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Dominci v. State Farm Mutual Insurance Company, 390 P.2d 806 (Mont. 1964)

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stant case, obtained the legal services of a very able and experienced lawyer and at a stipulated fee far below that usually fixed in similar cases.[30]

The premise of this argument is that the policy against solicitation is overridden by the policy of securing fair settlement of claims. It is an appealing argument, but is subject to the criticism above. However, on the basis of such an argument, at least one state has exempted labor unions from the general statute prohibiting solicitation by "runners."[31]

The Brotherhood's plan has also been analogized to the retention by liability insurers of attorneys to handle claims against their customers.[32] This attempt to justify the Brotherhood's solicitation is weaker than the others. The insurer is the real party in interest as its money will be paid if the judgment is adverse. Moreover, the insurer attempts to settle claims and resorts to litigation in relatively few cases. The Brotherhood, on the other hand, is not a real party in interest, nor does it have the power to settle claims.

The effect of the Montana Supreme Court's decision in the instant case is to grant constitutional protection to legal aid plans where such plans do not cause a conflict in an attorney's loyalties. This does not indicate a complete break with tradition as courts have not indiscriminately condemned such plans in the past. Nonetheless, the decision is significant for it may encourage the proliferation of such plans. It is submitted, however, that the Montana Supreme Court should carefully scrutinize any plans that may come before it to exclude elements of unauthorized practice. In so doing, the plans should be limited to investigation and recommendation of attorneys. If so limited, legal aid plans can increase the quantity and quality of legal services rendered. Such plans are clearly subject to abuse, particularly solicitation, and courts and Bar alike must regulate their operation.

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UNINSURED MOTORIST POLICY—PROCEDURAL PROBLEMS ARISING FROM INTERVENTION OF INSURER IN ACTION BY INSURED AGAINST UNINSURED MOTORIST.—Plaintiff purchased a car insurance policy in which one clause stipulated the insured would be protected from legal damages caused by an accident with an uninsured motorist. A "no judgment" clause specified the insurance company would not be liable if the insured, without the consent of the company, sued an uninsured motorist to determine the damages. After an accident with an uninsured motorist the insurer refused to pay plaintiff for an injury. Subsequently the plaintiff brought

[30]268 Ill. App. 364 (1932).
[31]PA. STAT. ANN. tit. 12, § 1612 (1950).
[32]*Hildebrand v. State Bar of California, supra* note 1, at 521 (Traynor, J., dissenting).

an action against the uninsured motorist. A default judgment resulted. The present action was then commenced to determine the insurer's liability on the policy. The district court found for the insured. On appeal to the Montana Supreme Court, *held,* affirmed. The "no judgment" clause was voidable. Although the company was placed on "the horns of a dilemma," the court stated the insurance company could have protected itself through intervention on the side of the uninsured motorist. *Dominci v. State Farm Mutual Insurance Company,* 390 P.2d 806 (Mont. 1964).

Under the Montana Rules of Civil Procedure, intervention[1] is allowed either as a matter of right or by permission of the district court. Intervention is a matter of right when "the representation of the applicant's interest by existing parties is or may be inadequate, *and* the judgment is or may be binding on both parties."[2] The two conditions stated by this rule are conjunctive, thus both must be present before intervention is permitted.[3] Inadequate representation of the insurance company's interest may occur if the uninsured motorist has no counsel,[4] if there appears to be collusion between the uninsured and the insured motorist,[5] or if the uninsured motorist does not appeal when an appeal is in order.[6] In fulfilling the second condition courts have followed three alternative interpretations. One is that the petitioner cannot intervene unless the decision is res judicata[7] as to him. While the decision may be res judicata as to damages it could never bind the insurer on the contract and contract defenses between the insurer and insured would still remain. Taking this view the insurer would never have intervention as a right. A second possible interpretation would allow intervention if the petitioner were bound in a "practical sense,"[8] and a third interpretation would allow intervention

[1]This note will indicate some of the results which may follow from the interpretation of the Montana Rules of Civil Procedure as applied to actions involving an uninsured motorist clause. The holding that the "no judgment" clause was voidable will not be discussed. Most courts adopt the position of the Montana court regarding this clause. See *e.g.,* Boughton v. Farmers Insurance Exchange, 354 P.2d 1085, 79 A.L.R.2d 1245 (Okla. 1960).

[2]MONT. R. CIV. P. 24 (a) (2). Intervention by right is accomplished in two other ways: When conferred by statutory right, and when the applicant will be adversely affected by distribution or disposition of property under the control of the court. Neither of these methods is applicable in the instant case.

[3]2 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURES § 597, at 373 (Rules ed. 1961); *e.g.,* MacDonald v. U.S., 119 F.2d 821 (9th Cir. 1941), *modified* 315 U.S. 262 (1942).

[4]Importance of counsel was noted in United States v. C.M. Lane Lifeboat Co., 25 F. Supp. 410 (E.D.N.Y. 1938), which allowed intervention when the counsel of the party representing the applicant's interest showed an antipathy toward the applicant.

