To Intervene or Not Intervene: Recent Developments on the Risks and Benefits of Intervention

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Suit has been filed, coverage is in dispute, and the reservation of rights letter has gone out the door. What’s next? An insurer has three options to ensure its interests are protected: (1) file a separate declaratory judgment action seeking a determination as to coverage, (2) move to intervene and participate in the liability action against the insured, or (3) a combination of both. This session will highlight the role insurer intervention can play in a coverage dispute, its costs and benefits, and the willingness of courts to allow an insurer to intervene.

**Basis for Intervention**

The ability to intervene is derived from each jurisdiction’s rules of civil procedure, which provide for two types: intervention as of right and permissive intervention. Because insurers typically base their requests for intervention on the latter, this analysis will exclusively focus on permissive intervention.

At the federal level, Rule 24 of the Federal Rules of Civil Procedure provides the framework for permissive intervention:
(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.


State courts typically have a similar procedure. For instance, the Tennessee Rules of Civil Procedure provide an almost identical standard for permissive intervention:

Upon timely motion any person may be permitted to intervene in an action:

(1) when a statute confers a conditional right to intervene; or (2) when an movant's claim or defense and the main action have a question of law or fact in common. In exercising discretion the court shall consider whether or not the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Tenn. R. Civ. P. 24.02.

**Why Intervene?**
Take this set of facts: Contractor agrees to build a house for Customer. After its construction, Customer files suit alleging defects in the construction. Insurer undertakes the defense of Contractor under a reservation of rights on the belief that all allegations in the complaint center on faulty workmanship of Contractor, which is outside the scope of coverage under the policy. The two primary reasons an insurer may benefit from seeking intervention are:

(1) **Clarity of Judgment.**

Insurers typically seek intervention for the limited purpose of submitting jury interrogatories or a special verdict form to the jury in the underlying liability case (“the Procedural Intervention”). By doing so, the insurer ensures the jury has, in reaching its verdict, made findings of fact as to liability that will sufficiently explain its determinations and potentially eliminate any subsequent questions regarding coverage (i.e. expressly apportion any judgment between covered and non-covered losses). This is particularly important where a plaintiff makes both covered and non-covered claims against an insured. Put simply, should liability be found, the insurer (and court) could theoretically read the jury verdict and determine whether it has any duty to indemnify, thus abrogating the need for a separate declaratory judgment action on the issue of coverage.

As one example, in *Cmty. Vocational Sch. of Pittsburgh, Inc. v. Mildon Bus Lines, Inc.*, Erie Insurance Exchange (“Erie”) sought to intervene in a Telephone Consumer Protection Act (“TCPA”) case for the limited purpose of submitting special jury interrogatories to determine whether it had a duty to indemnify defendant against any
judgment obtained by plaintiff. 2017 U.S. Dist. LEXIS 57870, at *2 (W.D. Pa. Apr. 17, 2017). Erie argued that a jury award of general damages would prevent Erie from determining whether it has a duty to indemnify its insured against the judgment. Id. To remedy this issue, Erie proposed the submission of special interrogatories to ask the jury such questions as:

- whether any injuries caused by defendant's violation of the TCPA were “intended or expected”;
- whether the allegations and/or damages amount to a personal or advertising injury;
- when any personal or advertising injury took place; and
- whether any person’s right to privacy has been violated.

Id. at *25-26.¹ As reflected in the language of the proposed question, Erie wanted to ensure any jury verdict was broken down into covered and non-covered claims.

The problem an insurer can face by failing to intervene and propose such questions was highlighted by the Supreme Court of Vermont:

>[i]n the absence of special interrogatories it is impossible, of course, to reliably allocate the [ ] damages, but the problem could-and should-have

¹ Interestingly, however, the district court here ultimately denied the motion to intervene.
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.

*Pharmacists Mutual Insurance Co. v. Myer*, 993 A.2d 413, 419 (Vt. 2010). In the *Myer* case, the court found that the insurer failed to carry its burden of demonstrating what portion of the judgment was for covered and uncovered claims and, as a result, it was liable for the entire judgment amount. *Id.* at 420. *See also Butterfield v. Giuntoli*, 670 A.2d 646, 658 (Pa. Super. Ct. 1995) (reversing trial court’s grant of summary judgment in favor of insured on coverage matter where insurer “had the opportunity to resolve the issue [in the liability matter] by submitting specific instructions, specific interrogatories before or immediately after the verdict, or by seeking intervention, yet declined to do so….”).
The Insurer in our scenario faces the same problem. While it has provided a defense, liability counsel’s duty lies with the Contractor and, as a result, he or she will not necessarily be able to also protect the Insurer’s interest during litigation. The Insurer therefore faces a risk of a general verdict that fails to apportion the judgment between covered and non-covered claims, placing a heavy burden on the Insurer to do so in any subsequent coverage action. Intervening in the liability action for the purpose of propounding special interrogatories would have, at least in theory, alleviated this burden by clarifying the jury verdict.

