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Special Interrogatories in Coverage Disputes: How to Pop the Question

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Neither the plaintiff nor an insured defendant may be eager to ask the trial court to submit special questions to the jury: If the jury returns a plaintiff's verdict, both parties may prefer to leave the basis uncertain, placing the burden on the insurer to bring a declaratory judgment action or defend an indemnity action to establish that the basis for the liability judgment is *not* covered or excluded from the coverage of the policy. In *First State Ins. Co. v. J & S United Amusement*, 67 N.Y.2d 1044 (1986), the appellate division dismissed a declaratory judgment action as premature because the insured's liability had not been determined, noting that inconsistent findings could be avoided by requiring the jury to return a special verdict. Reversing on other grounds, the Court of Appeals suggested that because it was not a party to the underlying action, the insurer did not have standing to request a special verdict. 67 N.Y.2d at 1045-46. A motion to intervene can remedy that situation.[1]

However, despite the risk discussed in part one of this article (see "Special Interrogatories in Coverage Disputes: the Hidden Risk," NYLJ Feb. 24, 2017), and the obvious utility of special interrogatories, insurers rarely move to intervene and courts in New York often refuse to permit intervention. Courts in other jurisdictions have been more open. Although the results are mixed, the cases offer guidance.

The New York Cases

In *Restor-a-Dent Dental Laboratories v. Certified Alloy Products*, 725 F.2d 871 (2d Cir. 1984), the district court denied the insurer's motion to intervene to request the submission of special interrogatories to the jury. On appeal, the Court of Appeals held that the denial was not an abuse of discretion, considering that the insurer's duty to indemnify the defendant was limited to a portion of one of three causes of action; potential delay; and the insurer's right to appeal if its questions were not submitted in the form requested. The court also noted that defense counsel was appointed by the insurer, suggesting that intervention might deter settlement or exacerbate defense counsel's potential conflict of interest.

In *Kaczmarek v. Shoffstall*, 119 A.D.2d 1001 (4th Dep't 1986), the insurer moved to intervene in a personal injury action, but its motion was not limited to submission of a special verdict. The insurer argued that because defense counsel (provided by the insurer) was responsible to the insured, counsel would not advance a strong defense to the negligence claim, which was covered by the policy, but would focus on defeating the claim of intentional wrongdoing, which was not covered. Therefore, the insurer's interests would not be adequately represented and neither party would ask the trial court to submit special questions to the jury. The court denied the insurer's motion to intervene because the insurer would not be bound by the outcome of the trial, and if a liability judgment occurred, it could bring or defend a declaratory judgment action or defend an action under the insurance contract.

In *J. Barrows v. Uvino*, Case No. 09-cv-3905 (E.D.N.Y., Jan. 20, 2012), the court denied the insurer's motion to intervene without providing a written decision. The background is discussed in a decision in a later action brought by the claimants against the insurer, *Uvino v. Harleysville Worcester Ins. Co.*, 2015 WL 925940 (S.D.N.Y. March 4, 2015). After the insurer moved to intervene shortly before trial, the insured moved to disqualify defense counsel, contending that the motion revealed a conflict of interest. The court granted the motion to disqualify and denied the motion to intervene.[2]

Finally, in *John Wiley & Sons v. Book Dog Books*, 315 F.R.D. 169 (E.D.N.Y. 2016), the court denied the insurer's motion to intervene because the insurer, defending the action under a reservation of rights, waited three years before filing its motion; discovery was complete and summary judgment motions had been briefed in full; and the insurer failed to submit to the court the interrogatories it sought to submit to the jury. Granting intervention might also cause delay or prejudice: Discovery had not focused on the issue that would determine whether the plaintiffs' claims were covered and the defense might have to present alternate theories of liability to the jury.

Motions in Other Jurisdictions

In *Plough v. International Flavors and Fragrances* 96 F.R.D. 136 (W.D. Tenn. 1982), the court permitted the insurer to submit special interrogatories to the court, but reserved decision on whether those questions would be submitted to the jury. Surveying the case law, the court in *Thomas v. Henderson*, 297 F. Supp. 2d 1311 (S.D. Ala. 2003), permitted intervention, finding that without an itemized verdict, resolution of coverage issues could be difficult, "as there would be no way to distinguish among the types of claims and damages embraced by any damages award the jury might render." 297 F. Supp. 2d at 1327. The court found the possibility of avoiding re-litigation of the same issues a strong reason to permit intervention; the possibility of prejudice or delay could be minimized or avoided by imposing procedural safeguards. Intervention to submit special interrogatories was also allowed in *Central Assocs. v. Crop Production Services*, 2013 WL 1331974 (S.D. Ala. April 2, 2013), and *ADT Services AG v. Brady*, 2014 WL 4415955 (W.D. Tenn. Sept. 8, 2014).

Intervention was refused in *Frank Betz Assocs v. J.O. Clark Construction*, 2010 WL 2375871 (M.D. Tenn. June 4, 2010), and *Gadley v. Ellis*, 2015 WL 3938543 (W.D. Pa. June 26, 2015. In *Betz*, the insurer failed to provide a copy of the policy, did not submit proposed interrogatories, articulated no common questions of law or fact, and had not brought a declaratory judgment action. The court viewed its own typical verdict form sufficiently

detailed to assess liability separately for each cause of action. In *Gadley*, the insurer filed its motion to intervene two and one-half years after the action was brought; discovery was closed; the insurer failed to provide proposed interrogatories; and the court expressed concern that intervention might inject questions regarding categories of damages that the parties had not litigated and which might confuse the jury.

Increase the Chances of Success

Considering the grounds for denial of intervention motions illustrated in the cases discussed above, the motion should be made by coverage counsel, not defense counsel; the motion should be made early enough that if discovery is necessary, it can be conducted within the limits of any discovery schedule in place; both the policy and proposed interrogatories should be submitted to the court; and a declaratory judgment action should be commenced before the motion is made or simultaneously. The motion may be denied, but may prove invaluable if granted and will reduce the insurer's risk of being held liable for uncovered or excluded losses.

Endnotes:

1. Because coverage issues present a conflict between the interests of the defendant and the insurer, the insurer may not instruct defense counsel to make such a request.

2. Denial of the insurer's motion to intervene proved a Pyrrhic defeat. Following a general verdict in their favor, the claimants sued the insurer to recover on the judgment. The court granted summary judgment to the insurer because the claimants could not show that the damages flowed from the covered, rather than the uncovered, claims asserted in the underlying action. *Uvino v. Harleysville Worcester Ins. Co.*, U.S. District Court, S.D.N.Y. Docket No. 13Civ.-4004 (ECF Doc. No. 80, Aug. 18, 2016).

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