" of resolving these issues, the Indiana court held, is for "the insurer [to] le... a separate declaratory judgment suit to determine coverage." *Id.* A Maryland appellate court similarly declined intervention in part because "at the trial of a tort case, Maryland law ordinarily prohibits evidence or even mention in front of the jury that the defendant has insurance." *Allstate Ins. Co. v. Atwood*, 319 Md. 247, 257, 572 A.2d 154, 159 (1990). It does so, the court held, because the "matter of liability insurance is irrelevant to the issue of the defendant's liability and is highly prejudicial." *Id.* Along those lines, an Indiana appellate court speculated that the insurer's presence at trial might lead the jury to conclude that the insured was fully insured against any judgment it might enter against her and cause it to improperly award a higher number of damages. *See Allstate Ins. Co. v. Keltner*, 842 N.E.2d 879, 884 (Ind. Ct. App. 2006). The Wyoming Supreme Court agreed that insurer intervention should not be allowed for this same "strong public policy consideration." *State Farm Mut. Auto. Ins Co. v. Colley*, 871 P.2d 191, 195 (Wyo. 1994).

Some state courts have declined intervention because placing both tort liability and insurance coverage issues in the same action might confuse the trier of fact. *See Cromer*, 471 N.E.2d at 704 ("To permit intervention by the insurer to litigate coverage in the principal tort case against its insured would distract the trier and literally force the plaintiff to become embroiled in a matter in which she does not yet have an interest."). Other courts point to the unfairness of the insured having to litigate against both the claimant and the insurance company in the same action. *See Atwood*, 572 A.2d at 159 (the insured "would be forced not only to defend against the allegations of . . . [the plaintiffs], but also against the vast resources and expertise of her insurer who would be trying to prove that which was its contractual duty to disprove"); *Colley*, 871 P.2d at 195; *Nieto v. Kapoor*, 61 F. Supp. 2d 1177, 1195 (D.N.M. 1999); *Builders Mutual*, 847 S.E.2d at 91-92. Similarly, insurer intervention also has been denied since it may unfairly place an inherent conflict of interest between the insured and insurer in the middle of the underlying lawsuit, *see Donna C. v. Kalamaras*, 485 A.2d 222, 225 (Me. 1984); *Markowski v. Humphrey*, 2008 WL 382671 (N.J. Super. Ct. App. Div. Feb. 14, 2008); *Nat'l Fire Ins. Co. of Pitt., P.A. v. Bakker*, 917 F.2d 22 (4th Cir. 1990), particularly when the insured's defense counsel was retained by the insurance company, *see Builders Mutual*, 847 S.E.2d at 92.

Other courts have declined a liability carrier's request to intervene on the grounds that the insurer has only a "contingent" and not a "direct" interest in the underlying lawsuit. *See United States Fidelity & Guaranty Co. v. Adams*, 485 So.2d 720, 721-22 (Ala. 1986); *Jackman v. Jones*, 198 Or. 564, 258 P.2d 133 (1953); *Colley*, 871 P.2d at 195; *Harbor Specialty Ins. Co. v. Schwartz*, 932 So. 2d 383, 388 (Fla. App. 2 Dist. 2006) (insurer "does not have a direct and immediate interest in the cause of action that would justify intervention"), *cited in Houston Specialty Ins. Co. v. Vaughn*, 261 So. 3d 607, 610-13 (Fla.App. 2 Dist 2018) (same).

The Second Circuit explained the "contingent interest" rationale in *Restor-A-Dent Dental Lab., Inc. v. Certified Alloy Prod.*, 725 F.2d 871 (2d Cir. 1984), where the plaintiff Restor-A-Dent sought recovery for the defendant Certified Alloy Products' delivery of allegedly defective alloy for use in dental products. Certified's insurer sought to intervene in the lawsuit for the purposes of submitting written interrogatories

to the jury on issues relevant to the carrier's coverage. In declining the insurer's request, the Second Circuit explained that the "transaction that is the subject matter of the action is . . . Restor-A-Dent's claim for damage against Certified." *Id.* at 875. The insurance company's interest, in contrast, was "the amount it will have to pay Certified if Restor-A-Dent wins." *Id.* The court noted that the insurer's interest "depends upon two contingencies": "a jury verdict for Restor-A-Dent, for only then will the question of [the insurer's] liability become relevant"; and a "finding in litigation . . . between [the insurer] and Certified that [the insurer] is not responsible for indemnification of certain types of losses under the terms of the policy." *Id.* Because neither of those contingencies had occurred, the Second Circuit declined intervention by the insurer. *Id.*

