IADC COMMITTEE NEWSLETTER

TRIAL TECHNIQUES AND TACTICS

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IN THIS ISSUE

Litigation in an underlying lawsuit where an insurance carrier is defending an insured under a reservation of rights can present unique challenges for all parties. It is not uncommon for an insurance carrier to move to intervene to address facts pertinent to coverage. This article addresses intervention under Fed. R. Civ. P. 24 and the standard applied to intervention as of right versus permissive intervention.

To Intervene, or Not to Intervene, That is the Question

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To be, or not to be, that is the question:
Whether 'tis nobler in the mind to suffer
The slings and arrows of outrageous fortune,
Or to take arms against a sea of troubles
And by opposing end them.

William Shakespeare, Hamlet, at:
http://shakespeare.mit.edu/hamlet/full.html
, last accessed September 13, 2018

While not as existential as Hamlet's query, an insurer defending an insured under a reservation of rights is often confronted with coverage determinant questions. The issue, then, is how best to obtain the answers to those essential questions. Is it "nobler in the mind to suffer the slings and arrows of outrageous fortune"? *Id*. Will the insurer stand aside in the underlying action and await the outcome that could yield success or defeat in a coverage action? Or, is it best to "take arms against a sea of troubles and by opposing end them"? *Id*. Shall it intervene to address the coverage dependent issues head-on?

When a claim may or may not be covered an insurer may defend its insured under a reservation of rights. Coverage for such a claim is usually fact specific, which will eventually be laid out at trial. However, while the facts are at issue in the trial, the verdict is not likely to be sufficiently specific so as to resolve each relevant (as it pertains to insurance coverage) fact.

For example, a Plaintiff files an action against an insured for copyright violation. As a potential "personal and advertising injury" claim, an insurer may defend the insured under a reservation of rights. A Plaintiff does not need to prove knowledge to prevail in a copyright infringement lawsuit. The Plaintiff may prevail by proving either 1) a negligent or willful violation, or 2) a knowing violation of the Plaintiff's rights. The former might be covered; the latter could be excluded. If the jury provides a general verdict form, the insurer may never know what the jury's verdict was based upon – negligence, willfulness, or knowledge.

An insurer may have a right to intervene in an underlying action pursuant to Fed. R. Civ. P. 24(a). The Rule provides, in part: "On timely motion, the court must permit anyone to intervene who:…(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."

There are four factors to consider for intervention as a matter of right: 1) the application must be timely, 2) the movant must show an interest in the underlying action, 3) the movant's interest may be impaired in the underlying action, and 4) the existing parties will not adequately protect that interest. *See, R Best Produce, Inc. v. Shulman-Rabin Mktg. Corp*., 467 F.3d 238, 240 (2nd Cir. 2006).

Timeliness is case specific. *Aristocrat Leisure Ltd. v. Deutsche Bank Tr. Co. Ams*., 262 F.R.D. 348, 352 (S.D.N.Y. 2009) ("[E]ach intervention case is highly fact specific and tends to resist comparison to prior cases."). To determine if the intervention is sought timely, Courts have looked to four factors: 1) how long was the

movant aware of the issue prior to seeking intervention, 2) prejudice to the existing parties if granted, 3) prejudice to the movant if denied, and 4) unusual circumstances in favor or or opposing intervention. *In re Holocaust Victim Assets Litig*., 225 F.3d 191, 198 (2nd Cir. 2000); *see also, United States v. Thorson*, 219 F.R.D. 623, 627 – 28 (D.C. Wisc. Sept. 26, 2003) (applying the four factors and noting that the question is one of "reasonableness").

An insurer always has an interest because it may or may not have coverage in the underlying action. However, and not surprisingly, the issue is more complicated. "[T]he Supreme Court has stated that the interest must be 'significantly protectable.'" *Restor-A-Dental Lab., Inc. v. Certified Alloy Products, Inc*., 725 F.2d 871, 874 (2nd Cir. 1984) citing *Donaldson v. United States*, 400 U.S. 517, 531 (1971). The interest must be "sufficiently direct and immediate to justify his entry as a matter of right." *Restor-A-Dental Lab., Inc.*, 725 F.2d at 874. Such interest must be "direct, as opposed to remote or contingent." *Id*. It is not uncommon for courts to opine that an insurer's interest is contingent and will deny intervention as a matter of right accordingly.

The third prong, impairment of interest, is dependent on first establishing an interest in the action. In *Thorson*, the Court stated "[d]isposition of the underlying action would impair Acuity's ability to protect its interest if plaintiff's claims are determined to fall outside the policy coverage." *Thorson*, 219 F.R.D. at 627. However, courts have also looked at the impairment of interest from the narrow perspective that both the insured and insurer have an interest in avoiding liability to the underlying Plaintiff. "When the party seeking intervention has the same ultimate objection as a party to the suit, a presumption arises that its interests are adequately represented." *See, United States v. B.C. Enters., Inc*., 667 F.Supp. 2d 650, 657 (E.D. Va. Nov. 6, 2009).