[5]Klein v. Nu-Way Shoe Co., 136 F.2d 986 (2d Cir. 1943). Allegation of collusion was enough to allow intervention as a right.

[6]Pellegrino v. Nesbit, 203 F.2d 463, 37 A.L.R.2d 1296 (9th Cir. 1953).

[7]Sutphen Estates v. United States, 342 U.S. 19 (1951) is an example of where there was substantial infringments on the petitioner's interest, but since the action was not res judicata to the applicant, intervention was not allowed.

[8]As an example, a union and a competitor of a company were allowed to intervene when the company was being sued by the United States to determine the wage scale of its employees, as both the union and competitor would be bound in a "practical sense." Textile Workers Union of America, CIO v. The Allendale Co., 226 F.2d 765 (D.C. Cir. 1955).

if it appeared *probable* the insurer would be bound.[9] Whether the insurance company can intervene as a matter of right will be determined by which interpretation the Montana court uses.[10]

If the insurance company cannot meet both conditions and intervene as "a matter of right," the court may nevertheless permit intervention. Permissive intervention is ordinarily allowed when "the representation of the applicant's claim or defense and the main action have a question of law or fact in common."[11] In the instant case the amount of "legal damages" is a question of law or fact which the insurer has in common with the uninsured; therefore, the court may permit the insurer to intervene. If intervention is refused, the company may be bound, as a practical matter, to a judgment it did not defend. Furthermore, the ruling denying intervention cannot be reversed unless there is a clear abuse of discretion, which seldom occurs.[12]

Intervention, if allowed, could substantially alter the position of all the parties involved. For example: The insurance company becomes a named party defendant in a tort action, which may cause the jury to increase the damage award. The insured in placed at a disadvantage as a result of a standard provision in the policy stipulating that a written statement must be submitted to the company giving full details of the accident.[13] The statement given by the insured in the process of presenting a claim may not be as guarded as one given after securing competent legal counsel. The status of the uninsured motorist may also change. If he were without legal counsel prior to intervention by the insurance company, after intervention he would have well informed capable counsel.[14] However, the uninsured motorist might not welcome intervention

[9]Probable liability is illustrated by Kozak v. Wells, 278 F.2d 104, 84 A.L.R.2d 1400 (8th Cir. 1960). This case involved an action to quiet title to several lots with a common grantee. It was held that although the determination of the title to one lot would not be res judicata as to the other lots, the action would probably bind the other owners since the same reasoning would be used to determine the title for all lots.

[10]The present Montana Rules of Civil Procedure were made effective Jan. 1, 1962, but the Montana Supreme Court has not construed rule 24 which governs intervention. However, State *ex. rel.* Hersman v. District Court of Sixth Judicial Dist., 142 Mont. 139, 381 P.2d 799 (1963) held that the new rules should be correlated into the former practice under the old rules whenever possible. Formerly the Montana court held that statutes allowing intervention were to be liberally construed. Carlson v. Flathead County, 130 Mont. 24, 293 P.2d 273 (1955).

[11]MONT. R. CIV. P. 24 (b) (2). Permissive intervention may also be allowed when conferred by statute.

[12]4 MOORE, FEDERAL PRACTICE § 24.15, at 103 (2d ed. 1963). "It could seldom if ever, be shown that the trial court had abused its discretion in denying the right to intervene."

[13]*E.g.*, State Farm Mutual Automobile Policy 9520. 5a NW. This policy provides, in addition to the standard cooperation clause, that the insured shall give a written account of the accident. If requested by the insurer, this statement must be given under oath.

[14]Although no studies have been made, it is apparent that most uninsured motorists are indigent and consequently would not have retained counsel.

[15]The converse of this situation may also occur. The insurance company has the right of subrogation under a "trust agreement" with the insured motorist, thus the uninsured motorist is liable to his own co-defendant for the amount of the judgment.

if he has a counterclaim. If the counterclaim is successful it must be paid by the intervening insurance company who has a liability contract with the insured. Thus, if the insurer is allowed to intervene, the uninsured motorist will have as co-defendant the party who may be liable for satisfaction of his counterclaim.[15]

A further effect of allowing intervention could be the raising of contract issues by the insurer.[16] Because the uninsured motorist is not privy to the contract, contract defenses would be available only against the insured. The court must determine what to do with the contract issues. If it determines that contractual questions, such as whether there has been a breach of the cooperation clause, should be decided in separate litigation,[17] the insurance company is given the advantage of two legal proceedings in which to defend a single claim. The insurer will not have to pay legal damages if the insured does not succeed in the tort action against the uninsured motorist. However, if he is successful the insurer will have an additional action in contract to defeat the claim.[18] On the other hand, if the court decides that the contract issues should be raised in the tort action, a likely result would be confusion of the jury, since matters foreign to the determination of damages and negligence would be aired. In addition, if the contract issues were raised the jury would have a clear understanding of whom the company represents, thus seeing it not only as a defendant, but also as a "turncoat" disputing the claim of its own insured. Under these conditions a prejudicial determination of the case seems quite possible.

