SAN FRANCISCO
Daily Journal
www.dailyjournal.com
FRIDAY, JANUARY 20, 2012

Update on an insurance company's right to intervene

By Howard Garfield
Meckler Bulger Tilson Marick & Pearson LLP

Most attorneys who try personal injury, defective products and property damage cases are familiar with the occasional, but not infrequent, intervention of a defendant's liability insurer in the case. This most commonly occurs when an insured defendant is insolvent or suspended, in the case of a corporation, or has refused or failed to cooperate in his or her defense by failing to respond to discovery requests.

In these situations, plaintiff's counsel is poised to obtain or has already obtained a default against the insured defendant for failure to answer or respond to discovery. When faced with the dire financial consequences of a default judgment, most liability insurers will seek to intervene to present the best possible defense on behalf of their absent, defunct, or recalcitrant insureds.

Most practitioners also assume that because the carrier intervenes to present that defense (which might include, of course, comparative fault of the plaintiff or the fault of others), it does so as its insured's subrogor and is, therefore, subject to all of the insured's infirmities. Not so. Under California law, "intervention by an insurer is permitted where the insurer remains liable for any default judgment against the insured, and it has no means other than intervention to litigate liability or damage issues." *Reliance Ins. Co. v. Superior Court* (2000) 84 Cal.App.4thh 383, 385. Based upon this independent right, an insurer that remains liable for a default judgment against its insured may intervene to protect its own pecuniary interests free of its insured's infirmities.

The recent case of *Western Heritage Insurance Co. v. Superior Court* (Parks), (2011) 199 Cal.App.4th 1196, provides both a good example of a permitted intervention and an excellent explication of an insurer's independent right to intervene, and its scope. The plaintiffs were the adult children of George B. Parks, who died following an automobile accident. At the time of the accident, Parks was a passenger in a vehicle owned and driven by his home health care worker Julia Reyes, who was acting within the course and scope of her employment by Grateful Home Care Inc. The company had at the time a contract with Parks. Purportedly, both the negligence of Reyes and the other driver caused the accident.

After the accident, Parks, who suffered from dementia, complained of head pain. Reyes did not seek or obtain medical treatment for him, but merely took him home, gave him his dementia medication and put him to bed. The next morning Parks was found dead. The cause of death was a brain injury he had suffered in the accident.

Based upon this independent right, an insurer that remains liable for a default judgment against its insured may intervene to protect its own pecuniary interests free of its insured's infirmities.

Parks' two adult children and his estate sued Reyes and Grateful Home Care for negligence. They further claimed against Grateful Home Care negligent hiring and misrepresentations about Reyes' competence as a health care provider. Grateful Home Care tendered its defense and that of Reyes to Western Heritage, the issuer of their one-year general liability policy. Western Heritage agreed to defend subject to a reservation of rights and appointed defense counsel to file an answer to the complaint on behalf of Reyes and Grateful Home Care.

Subsequently, the plaintiffs sent discovery and deposition requests to Reyes. She did not respond. Eventually, and despite numerous court orders, Reyes failed to provide verified responses to the written discovery requests and failed to appear for her deposition. On plaintiffs' motion, the court entered terminating sanctions against Reyes, struck her answer, and entered her default.

Western Heritage moved to intervene arguing that it had its own direct interest in the case and its ultimate outcome in light of Insurance Code Section 11580(b)(2). The statute provides that a judgment creditor in an action based on bodily injury, death or property damage may sue the insurer of the defendant directly on the policy, subject to its terms and conditions, to recover on the judgment. Western Heritage expressly sought to dispute "the issues of liability and damages against Reyes."

The trial court granted the motion. However, before the motion, the court, on the basis of the default against Reyes, had granted one of plaintiffs' motions in limine that precluded the defendants from disputing her liability. Because the court perceived that Western Heritage was stepping into Reyes' shoes, it limited the scope of its intervention to contest damages only. In an attempt to overturn this, Western Heritage filed its own motion in limine. The court denied the motion, holding that because Western Heritage was stepping into the shoes of its insured Reyes, it had no greater right to litigate liability than she would have had.

In a wide-ranging opinion filled with useful history and dicta, the appellate court reversed this decision. First, the court reviewed the circumstances in which intervention had been permitted in the past and affirmed the trial court's grant of Western Heritage's motion to intervene. In so doing, it held that the risk that Western Heritage would be financially responsible for a default judgment under Section 11580(b)

Howard Garfield, *a litigation partner in the San Francisco office of Meckler Bulger Tilson Marick & Pearson LLP, focuses his practice on insurance coverage, employment and other commercial and business disputes.*

(2) was sufficient to create an interest that would support its right to intervene.

Second, the court reversed the trial court's limitation on the scope of Western Heritage's intervention and held that Western Heritage, as intervenor, had the right to litigate both Reyes' liability and damages and was not bound by the procedural infirmities of its insured. Interestingly, the court relied upon Deutschman v. Sears, Roebuck & Co. (1982) 132 Cal. App.3d 912, 916, where the insurer intervened by right of subrogation. The court specifically noted that once the insurer was permitted to intervene, it became a party to the lawsuit and was not bound by the procedural defaults of other parties.

Third, the court decided, oddly in contravention of its reliance on Deutschman, that because Western Heritage's intervention was based on Section 11580(b)(2), cases relating to subrogation were inapplicable. Virtually in the same breath, it went on in dicta to state that it makes no difference whether the insurer intervenes on the basis of its right of subrogation or its risk of liability under Section 11580(b)(2). In both cases, the insurer has the right to protect its own interests and to litigate issues of both the liability of its insured and damages. The two key elements are: the insurer must face the risk that it will be responsible for the default judgment; and the insurer must seek to protect its own interests.

What if an insurer does not face the risk of liability for a judgment under Section 11580(b)(2)? This statute applies by its express terms only to cases based upon death, bodily injury or property damage. Consider a judgment that is based solely on economic loss, such as a professional liability case or a case involving directors' and officers' liability? In such a case, the insurer faces no risk of responsibility for a judgment under Section 11580(b)(2). Presumably then, in California at least, the insurer would not have the right to intervene to protect its interests because it would have no interests to protect: The judgment creditor would have no standing to sue the legal malpractice or directors' and officers' liability insurer and would have to be content with collection proceedings on the judgment

Such policies, however, may contain a provision that makes the insurer liable for all or certain judgments against its insured. Could such a contract provision provide the basis for the insurer's intervention? The answer under Western Heritage is yes, it would. The decision's rationale is not that the insurer's right to intervene is created by a statute such as Section 11580(b)(2) or by the right of subrogation. Rather, it is because "intervention by an insurer is permitted where the insurer remains liable for any default judgment against the insured, and it has no means other than intervention to litigate liability or damage issues." *Reliance Ins. Co. v. Superior Court* (2000) 84 Cal.App. 4th at p. 385.

Reprinted with permission from the ***Daily Journal***. ©2012 Daily Journal Corporation. All rights reserved. Reprinted by Scoop ReprintSource 1-800-767-3263