Although courts have rejected a liability insurer's right to intervene under a variety of rationales, these courts almost uniformly hold that the insurer is not bound by the resulting decision in the underlying lawsuit, at least with respect to findings of fact relevant to coverage. *See Kaczmarek v. Shoffstall*, 119 A.D.2d 1001, 1002, 500 N.Y.S.2d 902 (1986); *Kalamaras*, 485 A.2d 224-25; *Cromer*, 471 N.E.2d at 704; *Markowski*, 2008 WL 382671, at *11; *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 861 N.E.2d 519, 523-24 (2007) (denying insurer's motion to intervene, but stating that since intervention was attempted and denied, the insurer can litigate the issue later in another case); *M.A. v. Wyndham Hotels & Resorts, Inc.* (Apr. 13, 2020), S.D. Ohio Nos. 2:19-cv-849 and 2:19-cv-755, 2020 U.S. Dist. LEXIS 63768, *9 (citing *Germ* in denying intervention); *Builders Mutual*, 847 S.E.2d at 93-94; *but see State Farm Fire and Cas. Co. v. Taylor*, 706 S.W.2d 352, 353 (Tex. App. 1986).

By way of example, in *Allstate Ins. Co. v. Atwood*, the plaintiff in the underlying lawsuit brought alternative counts of negligence and battery against the defendant. The jury later found in favor of the plaintiff on the negligence count. *Atwood*, 319 Md. at 250, 572 A.2d at 155. In the declaratory judgment action led by the defendant's insurance carrier, the trial court initially held that the insurer was bound by the finding of negligence from the underlying suit because the carrier failed to intervene in that suit. *Id.*, 572 A.2d at 155-156. The Maryland appellate court disagreed. After explaining that intervention was not permitted in that state, the appellate court held that if the "judge in the declaratory judgment action determines that the issue was not fairly litigated in the tort trial, then the insurer should be permitted to relitigate the matter in the declaratory judgment action." *Id.* at 262, 572 A.2d at 161.

In determining whether an issue was "fairly litigated," courts should focus on the conduct of the claimant and the insured in the underlying lawsuit, such as whether they engaged in "nondisclosure of the facts, in an obvious effort to bring within insurance coverage a matter which is outside of that coverage," or other "tactics . . . to cooperate in persuading a jury that intentional wrongful conduct is mere 'negligence.'" *Id.* at 262-63, 572 A.2d at 161. While an insurance company may "promise [] to pay in accordance with the legal obligations resulting from the tort action," the Maryland appellate court commented that it does "not undertake to be the victim of fraud or collusion." *Id.* at 263, 572 A.2d at 161-62. The court concluded: "It is not fair to require that an insurer pay when the finding of negligence was the product of an unfair trial and when the insurer has no opportunity to litigate the matter." *Id.*, 572 A.2d at 162.

Intervention Allowed for Insurance Coverage Purposes

Although the appellate court in *Atwood* held that Maryland does not allow liability insurers to intervene in underlying tort actions, the court did concede that it "would promote the efficient administration of justice, and be less burdensome on the parties, if the insurer's request for declaratory relief were made in the tort case." *Id.* at 264, 572 A.2d at 162. For these reasons, an increasing number of states allow, and in some instances even require, insurance companies to intervene when the underlying action could

determine issues relevant to the insured's insurance coverage. The scope of the insurer's participation in these underlying actions varies from state to state.

