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To Intervene or Not to Intervene? That is the Question!

A. Intervention: Understanding Legal Basis: California

1. Intervention is statutorily governed. Upon timely application, any person who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding. (Cal. Civ. Proc. Code § 387(a).) Under Code of Civil Procedure Section 387(a), a court may grant leave to non-parties to join the plaintiff in claiming what is sought by the complaint; to unite with the defendant in resisting the plaintiff's claims; or to demand anything adverse to both parties. (Cal. Civ. Proc. Code § 387(a).) Also, an order denying intervention is appealable. (*See, Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 439.)[1]

2. Courts have interpreted Section 387(a) to hold that intervention is proper where: (1) the nonparty has a direct and immediate interest in the litigation; (2) intervention will not enlarge the issues in the case; and (3) the reasons for intervention outweigh any opposition by the existing parties. (*See, Truck Ins. Exch. v. Superior Court (Transco Syndicate #1)* (1997) 60 Cal.App.4th 342, 346 (citing Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (Rutter, rev. # 1, 1996) § 2:414, p. 2–55, emphasis omitted); and *Reliance Ins. Co. v. Superior Court (Wells)* (2000) 84 Cal.App.4th 383, 386.)

3. The court has "**broad discretion** in determining whether to permit intervention," especially when there is evidence showing that the interests in defending claims would not necessarily be adequately represented by the named defendants. (*See, US Ecology, Inc. v. State of Calif.,* (2001) 92 Cal.App.4th 113, 139-140; *People v. Superior Court (Good)* (1976) 17 Cal.3d 732, 737; *Jade K. v. Viguri* (1989) 210 Cal.App.3d 1459, 1468; and *Simpson Redwood Co. v. State of Calif.* (1987) 196 Cal.App.3d 1192. *See also, Simac Design, Inc. v. Alciati* (1929) 92 Cal.App.3d 146, 157 [Court allowed intervention upon oral motion by attorney at hearing on Writ of mandate Petition]; and *Howard Jarvis Taxpayers Ass'n v. Bowen* (2011) 192 Cal.App.4th 110 ["Taxpayers petitioned for writ of mandate challenging ballot label, title, and summary for a ballot measure for approval of state bonds"] (Emph. added.).)

[1] Federal courts have a similar provision concerning intervention. (See, Fed. Rule Civ. Proc. 24.)

B. Intervention: Understanding Legal Basis: Florida

1. Similar to California, a person having a legal interest in the outcome of a pending case involving other parties may join in the litigation by filing a Motion to Intervene. *Florida Rule of Civil Procedure*, 1.230 provides the following: "Anyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion." In essence this Rule allows a non-party to join a pending action to assert and protect its interest, and provide for efficient and expeditious adjudication of legal matters.

2. First, the trial court must determine whether to grant or deny a Motion to Intervene by assessing whether or not the interest asserted is appropriate to support intervention. If the court determines that the party seeking intervention has an interest in the litigation that is of "such a direct and immediate character that the intervenor will either gain or lose by direct legal operation and effect of judgment", it is likely the Motion will be granted and the party will be allowed to participate in the litigation. (*Morgareidge v. Howey*, 75 Fla. 234, 78 So. 14, 15 (1918). *See also, Union Cent. Life Ins. Co. v. Carlisle*, 593 So. 2d 505 (Fla. 1992); *Southern Comfort Grill, Inc. v. Hanks Const., LLC*, 162 So. 3d 144 (Fla. 4th DCA 2015). After the Motion is granted the trial court then determines the extent to which the intervening party should be allowed to participate as an intervenor. The intervention should be limited to the extent necessary to protect the interests of all parties. *Id.*at 507-508.

3. The decision to allow an intervenor in a case is within the discretion of the trial judge. *Grimes v. Walton County*, 591 So. 2d 1091 (Fla. 1st DCA 1992). Under Florida law an intervenor may not be allowed after the final judgment has been rendered. *P.S. Capital LLC v. Palm Springs Town Homes, LLC*, 9 So. 3d 643 (Fla. 3d DCA 2009). However, in rare circumstances a court may permit an intervenor post judgment only "if the interests of justice require intervention, and then only if intervention does not injuriously affect the rights of the litigants. *Wags Transp. System*, *Inc. v. City of Miami Beach*, 88 So. 2d 751 (Fla. 1956). *See also Dickinson v. Segal*, 219 So. 2d 435 (Fla. 1969) (applying general rule noting that the exception stated in *Wags* was limited to the facts of that case).