(2) Efficiency.

While propounding special interrogatories to clarify a judgment would reduce the time and expense to be incurred by an insurer in a separate coverage matter, some insurers wish to take it a step further and intervene for the purpose of having the court decide the issue of coverage as part of the liability matter (“the Substantive Intervention”). By doing so, an insurer may be able to address both issues in “one shot” and avoid the added expense of duplicative discovery and other similar costs. This is particularly true where an insurer believes it has no duty at all to defend an insured under the terms of the complaint. In that case, it may wish to request a stay in the liability matter while the issue of coverage is sorted out. Otherwise, the insurer may ultimately find it has incurred unnecessary costs and expenses in providing a defense to its insured.

It is easy to understand why the Insurer in our scenario may wish to intervene for a more substantive purpose than simply submitting special interrogatories to the jury. If
it believes that the claims asserted by Customer all relate to faulty workmanship of Contractor, which is outside the scope of coverage under the policy, it may wish to stop the flow of defense expenses by placing the liability matter on hold and obtaining a definitive answer on the issue of coverage. This is particularly true under these specific facts, as even relatively simple construction matters often require the use of experts and result in fairly substantial defense costs. If the Insurer simply filed a separate declaratory judgment action, both could proceed independently and require the Insurer to incur the concurrent costs of both actions. Even if the Insurer does not dispute the duty to defend, the Insurer may simply wish to intervene and avoid the expense that would be incurred by pursuing a separate declaratory judgment action.

**Can An Insurer Intervene?**

Unlike the other primary method of resolving insurance coverage issues, the declaratory judgment action, there is only a limited amount of case law concerning insurer intervention. In fact, not a single decision by Tennessee state courts appears to address this issue. Moreover, because the grant of permissive intervention is a discretionary decision by the trial court, jurisdictions throughout the country have reached different conclusions when asked to decide whether an insurer should be allowed to intervene in a liability action.
(1) The Procedural Intervention.

Courts in a number of federal and state jurisdictions have previously allowed insurers to intervene for the purpose of posing special interrogatories to the jury or a jury verdict form, including:

- **Alabama.** *Thomas v. Henderson*, 297 F. Supp. 2d 1311, 1313 (S.D. Ala. 2003) (granting a non-party insurer’s motion to intervene because there was no question that the proposed intervention shared common facts with the subject claims and there was no showing that the insurer’s limited intervention would delay or prejudice the adjudication of any party’s rights).

- **Arizona.** *McGough v. Ins. Co. of N. Am.*, 691 P.2d 738, 740 (Az. Ct. App. 1984) (granting motion to intervene where the insurer had a substantial interest in the action, had filed a timely motion to intervene, and had agreed to defend the insured, thereby not losing its right to intervene).

- **Connecticut.** *Knowling v. Hunt*, 577 A.2d 1144, 1145 (Ct. Super. Ct. 1990) (“If this court refused to allow intervention, then in all likelihood the issue in question would have to be litigated in another action, which is clearly contrary to the interests of judicial economy.”).

- **Florida.** *Emp’rs Ins. of Wausau v. Lavender*, 506 So. 2d 1166, 1167 (Fla. Dist. Ct. App. 1987) (technically denying the motion to intervene filed prior to trial, but allowing insurer to intervene post-verdict for the same limited purpose of preparing jury instructions and a special interrogatory verdict for submission to the jury).
• **Nevada.** *Fid. Bankers Life Ins. Co. v. Wedco, Inc.*, 102 F.R.D. 41, 44 (D. Nev. 1984) (granting insurer’s motion after finding the possibility that relitigation of the same issue may be avoided is a strong reason to permit intervention.).

• **Ohio.** *Tomcany v. Range Constr.*, 2004-Ohio-5314, *38* (Ohio Ct. App. 2004 (“[I]f [insurer] were not permitted to intervene in this matter, a general verdict without interrogatories … might bar appellant from denying coverage for the verdict.”)

