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Insurer Intervention—How, Why, and When

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An insurer's reservation of rights letter properly notifies an insured that certain policy provisions ultimately may bar or limit coverage for a claim against the insured, depending on further factual development. It may take further effort by the insurer, however, to ensure that the relevant facts are determined. In particular, an insurer may need to take action so that damages are allocated between covered and non-covered claims. Different jurisdictions provide varying mechanisms for an insurer to clarify the facts relevant to apportionment of any damages that may be awarded. One such mechanism is permissive intervention. This article explains how intervention can be accomplished, the reasons militating in favor of intervention, when an insurer might intervene in the underlying action, and potential pitfalls if an insurer ignores proper intervention procedures.

The Rules of Permissive Intervention

Each jurisdiction's rules of civil procedure or the applicable arbitration rules provide the threshold standards for intervention. Rule 24(b) of the Federal Rules of Civil Procedure governs permissive intervention[1] in federal courts and provides the framework for an insurer's motion to intervene:

> (1) In General. On timely motion, the court may permit anyone to intervene who:
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> (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]

State courts typically have similar procedures. For example, Florida's Rule of Civil Procedure 1.230 provides that "[a]nyone 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 court in its discretion." California's Code of Civil Procedure Section 387(a) provides that

> 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. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by

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> joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court. . . .

Courts in various jurisdictions—including Alabama, Arizona, Connecticut, Florida, Maryland, Mississippi, Nevada, Ohio, Pennsylvania, Tennessee, Vermont, and Wisconsin—have expressly authorized insurers to intervene for the purpose of posing special interrogatories to the jury or a jury verdict form. Although other courts—including those in Alabama,[3] California, Illinois, Indiana, Maine, Mississippi, New Mexico, New York, Ohio, and Wyoming—have denied insurers' motions for intervention, the scope of participation sought by the intervening insurer, the timing, or the claimed basis for the intervention may have resulted in the denial of the request for intervention in many of those cases. For example, in *Cromer v. Sefton*,[4] the insurer sought to intervene in the underlying action in order to contest coverage. Likewise, in *Donna C. v. Kalamaras*,[5] an insurer sought to intervene to participate fully as a party in the underlying action. In both instances, intervention was denied.

Reasons to Intervene

Intervention may allow an insurer to pose special interrogatories to the jury or submit a jury verdict form. In that way, the same jury that has made findings of fact as to liability will further explain its determinations. Special interrogatories or a jury verdict form thus may help eliminate uncertainty about coverage for a jury verdict. As the Supreme Court of Vermont explained in *Pharmacists Mutual Insurance Co. v. Myer*,

> [i]n the absence of special interrogatories it is impossible, of course, to reliably allocate the [ ] damages, but the problem could—and should—have been avoided. While [the insurer] did not control the litigation—having perceived a conflict and deferred to independent counsel—it nevertheless continued to monitor the [underlying] trial through its "litigation specialist" and remained in regular contact with defense counsel. Indeed, [the insurer] remained the most informed party concerning coverage issues and the potential difficulties of parsing a general verdict as between covered and uncovered claims. Therefore, to protect its interests and meet its burden it was incumbent upon [the insurer] to notify the trial court and the parties of the potential apportionment issue and of the need for special interrogatories allocating damages, to seek permission if necessary to attend the charge conference to propose such interrogatories, or even to intervene in the litigation if all else failed.[6]

Because the insurer did not take the steps found to have been required in *Myer*, the consequences imposed by the court were that the insurer would remain responsible for the jury award in its entirety in the event that any of the conduct at issue was found to fall within the policy's coverage.[7]

Under oft-cited *Duke v. Hoch*[8] and its progeny, an insurer that does not clearly convey to the policyholder the vital role of a special verdict in potential coverage litigation faces the prospects

of either bearing the burden of apportioning damages between covered and uncovered claims, or standing by as the trial court attempts unilaterally to allocate such damages.