C. California Case Study: Intervention Procedures Shaped

1. In 2011, the Second Appellate District issued an important decision in *Western Heritage Insurance Company v. Superior Court* (2011) 199 Cal.App.4th 1196 (*Western Heritage),* which expanded intervention for insurance carriers. In *Western Heritage*, Western Heritage provided a defense to its insured, a commercial home healthcare services company, in an action for damages arising out of an automobile accident. The insured's employee, in the course and

scope of her employment, drove in an allegedly negligent manner, causing death and personal injuries.

2. During the litigation, the defendant employee driver refused to provide discovery responses and to appear for deposition, despite court orders to do so. Western Heritage's retained defense counsel answered the complaint against the defendant driver, but never communicated with the defendant driver. After failing to comply with discovery orders, the plaintiff moved to strike the driver's answer, which the court granted. A default was then entered against the defendant driver. Sensing the potential detrimental impact, Western Heritage moved to intervene. Intervention was granted, but the scope of intervention was contested.

3. Prior to Western Heritage's intervention, the trial court granted plaintiff's motion in limine regarding liability. As a result, Western Heritage was only permitted to dispute damages and not the liability of the absent employee. Western Heritage appealed and the California Court of Appeals issued an order to show cause and a stay of further trial court proceedings pending the Court of Appeals' review of the record. The California Court of Appeals found that Western Heritage had the right to assert, on its own behalf, all defenses that otherwise would have been available to the insured parties whether as to liability or damages. No doubt, Western Heritage was concerned that it could face a blind-sided attack for limitless damages under Insurance Code Section 11580.

4. Specifically, the trial court held that because Western Heritage was stepping into the shoes of the absent employee, Western Heritage had no greater rights to litigate liability than its insured would have had which seemed logical. On appeal, however, Western Heritage challenged the trial court's determination arguing that: (1) Western Heritage had the right to litigate all issues as an intervening party which could not be abridged; (2) that denial of an intervenor's right to contest liability of a defaulted insured would defeat the whole purpose of the intervention right; and (3) intervening insurers are not "subrogated" and therefore limited to the rights of its insured, but rather, the intervening insurer had rights independent of the insured.

5. As an intervening insurer, Western Heritage argued that its rights were not dependent on, nor were they limited by, the rights of the defaulted insured. The California Court of Appeals agreed with Western Heritage and reversed the trial court's ruling. The appellate court identified that as an intervenor, Western Heritage became an actual party to the lawsuit and an intervenor is not limited by procedural decisions made by a different party, with which it is aligned in terms of interest. As an intervenor, the Western Heritage was entitled to litigate the liability *and* damages issues that their insured was barred from litigating. If Western Heritage was not permitted to do so, there would be no purpose in allowing the carrier to intervene to protect its own interests, while at the same time limiting the scope of the insurer's defense to those issues to which its insured, because of the default, was limited to pursuing.

According to the Court, "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." (Emph. added.)

6. The Court then turned to the question of whether Western Heritage was required to vacate the default entered against the absent employee. Plaintiff had argued that because Western Heritage did not seek to set aside the default it had no basis to complain about the trial court's intervention limitation order. This argument was rejected by the California Court of Appeals. The *Western Heritage* Court held that the intervening insurer is no different than any other non-defaulting co-defendant once intervention has been granted. Under established California law, admissions implied from the default of one defendant ordinarily are not binding upon a co-defendant who, by answering, expressly denies and places in issue the truth of the allegations thus admitted by the absent party. It made no logical difference whether the non-defaulting co-defendant was originally named as a defendant or joined the action by subsequent intervention.

7. Simply put, a party's default does not bind non-defaulting co-defendants. An intervening insurer was not required to move to vacate the insured's default as to itself; the insured's default simply had no effect on the insurer. As an intervenor, Western Heritage was free to challenge liability, as well as damages.

D. Florida Case Study: Intervention Procedures Shaped

1. The eminent case which established the test for measuring the essential factors necessary to support intervention is found in *Morgareidge v. Howey*, 75 Fla. 234, 78 So. 14 (1918). The court in *Morgareidge* found that "[T]he interest which will entitle a person to intervene. . . must be in the matter in litigation, and such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. In other words, the interest must be that created by a claim to the demand in suit or some part thereof, or a claim to, or lien upon, the property or some part thereof, which is the subject of litigation." *Id*. at 15. The standard established in this case has been restated in many cases over the past decades. These are just a few: *Union Cent. Life Ins. Co. v. Carlisle*, 593 So. 2d 505 (Fla. 1992); *Kissoon v. Araujo,* 849 So. 2d 426 (Fla. 1st DCA 2003); *National Wildlife Federation Inc. v. Glisson*, 531 So. 2d 996 (Fla. 1st DCA 1988).