Some courts have allowed the carrier to intervene to seek a stay of the underlying lawsuit pending resolution of a separate declaratory judgment action. *See Gary v. Dollar Thrifty Automotive Group*, 329 Ga.App. 320, 763 S.E.2d 354 (2014); *Johnson v. Cape Industries, Ltd.*, 91 Ill.App.3d 192, 196, 414 N.E.2d 470, 473-74 (1980). Other courts have allowed the insurance company in certain circumstances to intervene to pursue declaratory relief on coverage in the same lawsuit with the tort claims. *See Fowler v. Robertson*, 178 Ga.App. 703, 344 S.E.2d 425 (1986); *Kentucky Farm Bureau Mut. Ins. Co. v. Conley*, 456 S.W.3d 814 (Ky. 2015); *Padilla v. Norwegian American Hosp.*, Inc., 266 Ill.App.3d 829, 641 N.E.2d 572 (1994); *Hoyle v. DTJ Enterprises, Inc.*, 143 Ohio St.3d 197, 36 N.E.3d 122 (2015). Still other courts have even allowed the insurer to seek findings from the trier of fact relevant to the insurance coverage issues, *see Kentucky Farm Bureau Mut. Ins. Co. v. Coyle*, 285 S.W.3d 299, 302 (Ky. Ct. App. 2008); *Fid. Bankers Life Ins. Co. v. Wedco, Inc.*, 102 F.R.D. 41, 44 (D. Nev. 1984); or at least suggested that it could or should have done so, *see American Home Products Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d 760, 766 (2d Cir. 1984).

Allowing the insurance company to intervene to seek findings of fact relevant to coverage would be, perhaps, the "most efficient administration of justice" referenced by the Maryland court in *Atwood*. For example, in *Kentucky Farm Bureau Mut. Ins. Co. v. Coyle*, supra, the Kentucky appellate court allowed an insurance company to intervene in an underlying bodily injury case to seek factual findings as to whether its insured William Leslie Coyle accidentally or intentionally shot the plaintiff Michael David Elliot. The jury in that case was presented with two interrogatories:

> A. Do you believe from the evidence that WILLIAM LESLIE COYLE intentionally red a pistol at or in the general direction of MICHAEL DAVID ELLIOTT with the expected result of wounding/harming MICHAEL DAVID ELLIOT and was not an "accident" in the sense of being merely negligent and unintended?
>
> B. Do you believe from the evidence that WILLIAM LESLIE COYLE understood the physical nature of the consequences of his actions and intended to shoot or expect to injure MICHAEL DAVID ELLIOT upon discharge of the rearm on the date and at the time of the subject incident, and was not an "accident" in the sense of being merely negligent and unintended?

Coyle, 285 S.W.3d at 302; *see also Alhamid v. Great Am. Ins. Cos*. (7th Dist.), 2003-Ohio-4740, at ¶¶17-22 (reversing trial court for refusing to allow limited intervention to submit interrogatories). The jury answered "no" to both questions and determined the shooting to be accidental. *Id.* The appellate court, however, deemed the evidence to overwhelmingly support a finding of intentional conduct and reversed the case and remanded for entry of judgment in favor of the insurance company. *See id.* at 306-07. Although it took an appellate court to finally decide the factual issues relevant to coverage, *Coyle* is an example of how courts can allow the plaintiff, insured and insurer to make a record, seek a factual determination and appeal that determination on these issues in a single action, rather than in two separate actions with potentially conflicting results.

Beyond allowing intervention, some courts have indicated that an insurer may be collaterally estopped from re-litigating certain findings relevant to coverage if it fails to attempt to intervene in the underlying tort suit and seek such findings. *Hicks v. State Farm Mutual Automobile Ins. Co.*, 95 N.E.3d 852 (Ohio Ct. App. 2017) (citing *Howell v. Richardson* (1989), 45 Ohio St. 3d 365, 367-68, 544 N.E.2d 878, syl. corrected;

Grange Mut. Cas. Co. v. Uhrin (1990), 49 Ohio St. 3d 162, 550 N.E.2d 950 (minor correction) (where insurer could have intervened, the finding of negligence in the underlying case was binding on insurer, which could not re-litigate the issue of whether the policyholder intentionally caused injury, due to the collateral estoppel effect of the judgment). Estoppel will not apply, however, if the trial court refused to allow the carrier to intervene. *Hicks*, 95 N.E.2d at 859, ¶32 & n.4 (citing *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 861 N.E.2d 519, 523-24 (2007) (denying insurer's motion to intervene, but stating that since intervention was attempted and denied, the insurer can litigate the issue later in another case)).

