

ALERT

Possible Future Judgment Against Insured Does Not Support Claimant's Motion to Intervene as of Right

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The United States District Court for the District of Nevada has held that an underlying claimant's "hope of an eventual judgment" arising out of a suit for legal malpractice was not a legally protected interest such that the claimant could intervene in a related coverage action "as of right." *Colony Ins. Co. v. Schwartz*, 2013 WL 5308254 (D. Nev. Sept. 19, 2013).

The coverage action arose out of a claim for malpractice against an insured attorney. While that suit was pending, the insured's professional liability insurer filed a coverage action against the insured, which sought a declaration of no coverage based on the insured attorney's alleged failure to timely report the claim and alleged failure to disclose certain information on the application for coverage. The suit also named the underlying claimant, but the insurer was unable to effectuate service on the claimant of the summons and complaint and, ultimately, voluntarily dismissed the claimant from the case. The insurer and the insured attorney subsequently settled the coverage action. Before the case was dismissed, however, the claimant filed a motion to intervene.

The court denied the motion, holding there was no basis for intervention as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure. In reaching this conclusion, the court pointed out that the underlying malpractice suit was still ongoing and without a judgment. As such, according to the court, the "hope of an eventual judgment" was not sufficient to meet the requirement of a "legally protectable interest relating to the property or transaction that [was] the subject of the [coverage] action." The court also observed that

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the claimant had not shown that the two suits involved the same legal issues, noting that the underlying malpractice suit involved alleged breach of fiduciary duties whereas the declaratory judgment action involved fraud.