In *Duke*, the Fifth Circuit held that an insurer that provides a defense under a reservation of rights is required to make known to the policyholder's separate counsel the availability of a special verdict and the divergence of interest between the policyholder and the insurer that arises from whether damages are allocated. Once the underlying defense counsel that the insurer has appointed discloses this situation to the policyholder's own counsel, the policyholder would be entitled to make the decision whether to seek an allocated verdict. The court expressly declined to explore the situation in which the policyholder does not have separate counsel.[9]

As the *Duke* court explained, under Florida law, once the insurer establishes that any part of the damages arises from a non-covered claim, the burden shifts to the policyholder to establish the amount of the damages that related to covered claims. The *Duke* court indicated that, where the insurer fails to advise its policyholder of the divergence of interest between the insurer and the policyholder that may arise from an unallocated verdict, the policyholder need not bear the "impossible burden" of proving what portion of the damages is attributable to the covered claims.[10] Instead, the underlying trial court judge,

> as the trier of fact, will be in the position of establishing as best he can the allocation which the jury . . . would have made had it been tendered the opportunity to do so. If it is impossible for the court to make a meaningful allocation based on only the transcript, [the policyholder] should have the right to adduce additional evidence and [the insurer] to present evidence in rebuttal.[11]

The courts adopting *Duke* implicitly predicate their analyses on the presumption that an insurer can direct the attorneys whom it retains to defend a policyholder to seek an allocated verdict or request an apportionment of damages in settlement.[12] However, this assumption is questionable, particularly where insurers can readily identify claims about which the insured has been informed of the need to allocate damages and the benefits of a special verdict form, and the insured nonetheless has objected to the use of a special verdict form.[13] Although such a refusal by the policyholder may make it less likely that a court would find that the insurer has waived or is estopped to contest coverage for a general verdict, and may also obviate any burden on the insurer to apportion the damages, it also means that the insurer may have to incur additional costs in seeking allocation of damages, which could have been avoided had a special verdict form been used.[14]

Recently, in *Uvino v. Harleysville Worcester Insurance Co.*,[15] the insurer's effort to advise the insured about the need for special interrogatories and intervene for that purpose prevented the insured and claimants from shifting the burden of proving allocation to the insurer and potentially created a significant hurdle for the insured and claimants after the jury verdict was rendered.

Shortly before trial in the underlying action, the insurer had moved to intervene for the purpose of seeking special interrogatories to avoid a coverage allocation dispute. The insurer made known both the availability of special interrogatories and the divergence of interest between the

insurer and the insured as to the verdict.[16] After the trial court denied the motion to intervene and granted the insured's motion to disqualify the insurer-provided defense counsel and compelled the insurer to pay for independent defense counsel, no party made any further attempt to submit special interrogatories to the jury.[17] The jury found the insured liable and awarded general damages, consequential damages, and damages for breach of fiduciary duty.[18] The court held that the insured and claimants could not use the unallocated jury verdict to obtain indemnity for the entire verdict amount.[19] Because the insurer had fairly apprised the insured of the need for special interrogatories, even though the court in the underlying action refused to allow the insurer to intervene, the insurer had avoided shifting the burden of proving allocation to the insurer. [20] Moreover, having blocked the allocated verdict, the court in the coverage action was "skeptical" that the claimants could meet their burden in the coverage action to prove the covered amounts, and the court ordered the claimants "to demonstrate in writing in advance of [an allocation] proceeding how they intend to identify covered damages, if any, incorporated in the general verdict with prima facie showings of examples of covered damages."[21]

When to Seek Permissive Intervention

While insurers typically seek intervention only for the purpose of submitting jury interrogatories or a special verdict form, and thus move to intervene only shortly before trial in the underlying action, careful attention must be paid to whether that is the requisite timing in the relevant jurisdiction. The timeliness factors under the Federal Rules of Civil Procedure are

> (1) the length of time during which the would-be intervenor knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of prejudice to the existing parties as a result of the would-be intervenor's failure to apply as soon as he knew or reasonably should have known of his interest; (3) the extent of prejudice to the would-be intervenor if his petition is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely.[22]

The Alabama Supreme Court has held that, applying these factors, an insurer's proposed intervention, once discovery had proceeded to a certain degree, was too late, at least under circumstances where the insurer also seeks to participate in discovery to some extent.[23] As to the first factor, the Alabama court held that the insurer knew of its interest in the case as of when it issued its first reservation of rights letter. Looking at the prejudice to the existing parties, the court noted that the insurer in this instance was seeking to intervene not only for the purpose of jury interrogatories but also purportedly to participate in discovery. The court held that intervention after written discovery and at least one key deposition had concluded would unnecessarily complicate and delay the underlying action, thus prejudicing the parties. In contrast, because the insurer could pursue a declaratory judgment action after the underlying action concluded to address allocation, the court concluded that the insurer would not be prejudiced if it could not intervene. Finally, the court found no unusual circumstances militating in favor of intervention. Therefore, the insurer's motion to intervene was denied. While this case might be distinguished where an insurer seeks to intervene solely to allocate damages at trial, the court's discussion of timing may merit consideration in any event.[24]