Intervention Allowed for Tort Liability Purposes

In addition to lawsuits in which findings of fact relevant to coverage may be determined, some courts have allowed liability insurers to intervene in lawsuits in limited circumstances to litigate and defend against the substance of the plaintiff's claim against the insured, including as to liability and damages. Specifically, these courts have permitted intervention when a claimant has obtained a default judgment against the insured or when the insured's corporate status has been suspended. *See Western Heritage Ins. Co. v. Superior Court*, 199 Cal.App.4th 1196, 1205, 132 Cal. Rptr.3d 209, 216-17 (2011); *Guaranty Nat. Ins. Co. v. Pittman*, 501 So.2d 377, 384-85 (Miss. 1987). Additionally, they have especially allowed intervention when the court suspects that the plaintiff and insured have agreed that the insured may put up less than a full defense in the underlying action. *See McGough v. Insurance Co. of North America*, 143 Ariz. 26, 33-34, 691 P.2d 738, 745-46 (Ariz. Ct. App. 1984); *Campbell v. Plank*, 133 F.R.D. 175 (D. Kan. 1990); *Liberty Mut. Fire Ins. Co. v. Quiroga-Saenz*, 343 Ga.App. 494, 500-01, 807 S.E.2d 460, 465 (2017); *Su Duk Kim v. H.V. Corp.*, 5 Haw.App. 298, 688 P.2d 1158 (1984). Courts have allowed intervention in these circumstances because the insurer "may have no other opportunity to litigate fault or damage issues in any action brought by plaintiff on its judgment." *Western Heritage*, 199 Cal.App.4th at 1207-08, 132 Cal. Rptr.3d at 218.

To intervene, these jurisdictions generally require the insurance company to at least have offered to defend the insured. As one California appellate court put it, "an insurer providing a defense, even though the subject to a reservation of rights, may intervene in the action when the insured attempts to settle the case to the potential detriment of the insurer." *Gray v. Begley*, 182 Cal.App.4th 1509, 106 Cal.Rptr.3d 729 (2010). If the court allows an insurer to intervene to litigate liability and damages issues, the insurer may raise defenses that even its insured may be barred from asserting. "The entire purpose of the intervention is to permit the insurer to pursue its own interests, which necessarily include the litigation of defenses its insured is procedurally barred from pursuing," explained another California appellate court. *Western Heritage*, 199 Cal.App.4th at 1208, 132 Cal.Rptr.3d at 219.

For example, in *McGough v. Ins. Co. of North America*, supra, the plaintiffs led a wrongful death suit against a pilot for injuries sustained in a plane crash. The pilot had a $100,000 liability policy with Compass Insurance Company. *McGough*, 143 Ariz. at 28, 691 P.2d at 740. The owner of the plane had a $1,000,000 liability policy with Insurance Company of North America (INA). *Id.* While Compass initially provided a defense to the pilot, it later considered paying its policy limit and withdrawing its defense. *Id.* at 29, 691 P.2d at 741. INA then agreed to defend the pilot if Compass did withdraw. Id. The pilot, however, indicated that he would accept that defense only if INA withdrew its coverage defenses. *Id.* On the same date, the plaintiffs and the defendant pilot entered into an agreement whereby a stipulated judgment would be entered in favor of plaintiff for $1,100,000; the plaintiffs would not execute on the judgment against the pilot, Compass would pay plaintiffs $100,000, and any rights held by the pilot against INA would be assigned to plaintiffs. *Id.* When an evidentiary hearing in the underlying lawsuit was scheduled, INA led a motion to intervene. *Id.* The trial court denied INA's motion and entered judgment in favor of the plaintiff