2. In 1992 the Florida Supreme Court took the rule in *Morgareidge* a step further in favor of allowing insurance companies to intervene to protect their rights. The Court in *Union Central Life Insurance Co. v. Carlisle*, 593 So. 2d 505 (Fla. 1992) decided that the trial judge could also determine the extent to which an intervening party may participate in a pending case. The Court established the following two-step process for adjudicating Motions to Intervene: "[F]irst the trial court must determine that the interest asserted is appropriate to support intervention. Once the trial court determines that the requisite interest exists, it must exercise its sound discretion to determine whether to permit intervention. In deciding this question the court

should consider a number of factors, including the *derivation of the interest, any pertinent contractual language, the size of the interest, the potential for conflicts or new issues, and any other relevant circumstances*." *Id.* at 507, 508. Then the Court took one more step forward and determined the court must determine the parameters of the intervention and that intervention should be limited to the extent necessary to protect the interests of all parties. *Id.* at 508.

3. The *Union Central Life Insurance Co.*, decision set forth a valuable compromise for insurance companies wishing to intervene in a case to protect its interests in an ongoing case involving its' insured. By requiring the court to determine the parameters of intervention by a non-party, it allows for an intervening insurance company to be active in a case on a "limited basis" in order to be provided with the opportunity to assert and protect its interest, and the right to be heard in matters which would affect the insurance company. While the Court in *Union Central Life Insurance Co*., made it clear that an insurance company may not interrupt or interfere with the primary litigation between its insured and a tortfeasor, it does give insurance companies the green light to intervene in order to have a meaningful opportunity to assert and protect its interests, providing the ability to be heard, and appeal any adverse ruling.

E. Intervention: When should it be considered in California

1. Intervention may occur even *after* judgment has been entered. (*Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 437 [section 387 amended to "upon timely application" in 1977]; see *Lazar v. Hertz Corp.* (1983) 143 Cal.App.3d 128, 142.) Intervention is appropriate under these circumstances where an insurer has in interest in the judgment. (*Western Heritage*, *supra*, 199 Cal.App.4th at p. 1205; *Royal Indemnity Co. v. United Enterprises, Inc.* (2008) 162 Cal.App.4th 194, 206; *Reliance Ins. Co. v. Superior Court* (2000) 84 Cal.App.4th 383, 385-387.) Case law suggests that intervention may not occur, however, after an appeal.

2. If you are considering intervention, one must first assess if any direct and immediate interest in the litigation exists.

3. Critical Questions: In other words, if the litigation continues without intervention, will the proposed intervenor be damaged? Will the proposed intervenor lose an opportunity to prevent exposure for which it would ultimately be responsible? Carrier intervention raises other concerns. Is the carrier's insured already in the litigation? Is the carrier defending its insured and is intervention really necessary to protect its rights? Of course, if the insured is uncooperative, as the insured was in *Western Heritage,* intervention becomes the only available procedural protection. Carrier intervention for a suspended corporation is statutorily permitted. (See, Rev. Tax. Code Sect. 19719 (b) and (c).)

4. The Courts have held that a carrier must intervene in the underlying action to satisfy its duty to defend when its insured has been suspended by the California Franchise Tax Board: "In this case we hold when an insurance company seeks to provide a defense in pending litigation for a corporation that has been suspended for nonpayment of its taxes, the insurance

company must intervene in the action to protect its own interests and those of its insured. The insurance company may not answer and litigate the lawsuit in the name of the suspended corporation without intervening in the case." (*Kaufman & Broad Communities, Inc., et al., v. Performance Plastering, Inc.* (2006) 136 Cal.App.4th 212, 216 [emphasis added]; see also *Reliance Co. v. Superior Court* (2000) 84 Cal.App.4th 383; see also *O'Hearn v. Hillcrest Gym & Fitness Center, Inc.* (2004) 115 Cal.App.4th 491, 494, fn. 1; *Schwab v. Southern California Gas Co.* (2004) 114 Cal.App.4th 1308, 1319, fn. 8).