• **Tennessee.** *Plough, Inc. v. Int’l Flavors & Fragrances, Inc.*, 96 F.R.D. 136, 137 (W.D. Tenn. 1982) (allowing an insurer “to intervene for the very limited purpose of submitting special interrogatories” but “reserv[ing] judgment until such interrogatories are submitted on whether they shall be employed in returning a verdict, or if a general verdict form will be submitted to the jury.”).

In such cases, courts often found the coverage and liability matters to be sufficiently related to share common questions of fact and viewed judicial economy to be the deciding factor in granting intervention, even in the face of slight prejudice to the parties. See e.g. *Thomas*, 297 F. Supp. 2d at 1327 (finding the possibility that “relitigation of the same issue may be avoided is a strong reason to permit intervention” and “any potential prejudice may be obviated or at least minimized through imposition of procedural safeguards.”); *Knowling*, 577 A.2d at 1146 (“The plaintiff’s contention that the jury would be confused by this intervention is without merit and certainly outweighed by the interest
of Allstate in being able to put forth its position before the jury, and by the interest of the judicial system in being able to dispose of a case in one trial instead of two.

However, other courts, even some in the same jurisdiction as those noted above, have denied motions for Procedural Intervention for a number of reasons:

1. **Failure to Show Common Questions of Law/Fact**

   A few courts have denied motions for Procedural Intervention where the insurer failed to satisfy the first essential element of permissive joinder: a common question of law or fact between the claims. These cases typically involve an insurer making only “general allegations” in its motion and/or failing to attach important documents, such as the policy or proposed interrogatories.

   - **Nebraska.** *High Plains Coop. Ass’n v. Mel Jarvis Constr. Co.*, 137 F.R.D. 285, 290 (D. Neb. 1991) (“[A]n applicant for intervention must first show that its ‘future defense’ in a coverage dispute has ‘questions of fact in common with the main action.’ This USF & G has not done.”).

   - **Second Circuit.** *Restor-A-Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871, 877 (2d Cir. 1984) (finding district judge did not abuse discretion when denying motion to intervene where insurer failed to attach copy of the policy and therefore court could not determine whether there was a “legitimate controversy” or whether the motion “was merely a tactical move.”).
• **Ohio.** *Trs. of Painting Indus. Ins. Fund v. Glass Fabricators, Inc.*, 2014 U.S. Dist. LEXIS 159257, at *3 (N.D. Ohio Nov. 10, 2014) (permissive intervention denied because insurer’s indemnity defenses and underlying action would “require different evidence and different laws will apply.”)

• **Tennessee.** *Frank Betz Assocs. v. J.O. Clark Constr.*, 2010 U.S. Dist. LEXIS 55193, at *4 (M.D. Tenn. June 4, 2010) (rejecting an insurer’s motion to intervene where the motion only broadly alleged that the insurer did not believe the policy provided coverage for the claims against its insured and did not specifically identify a common question of fact between the questions of coverage and liability).

2. **Prejudice to the Insured/Conflict of Interest.**

A significant number of courts have rejected requests to intervene based upon concerns of a potential conflict of interest and resulting prejudice to the insured. These cases focus on the fact that the addition of the insurer creates a situation where the insured is defending itself against the resources of both the tort plaintiff and the insurer at the same time, even with something as simple as propounding special interrogatories. Of course, it is in an insured’s best interest to have any judgment eligible for coverage. As a result, intervention could open the insured to attack from two separate angles – liability and coverage. Moreover, courts have expressed concern that the addition of coverage questions could distract the jury from the issue of liability. In contrast, these courts have typically found the insurer will not be significantly prejudiced through the denial of its
request to intervene, as it may file a separate declaratory judgment action for the purposes of determining its duty to defend and indemnify.

• **Second Circuit.** *Restor-A-Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871, 877 (2d Cir. 1984) (“Allowing the insurer to intervene even for limited purposes might, as a practical matter, deter a settlement and may well exacerbate a potential conflict of interest for the attorney furnished by Unigard to represent Certified.”).

• **Illinois.** *Davila v. Arlasky*, 141 F.R.D. 68, 72 (N.D. Ill. 1991) (where a policy contains a willful conduct exclusion, “a conflict exists between the insurers who would be just as happy to see willful conduct proved, and the insured, who wants any liability to be covered by the policy.”).