In contrast, some jurisdictions have concluded that intervention attempted on the eve of the underlying trial is too soon. Maryland, for example, has adopted a post-verdict intervention approach. In *Allstate Insurance Co. v. Atwood*,[25] Maryland's highest court ruled that it would have been inappropriate for the insurer to intervene in the underlying action before trial. The court expressed concern that the policyholder would be forced to defend simultaneously against both the tort plaintiff and the insurer. In addition, the court reasoned that insurer intervention would be tantamount to authorizing direct actions by plaintiffs against liability insurers, which is not permitted under Maryland law. Finally, the court reasoned that intervention by the insurer in the underlying action would not have been appropriate because Maryland law ordinarily prohibits evidence or discussion in front of the jury in the underlying action that the defendant has insurance.

The *Atwood* court outlined a procedure for the insurer to move to intervene within 10 days after the entry of judgment in the underlying action and file a declaratory judgment complaint regarding its duty to pay any damages assessed against the insured.[26] The motion to intervene would render the tort judgment nonfinal. In the declaratory judgment action, the court would first determine whether the issue that was resolved in the underlying action and that determined insurance coverage was fully and fairly litigated in the underlying action. If it was fairly litigated in the underlying action, the insurer would be bound by that determination in the coverage action. Otherwise, the insurer would be permitted to re-litigate the issue in the coverage action.

A Florida intermediate appellate court likewise has denied an insurer's motion to intervene to pose special interrogatories before the return of the main verdict. In *Employers Insurance of Wausau v. Lavender*,[27] the trial court denied the insurer's motion to intervene in the underlying action, which the appellate court held was not an abuse of discretion. However, the appellate court recommended that the insurer be permitted to intervene if the jury returned a verdict adverse to the policyholder "for the same limited purpose of preparing jury instructions and a special interrogatory verdict for submission to the jury."

Potential Pitfalls

Failure to carefully follow the prescribed rules for intervention, at least in Washington State, may create additional, extra-contractual exposure for the insurer. In *Mutual of Enumclaw Insurance Co. v. Dan Paulson Construction, Inc.*,[28] an insurer that had been defending its insured under a reservation of rights directly contacted the arbitrator in the underlying matter, requesting apportionment of any arbitration award. The insurer did not formally move to intervene or request permission from the arbitrator to attend, as permitted under American Arbitration Association rules. Although the insurer had asked its insured for permission to intervene or have an insurer coverage representative attend the arbitration, the insured had denied both of these requests. Shortly before the arbitration hearing began, the insurer, having filed but not served a declaratory judgment complaint, then sent a subpoena duces tecum to the arbitrator for deposition upon written question after the arbitration, together with a cover letter explaining the insurer's coverage concerns to the arbitrator. On the second day of the arbitration, the insurer sent a second letter to the arbitrator, this time with a copy to all parties, slightly narrowing the subpoena and reiterating its coverage concerns. The insurer also dismissed the coverage declaratory judgment action during the arbitration hearing. By the sixth day of the arbitration hearing, the parties settled with a lump-sum consent arbitration award and assignment of rights

under the policy. At some point after the arbitration hearing had begun, the insurer learned that the insured and claimant had agreed, at the insured's request and presumably to attempt to thwart any apportionment between covered and non-covered amounts, that any award would be a lump sum.

When the claimant, through assignment, pursued a bad-faith claim against the insurer, the Washington court concluded that the insurer acted in bad faith by sending the subpoena and ex parte communications to the arbitrator. The court found that the insurer ignored the concerns of its insured, which had urged the insurer not to contact the arbitrator, and showed concern for its own monetary interest while not showing concern for how its conduct might affect the insured's financial risk. The court rejected the argument that the insurer's conduct should be excused as "somewhat clumsy" and perhaps improper, but not in bad faith. Although the court did not discuss whether or how the insurer properly could have protected its interests under the circumstances, the insurer presumably could have showed the exact same interest for its financial concerns with respect to allocation of any award, without any extra-contractual exposure and avoiding any estoppel risk, simply by abiding by the prescribed intervention rules.