5. The *Kaufman & Broad Communities* Court explained that: "Under section 23301, a corporation suspended for the failure to pay its taxes is unable to exercise its "corporate powers, rights and privileges" which, as we have already stated, includes the right to defend a lawsuit. Section 19719, subdivision (a), makes it a crime for any person "to exercise the powers, rights, and privileges of a corporation that has been suspended pursuant to Section 23301." Subdivision (b) of section 19719 only exempts the "insurer, or to counsel retained by an insurer on behalf of the suspended corporation," from these criminal penalties. Thus, section 19719 does not generally authorize the insurer to exercise the rights and powers of its corporate insured. This obviously includes the right to sue or defend a lawsuit or even to appear in the lawsuit. This statute does not authorize the insurance company to exercise those rights and powers in the corporation's name in a lawsuit. Instead, the only manner in which the insurer may exercise those powers is by intervening in the lawsuit under Code of Civil Procedure section 387 and asserting any defenses on behalf of its insured. (Id., at 220 - 221.)"

6. Upon such an Intervention, the carrier becomes a party in the underlying action, defending against its potential exposure, if any, under the policy it issued to the suspended insured corporation, and subject to all of its available coverage defenses thereunder, in addition to all liability defenses the insured would have otherwise been able to assert.

7. Additionally, a carrier who had the opportunity to intervene, and yet fails to intervene, and allows a subsequent default to be entered against its insured, risks losing the rights to raise any liability defenses in a later Insurance Code Section 11580 direct action against it. (*Garamendi v. Golden Eagle Ins. Co.* (2004) 116 Cal.App.4th 694, 2004 Cal.App.LEXIS 277, at p. 35.)

8. Bad Faith Implications: But if the insured is cooperative in the litigation, and the carrier still elects to intervene to protect a recovery right in the litigation, the carrier may be placing its interest above those of its insured and subjecting itself to potential bad faith exposure. Coverage counsel should be consulted before proceeding in this manner.

F. Intervention: When should it be considered in Florida

1. In Florida, intervention is a valuable legal strategy which can open a door to allow insurance companies to participate in ongoing litigation to protect their interests in litigation involving an insured. It is imperative that insurance companies understand the

potential use of Florida Rule of Civil Procedure, 1.230 when seeking avenues of relief to protect its rights in litigation.

2. In Florida insurance companies may benefit by intervening in a case under the following circumstances:

- Protect Interests or Rights;
- Assert the right to be heard;
- Protect Subrogation rights;
- Assure the right to appeal a final judgment if needed;
- Participate in matters related to division of funds post-final judgment; and
- Utilize Declaratory Judgment remedy to determine "duty to defend."

While these are just a few ways an insurance company may find it beneficial to intervene in ongoing litigation, there are many more that could be considered based on the facts and circumstances of each individual case.

G. Intervention Procedures: California

1. Usually, the intervenor appears *ex parte* in the court where the action is filed. The intervenor must file a complaint in intervention which contains fact specific allegations satisfying the statutory requirements identified in Section 387(a).

2. The intervenor should not delay in seeking relief. Any delay could be termed potentially prejudicial to the parties already in the case and, thus, intervention could be denied. An objection should be made by other parties if intervention is not appropriate or it could be waived on appeal.

H. Intervention Procedures: Florida

1. In Florida the intervenor should not delay in seeking relief. The reason for this relates to Florida law which generally holds an intervenor may not be allowed after final judgment. Also, an order denying a Motion to Intervene is immediately appealable as a final order. Litvak v. Scylla Properties, LLC, 946 So. 2d 1165 (Fla. 1st DCA 2006). An order on a Motion to Intervene is reviewed on the merits by the abuse of discretion standard. Id.

2. In Florida a motion to intervene may be served at any time during the pendency of the action so long as it is before the final judgment. Further, the Court may require an evidentiary hearing to determine whether to allow intervention. Also, a party can intervene in an action without filing a complaint as long as the party does not have affirmative claims.

Moreover, the intervenor generally cannot inject new issues into a case not already embodied in the original suit and the intervenors interests are subordinate to the main proceedings.

3. However, Florida Courts can override the limitation and allow counterclaims. Moreover, indispensable parties are not subject to the limitation. Further, the Intervenor must file a complaint if the Intervenor has affirmative claims that need to be made in a case. The proper procedure would be to file a Motion to Intervene with the proposed Intervenor Complaint attached.

I. Conclusion

Intervention can be an invaluable procedural tool for efficiently resolving issues in one case while preventing outcomes which might severely prejudice a third party. Before intervening, however, one must carefully assess all possible issues and the potential outcome.