• **Kentucky.** *Powell v. Tosh*, 2012 U.S. Dist. LEXIS 11301, at *13 (W.D. Ky. Jan. 30, 2012) (“If ANPAC and Westfield were allowed to intervene, this may, as a practical matter, deter settlement and exacerbate a potential conflict of interest for the attorneys furnished by ANPAC and Westfield to represent the defendants.”).

• **Nebraska.** *High Plains Coop. Ass’n v. Mel Jarvis Constr. Co.*, 137 F.R.D. 285, 290-91 (D. Neb. 1991) (rejecting request to intervene and propound special interrogatories to jury because it “may adversely affect the potential liability of either the insured or the insurer, and counsel for Jarvis may be put in the intolerable position of taking a position that is potentially hostile to the insured.”).
• **New Mexico.** *Nieto v. Kapoor*, 61 F. Supp. 2d 1177, 1195 (D.N.M. 1999) ("As the Court already has explained, allowing Medical Protective to intervene where its interests are unquestionably antagonistic to Dr. Kapoor’s will prejudice the adjudication of his rights. Not only will he have the burden of presenting a defense to Plaintiffs’ accusations, but he will carry the additional burden of having his insurer interfere with his defense.").

• **Tennessee.** *Frank Betz Assocs. v. J.O. Clark Constr.*, 2010 U.S. Dist. LEXIS 55193, at *10 (M.D. Tenn. June 4, 2010) ("[I]t appears that AIC is providing a defense, under a reservation of rights, to the Defendants, which would create a conflict of interest for the lawyers representing the Defendants if AIC were permitted to intervene.").

### 3. Timing.

Some courts have declined an insurer’s request to intervene when they have found the insurer waited too long before filing:

• **Arizona.** *Cooke v. Town of Colo. City*, 2013 U.S. Dist. LEXIS 134273, at *4 (D. Ariz. Sep. 19, 2013) (motion to intervene untimely when it was filed the day before the final pretrial conference).

• **Illinois.** *Sachs v. Reef Aquaria Design, Inc.*, 2007 U.S. Dist. LEXIS 75247, at *9 (N.D. Ill. Oct. 5, 2007) (motion to intervene untimely when it was filed more than a year after insurer learned of case).
• **Kentucky.** *Powell v. Tosh*, 2012 U.S. Dist. LEXIS 11301, at *13 (W.D. Ky. Jan. 30, 2012) (motion to intervene untimely when it was filed more than 30 months after complaint).


4. **The Substantive Intervention.**

As may be expected, insurers have found it much more difficult to persuade a judge to allow them to intervene in cases for a purpose beyond the submission of special interrogatories. See *e.g.* *Cromer v. Sefton*, 471 N.E.2d 700, 704 (Ind. Ct. App. 1984) (“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.”); *Donna C. v. Kalamaras*, 485 A.2d 222, 225 (Me. 1984) (upholding a trial court’s denial of permissive intervention when the insurer sought to “participate fully” in the litigation).

Nonetheless, a few courts have granted an insurer’s motion to intervene for more substantive purposes:


• **Wisconsin.** *Richardson v. Adam Helgerson & Monroe Cty.*, 2015 U.S. Dist. LEXIS 67580, at *6 (W.D. Wis. May 26, 2015) (granting motion to intervene where insurer sought permission to seek a declaratory judgment on issue of coverage).

**Practice Pointers:**

With courts recently appearing hesitant to allow an insurer to intervene for a number of reasons, it is critical that insurers follow certain guidelines to bolster their chances of success:

1. **Intervene Early.**

   The easiest way a court can dispose of a motion to intervene is to declare it untimely. It is therefore critical that the motion be filed as early in the litigation as possible, even if the insurer wishes to do nothing more than propound special interrogatories to the jury.

2. **Limit the Scope.**

   Put simply, the more involved an insurer wants to be in the liability matter, the more likely the court will find a conflict of interest or potential prejudice to the insured. The
insurer should therefore think carefully before seeking to do anything more than propose interrogatories to the jury.

(3). **Attach the Policy and Proposed Interrogatories.**

The insurer carries the burden of convincing the court to allow it to intervene. Ensuring the insurance policies and proposed interrogatories are both attached to the motion to intervene is vital to meeting this burden, and the failure to do so has been fatal to insurers in multiple jurisdictions.