The fourth prong centers on whether the existing parties will adequately protect the insurer's interest. If the Court focuses on the substantive defense of the underlying action – the effort to defeat the Plaintiff's claim – then the Court may find that the insured will adequately protect the insurer's interest. *See, B.C. Enters., Inc*., 667 F.Supp. at 657. Conversely, if the Court looks to protection of the insured's coverage interest then it may find that neither the insured nor the Plaintiff would adequately protect that interest (they would both likely want to see coverage exist should liability be established). *See, Thorson*, 219 F.R.D. at 627.

If the Court concludes that the insurer is not entitled to intervene as a matter of right, then it may obtain permissive intervention pursuant to Fed. R. Civ. P. 24(b)(2). Such Rule provides, in part: "On timely motion, the court may permit anyone to intervene who:… (2) has a claim or defense that shares with the main action a common question of law or fact." The Court has discretion to grant permissive intervention and "must consider whether intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Thus, the three factors to be considered for permissive intervention are: 1) timeliness of the motion, 2) a common question of law or fact, and 3) undue delay or prejudice. *See,*

United States v. Pitney Bowes, Inc., 25 F.3d 66, 73 – 74 (2nd Cir. 1994).

"The principal guide in deciding whether to grant permissive intervention is 'whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.'" *Id*. at 73. "[A] threshold consideration under Rule 24(b), as under Rule 24(a), is timeliness. *Id*. at *74*. Naturally, these issues are case specific as well. Prejudice and delay may be found, however, in the need for further discovery. *See, Bassett Seamless Guttering, Inc. v. GutterGuard, LLC*, 2007 U.S. Dist. LEXIS 51002 (M.D.N.C. July 13, 2007).

It is also noted that prejudice could arise as against the insurers if intervention is denied. While prejudice to the movant is not reflected in the Rule, it is an issue to address from the insurer's perspective. The Ohio Supreme Court has held that intervention is "a substantial right" under Ohio law. *Gehn v. Timberline Post & Frame*, 112 Ohio St. 3d 514, 519 (2007). However, denial of the "substantial right" did not determine the action or prevent a judgment; thus, it was not a final appealable order. *Id*. The Court noted that the insurer was not collaterally estopped from raising similar coverage issues in subsequent litigation. *Id*. As such, the Court opined that the denial was not a final appealable order, which cuts against the notion that an insurer is prejudiced by denial of intervention.

Based on the above, if an insurer is inclined to seek intervention in an underlying case, it can seek to do so either as a matter of right or permissively. In either instance, though, the insurer should take action early so as to avoid arguments relative to timeliness, undue delay, and prejudice. If, ultimately, the denial of intervention was because the insurer waited too long, then it may ultimately be estopped from raising coverage defenses later. Thereafter, it should address the differences of the parties' respective positions and the prejudice to the insurers should the case proceed to trial. Recalling the hypothetical question at the outset, is it even possible for an insurer to prove that the jury from the original action determined that the insured knowingly violation the original Plaintiff's copyright in a subsequent lawsuit? Even if the insurer can present evidence of a knowing violation at a subsequent trial, does that even matter? The question is not what the NEW jury determines, but what the ORIGINAL jury based its verdict upon.

TRIAL TIP:
PRELIMINARY QUESTIONS ON THE ADMISSIBILITY OF EVIDENCE
BY: JAMES A. KING

Two essential evidence rules that are often unrecognized and misunderstood by both the bench and the bar are Rules 104(a) and 104(b). These rules allocate responsibility between the judge and the jury for deciding preliminary questions of fact on which the admissibility of evidence depends. The rules set forth two different tests and procedures for admissibility. Federal Rule of Evidence 104(a) says that the judge is to make all necessary factual findings, or at least is supposed to, to determine whether evidence is admissible under the rules. Rule 104(b), by comparison, states that the judge will admit evidence if its relevance is dependent on the existence of a fact. It is then up to the jury to determine if that fact has been established, thus making the evidence relevant.

Specifically, Rule 104(a) provides:

> **(a) In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except privilege.

Rule 104(b), in turn, states as follows:

> **(b) Relevance That Depends on a Fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

As a practical matter, how do these rules work? There are certain fact-finding questions that a judge must resolve in order to determine if certain evidence is admissible. For example, if a party wishes to introduce evidence under a hearsay exception, say the exception for "business records" under Rule 803(6), the court must decide if the foundational elements required under the rule are satisfied in order to admit the evidence. Preliminary fact-finding will be necessary. The same is true for expert testimony and whether the testimony is reliable under *Daubert*. The judge, as the gatekeeper, must determine if the expert used reliable methods and applied those methods reliably. The court must make that finding, not the jury. As a rule, the proponent of the evidence must establish its admissibility by preponderance of the evidence.

What then are the types of preliminary questions that the jury must decide? When evidence has found to be admissible, but its relevance is conditional, the jury is the factfinder. The most common example of a Rule 104(b) determination is authentication. For instance, a party seeks to introduce a handwritten document of the defendant using the testimony of a witness who says she recognizes the handwriting. If the document is the defendant's handwriting, it is admissible; if not, the document does not come in. Who decides? This is a decision for the jury.

While it is uncommon to hear counsel invoke Rules 104(a) or 104(b) in trial, the rules and their allocation of responsibility are important to keep in mind. They color the entire evidentiary presentation. They are essential tools for your trial toolkit.

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