in the amount of $1,100,000. *Id.*

The Arizona appellate court in *McGough* ultimately decided that the trial court erred in prohibiting INA from intervening, holding that because collateral estoppel generally will apply to an insurance company as to litigated issues of the existence and extent of the insured's liability to the injured party, INA had an interest in the lawsuit sufficient to justify intervention. *Id.* at 30-31, 691 P.2d 742-43. Moreover, the appellate court held that INA had not forfeited its right to intervene by failing to offer a defense to the pilot at the outset of the case, noting "[s]ince Compass did step in, it was reasonable for INA to wait until it appeared [the pilot] would be without counsel retained by an insurer before INA offered to pay for additional counsel." *Id.* The Arizona appellate court also rejected the insured's argument that INA should have defended without reservation of rights, as accepting that argument would essentially "adopt a rule to force the insurance company to either defend and give up its rights to later litigate coverage, or to refuse to defend altogether." *Id.* at 33, 691 P.2d at 745. The court concluded that INA did not give up its right to intervene and reversed the matter for further proceedings. *Id.* at 33, 691 P.2d at 746.

Direct Actions

Another concern the Maryland appellate court in *Atwood* expressed with insurer intervention was that allowing "insurance company intervention in tort trials would be tantamount to authorizing direct actions against defendants' liability insurers," which that state generally forbids. *See Atwood*, 319 Md. at 257, 572 A.2d at 159. However, two states—Wisconsin and Louisiana—do allow a plaintiff to file suit directly against an insured's liability carrier to recover damages for certain tort claims. As a result, insurance companies in those states can litigate tort liability and insurance coverage issues in the same lawsuit with the claimant and/or the insured, much like in several of the intervention cases discussed above. When the plaintiff chooses not to include the liability insurer as a defendant, courts in these jurisdictions generally allow the carrier to intervene. *See Phillips v. Parmelee*, 351 Wis.2d 758, 840 N.W.2d 713 (2013).

Insurance Company Participation

As discussed above, jurisdictions that allow liability insurers to intervene or participate in the underlying tort actions against their insureds do so for two primary reasons: to provide for a more efficient resolution of insurance coverage issues, and to prevent collusive tort judgments. Depending upon the stated purpose and scope of the intervention, the courts in the cases cited herein have allowed carriers to participate in the litigation in several meaningful ways, including:

- Seeking a stay of the tort claims pending resolution of the insurance coverage issues.
- Litigating the insurance coverage issues alongside the tort liability and damages issues.
- Submitting written interrogatories or special verdicts to the trier of fact relevant to the insurance coverage issues.
- Setting aside default or other judgments entered against the insured.
- Defending the substance of the plaintiff's claim against the insured, including defenses that the insured himself may be barred from asserting.
- Conducting discovery on factual issues relevant to these matters; and

- Raising issues on appeal, including liability issues even though intervention was allowed for insurance coverage purposes only.

Given the complexity of the issues, the manner and method in which insurance companies can participate in the underlying action (*e.g.,* in the same trial, bifurcated trials, phased settings, etc.) is often left to the sound discretion of the trial court. *See Worrell v. Daniel*, 120 Ohio App.3d 543, 552, 698 N.E.2d 494, 500 (1997); *Col D'Var Graphics, Inc. v. Forrester Enterprises, Inc.*, 196 Wis.2d 646, 539 N.W.2d 337 (Wis. Ct. App. 1995).

Nevertheless, when an insurance company participates in a jury trial with the plaintiff and the insured, the jury will very likely learn of the existence of the insured's liability insurance. *See Stopplesworth v. Refuse Hideaway, Inc.*, 200 Wis.2d 512, 523-24, 546 N.W.2d 870, 874 (1996) ("We conclude that in a jury trial, as a procedural rule, the court should apprise the jurors of the names of all parties to the lawsuit. This rule shall apply in all cases, not just those involving insurance companies."). Courts in these jurisdictions have attempted to alleviate any unfair prejudice using cautionary jury instructions. *See id.* at 524, 546 N.W.2d at 874-75; *Domingue v. Continental Ins. Co.*, 348 So.2d 209, 210-11 (La. Ct. App. 1977).

Conclusion

While some states continue to follow the traditional rule prohibiting insurer intervention in an underlying tort action against the insured, an increasing number of states allow a liability carrier to intervene to provide for the efficient resolution of insurance coverage issues and to prevent the entry of collusive tort judgments. When considering whether an insurer may intervene and what an insurer may do once it intervenes, parties, lawyers and judges across the country would be wise to examine the experience of other states and courts that have already grappled with these complex issues.