Proposed Course of Action for an Insurer

As a general matter, it may benefit an insurer to create a record documenting communications with the insured's coverage counsel or representative in which the insurer unambiguously reserves the right to later contest coverage for amounts awarded under certain legal theories or types of damages excluded by the policy. Where applicable, the insurer should explain that the insured (or its assignee) would have the burden of proving which portions of the underlying verdict are covered under the policy. The insurer should advise the insured, where the insured would bear the burden of proving allocation as a general rule, that the use of a special verdict form would aid the insured in discharging its burden and safeguard insured's ability to seek indemnity from the insurer.

An insurer should be sensitive to the issue of potential intervention and prudently investigate the required procedures in the applicable jurisdiction. In some jurisdictions, an insurer arguably may be required to move to intervene in an underlying action or take other action to preserve its rights during the pendency of an underlying action. Failure to do so could allow an insured to assert that the insurer waived or is estopped to contest payment for non-covered claims.[29] Accordingly, an insurer could seek permissive intervention in underlying actions for the limited purpose of interposing jury interrogatories or special verdict forms in order to determine which damages are attributable to covered, rather than non-covered, claims. Any motion to intervene should emphasize that the insurer seeks to intervene for the limited purpose of proposing special interrogatories or participating in the drafting of jury instructions in order to apportion damage awards between covered and uncovered claims. Some courts have denied insurers' motions to intervene on the grounds that the injection of coverage issues into the litigation would unduly protract the case and confuse the jury. An insurer may also want to limit its intervention temporally, requesting that special interrogatories be posed only after the policyholder's liability has been adjudicated.

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[1] While virtually every jurisdiction provides for the intervention of nonparties, there is scant support for intervention as of right by an insurer seeking to intervene in order to submit special jury questions. The courts considering motions for intervention as of right generally have concluded that the insurers did not have a sufficiently direct interest in the outcome of the litigation to support intervention of right. *See, e.g.*, *Siding & Insulation Co. v. Beachwood Hair Clinic, Inc.*, 2012 U.S. Dist. LEXIS 25081, at *4–5 (N.D. Ohio Feb. 28, 2012) (denying insurer's motion to intervene as of right under Rule 28(a) on grounds that the insurer's interest pre-verdict, where the insurer had not "admitted" that the policy afforded coverage for any damages that might be awarded, was only "contingent"); *Hinton v. Beck*, 176 Cal. App. 4th 1378, 1385 (2009) (an insurer that defends under a reservation of rights has only a "consequential" interest that is insufficient for intervention under California's Code of Civil Procedure Section 387(a)).

[2] Two other considerations relate to potential permissive intervention. First, permissive intervention in federal cases requires that the intervenor have an independent jurisdictional basis for its claim. See 7C Charles A. Wright et al., *Federal Practice and Procedure* § 1917, at 518–604 (3d ed. 2007). Accordingly, permissive intervention is not available where diversity of citizenship or potential damages greater than $75,000 are lacking. Second, courts' denials of permissive intervention are usually governed by an abuse of discretion standard, which often proves nearly impossible to meet. *See, e.g.*, *McClelland v. Johnson*, 111 F. App'x 697, 697 (4th Cir. 2004) ("'in the absence of an abuse of discretion,'" typically "'no appeal lies from an order denying leave to intervene where intervention is a permissive matter within the discretion of the court'") (quoting *Bhd. of R.R. Trainmen v. B&O R.R. Co.*, 331 U.S. 519, 524 (1947)). The heavy burden the insurer faces to appeal a denial of its motion to intervene, however, also suggests that courts will not require intervention to avoid waiver or estoppel.

[3] Alabama permits intervention for an "alternative procedure," under which the trial of the underlying action is bifurcated, and in the event of a verdict or judgment against the policyholder, the insurer would then be permitted to try the coverage issues before the same judge. *See Universal Underwriters Ins. Co. v. E. Cent. Alabama Ford-Mercury, Inc.*, 574 So. 2d 716, 722–24 (Ala. 1990). However, the insurer is not guaranteed the right to either intervention or bifurcated trial under Alabama law. *See Emp'rs Mut. Cas. Co. v. Holman Bldg. Co.*, 84 So. 3d 856 (Ala. 2011).

[4] 471 N.E.2d 700 (Ind. Ct. App. 1984).

[5] 485 A.2d 222 (Me. 1984).

[6] *Pharmacists Mut. Ins. Co. v. Myer*, 993 A.2d 413, 419–20 (Vt. 2010).

[7] *Myer*, 993 A.2d at 420.

[8] 468 F.2d 973 (5th Cir. 1972).

[9] *Duke*, 468 F.2d at 979 n.4.

[10] *Duke*, 468 F.2d at 980.