The court could make the tort issue res judicata as to all parties and allow contract issues to be introduced in its discretion.[19] If the judge acting within his discretion would not allow a contract defense, hardship

[16]It has been held that one who intervenes as a matter of right should have the absolute right to raise new issues. 4 MOORE, FEDERAL PRACTICE, *supra* note 12, at §§ 24:16, 24:17. However, as pointed out in § 24:16, at 110 the question has been almost completely ignored. The few decisions considering the question are split. In Park & Tilford, Inc. v. Schulte, 160 F.2d 984, at 989 n.1, (2d Cir. 1947) Judge Clark (a leading authority on the federal rules) states that one who intervenes has the right to bring in any issue. The opposing view is supported by New York Central R. Co. v. United States, 200 F. Supp. 944 (S.D.N.Y. 1961), which holds that issues not ancillary to the main action will not be allowed. This matter is further complicated as "the decisions are not always clear as to whether the applicant has an absolute and unconditional right to intervene or only a permissive right." 2 BARRON AND HOLTZOFF, *supra* note 3, § 601, at 397. An additional problem is raised as to whether, if intervention is allowed, the judgment will be res judicata of all the intervenor's rights. An example of this confusion is Wert v. Burke, 197 N.E.2d 717 (Ill. 1964) where the court noted the insurer had the right to intervene, yet made intervention contigent upon the insurer agreeing to be bound by the judgment.

[17]See, *e.g.*, State *ex. rel.* State Farm Mutual Automobile Co. v. Craig, 364 S.W.2d 343, 95 A.L.R.2d 1321 (Mo. 1963), where the court allowed intervention as a matter of right by the insurer, but held that contract issues could not be raised in the same action.

[18]If the insurer reserves a right to disclaim the contract, he will not ratify the contract by defending the tort action. State Farm Mutual Automobile Ins. Co. v. Brown, 243 N.Y.S.2d 825 40 Misc. 2d 694 (Sup. Ct. 1963).

[19]*Wert v. Burke, supra* note 16, held that all issues must be joined at one trial, however new issues could not be introduced by the intervening insurer unless strong justification was made to the trial judge. The court noted the *Craig* case, *supra* note 17, but held opposite regarding the raising of new issues.

could result as the insurance company would then be placed in a position of choosing between a tort defense and a contract defense.

The problem of contract issues would never arise if the courts always denied intervention. The theory for such a decision to deny intervention could be based on either contract or public policy. The contract rationale against intervention is: the contract was for legal damages when they occurred; there is nothing enforceable in the contract which says the company can determine these legal damages; therefore the contract itself is controlling.[20] The policy reason for not allowing intervention is simply that the insurance company should not be placed in a position whereby it can defeat the claim of its insured.[21] If the company were allowed to defeat such a claim this could lead to a conflict of interests fraught with the possibilities of collusion, fraud, and abuse.[22] If intervention is not allowed, the uninsured motorist policy may become an unsatisfied judgment policy,[23] thereby possibly increasing insurance rates.[24] Further, if intervention is refused there is the prospect of two law suits in each claim, one suit on the tort and the other on the contract.

It is submitted the insurance company should have the *right*[25] to intervene if they are bound, as a "practical matter" in the tort action. It is unlikely the insurer will abuse this right as intervention means exposure to the jury as a party in interest. However, the court should not be bound to a "mechanical" rule. Rather it should be allowed, as far as possible, to take each case on its merits. Thus, the court can provide the most equitable solution feasible to the intricate problems which may arise.[26]

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[20]The contract rationale was considered by dictum in Mathews v. Allstate Insurance Co. 194 F. Supp. 459 (E.D. Va. 1961). In the instant case uninsured motorist insurance was compared to insurance for payment of medical bills incurred as the result of an accident. However, if intervention is to be allowed it would appear this analogy is inappropriate since standard accident policies generally give the insurer no right to require that the insured seek "bargain" treatment.

[21]In Holt v. Bell, 392 P.2d 361 (Okla. 1964), the court held the trial court could not permit *joinder* of the insurance company as this would place the insurer in a position of defeating a claim of its own insured.

[22]Greene v. Verven v. Daystrom Electric Co., 203 F. Supp. 607 (D. Conn. 1962).

[23]*State ex. rel. State Farm Mutual Automobile Co. v. Craig, supra* note 17.

[24]This is assuming the insurers' losses will increase if they are not allowed to intervene.

[25]This right could also be placed in the contract, but it might induce a negative reaction in prospective purchasers of insurance.

[26]An interesting situation is posed where the passenger of the insured motorist sues both the uninsured and insured motorists as joint tortfeasors and the insured motorist cross-complains against the uninsured motorist. An example of this situation is E. T. Wortman v. Safeco Insurance Co. of America, 227 F. Supp. 468 (E.D. Ark. 1963). In this case the insured motorist who thought he might have to file a compulsory cross-complaint against the uninsured motorist to establish legal damages, petitioned the federal court for the right to proceed directly against the insurer. Fortunately for the state court trial judge, the petition was granted.