[11] *Duke*, 468 F.2d at 984.

[12] *See, e.g.*, *Gay & Taylor, Inc. v. St. Paul Fire & Marine Ins. Co.*, 550 F. Supp. 710, 716 (W.D. Okla. 1981) (insurer that controls defense "had every opportunity to request an apportionment of damages").

[13] *See, e.g.*, *TranSched Sys. Ltd. v. Fed. Ins. Co.*, 67 F. Supp. 3d 523 (D.R.I. 2014); *cf.* *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602 (Minn. 2012) (rejecting

insured's argument that defense counsel appointed by the insurer had a duty to the insured to make a request for a written explanation of the arbitration award and imposing on the insurer a duty to disclose to the insured the insured's interest in obtaining a written explanation of an award that identifies the claims or theories of recovery actually proved and the amount of damages attributable to each).

[14] At least one court was unreceptive to the prospect of additional litigation to apportion damages after the insured, which had been alerted to the need to allocate damages, successfully objected to the claimant's proposed special verdict form. *See TranSched Systems*, 67 F. Supp. 3d 523. Disapproving "[t]hat very uneconomical concept of relitigating facts in multiple trials," the court ordered the parties to mediate the allocation amount, using either the assigned magistrate judge, a federal court mediator, or a private mediator of the parties' choosing. *TranSched Systems*, 67 F. Supp. 3d at 534.

[15] 2015 U.S. Dist. LEXIS 26441 (S.D.N.Y. Mar. 4, 2015).

[16] *Uvino*, 2015 U.S. Dist. LEXIS 26441, at *7–8.

[17] *Uvino*, 2015 U.S. Dist. LEXIS 26441, at *9.

[18] *Uvino*, 2015 U.S. Dist. LEXIS 26441, at *9.

[19] *Uvino*, 2015 U.S. Dist. LEXIS 26441, at *25.

[20] *Uvino*, 2015 U.S. Dist. LEXIS 26441, at *25.

[21] *Uvino*, 2015 U.S. Dist. LEXIS 26441, at *26.

[22] *E.g., United States v. Jefferson Cnty.*, 720 F.2d 1511, 1516 (11th Cir. 1983).

[23] *QBE Ins. Corp. v. The Austin Co.*, 23 So. 3d 1127 (Ala. 2009).

[24] *Compare Frank Betz Assocs., Inc. v. J.O. Clark Constr., LLC*, 2010 U.S. Dist. LEXIS 53437 (M.D. Tenn. June 4, 2010) (motion to intervene made after close of discovery and before trial timely, although denied on other grounds), *and Napoli v. City of Brunswick*, 2009 U.S. Dist. LEXIS 25214 (N.D. Ohio Mar. 26, 2009) (motion to intervene made only two months after complaint filed and before discovery began, for purposes of posing special interrogatories at trial, held to be timely), *with Cooke v. Town of Colorado City*, 2013 U.S. Dist. LEXIS 134273 (D. Ariz. Sept. 19, 2013) (insurer's motion to intervene for purposes of submitting special interrogatories and special verdict forms denied as untimely where made day before pretrial conference and after court ruled on motions for summary judgment), *J.T. Shannon Lumber Co. v. Gilco Lumber, Inc.*, 2008 U.S. Dist. LEXIS 85827 (N.D. Miss. Oct. 7, 2008) (motion to intervene to present special interrogatories or jury verdict form made 10 months after insurer agreed to provide defense under reservation of rights found to be not timely), *Sachs v. Reef Aquaria Design Inc.*, 2007 U.S. Dist. LEXIS 75247 (N.D. Ill. Oct. 5, 2007) (denying as untimely the insurer's motion to intervene made a year after insurer agreed to provide defense under reservation of rights), *and Davis v. Border*, 869 N.E.2d 46 (Ohio Ct. App. 2007) (insurer's motion to intervene after close of discovery and two months before trial found to be untimely).

[25] 572 A.2d 154, 155 (Md. 1990).

[26] *Atwood*, 572 A.2d at 162.

[27] 506 So. 2d 1166 (Fla. Dist. Ct. App. 1987).

[28] 169 P.3d 1 (Wash. 2007) (en banc).

[29] *See, e.g., U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061 (Fla. 1983); *Herrera v. Am. Standard Ins. Co.*, 279 N.W.2d 140, 144–45 (Neb. 1979); *Campbell v. Am. Fid. & Cas. Co.*, 192 S.E. 906 (N.C. 1937).