Determining Whether to Intervene or File a Declaratory Judgment
A Comparative Analysis

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Over two decades ago, in *Howell v. Richardson,* 45 Ohio St. 3d 365 (1989), the Supreme Court of Ohio held that an insurer must seize the opportunity to intervene, "[o]therwise, whether seized or not," the insurer will be bound by the liability determination against its insured. Where coverage is determined by the underlying facts or only certain claims are covered, the insurer and the insured may have divergent interests. An insurer seeking to protect its interests has three alternatives to consider: 1) file a declaratory judgment action; 2) move to intervene in the action against the insured; or 3) reach an agreement with the insured's personal counsel to propound jury interrogatories on the facts determinative of coverage. Each alternative has its benefits and disadvantages. The best course generally depends on the circumstances, the coverage issue, and the status of the suit against the insured.

Declaratory judgments: Determining coverage issues before liability is established.
A declaratory judgment action is generally of greatest utility before suit is filed against the insured or very early in the suit against the insured — it will generally take as long to resolve the declaratory judgment as the suit against the insured. However, filing a declaratory judgment has drawbacks.

First, if filed in federal court, jurisdiction is discretionary under 28 U.S.C. § 2201(a). It may be an abuse of discretion to accept jurisdiction over a coverage dispute which "does nothing to settle the controversy or 'clarify the legal relationship' between" the parties to the underlying liability litigation. *Travelers Indem. Co. v. Bowling Green Prof'l Assocs., PLC*, 495 F.3d 266 (6th Cir. 2007). Even if the District Court accepts jurisdiction, any coverage determination is at risk of being vacated on appeal for that reason. The strongest case for discretionary jurisdiction can be made in situations where there is not yet any underlying litigation against the insured. But if the insured files suit seeking declaratory judgment and damages, the Federal Court will generally not have discretion to dismiss. *Adrian Energy Assocs. v. Mich. PSC*, 481 F.3d 414, 422 (6th Cir. 2007). Ohio state courts are a more inviting venue for a declaratory judgment action because they do not have the same jurisdictional limitations as federal courts. R.C. 2721.02. Under Ohio law, an "actual controversy" is required minimally based on: (1) the insured having presented a claim and proof of loss; and (2) the insurer's denial or failure to respond within a reasonable time.

The second factor which may negatively impact the effectiveness of seeking declaratory judgment is an Ohio statute. If an insured brings a declaratory judgment action on coverage, the third-party claimant against the insured is bound by the result. But, pursuant to R.C. 2721.12(B), a declaratory judgment brought by the insurer is not binding on third-party claimants. *Estate of Heintzelman v. Air Experts, Inc.*, 126 Ohio St. 3d 138, 143 (2010). Thus, an insurer may have to re-litigate the same issue first with the insured and, if the insurer prevails, a second time with the third-party making a claim against the insured.

The third issue to consider is whether suit has already been filed against the insured by a third-party. Under Ohio's jurisdictional priority rule, "the court whose power is first invoked acquires exclusive jurisdiction" over the whole controversy. *State ex rel. Phillips v. Polcar*, 50 Ohio St.2d 279, syllabus, (1977). Thus, the first-filed action arguably has "exclusive jurisdiction." On the other hand, if the suits are filed in courts of different sovereigns, such as federal and state court or in two different states, it is a race to judgment. *Efros v. Nationwide Corp.*, 12 Ohio St. 3d 191, 193 (1984). The first action resolved will be *res judicata*. Again, a declaratory judgment action is most advantageous when filed early. In that way, it will either have jurisdictional priority with other later filed litigation or have the best chance of being first in the race to judgment.

Filing a declaratory judgment action on coverage is generally most advantageous before any liability action has been filed. That is true for both insurers and insureds as the filer can select both the venue and frame the issues. A declaratory judgment action is also the only option where no suit is pending against the insured or where intervention in the liability suit against the insured has been denied. In the latter situation, a declaratory judgment action may be a vehicle to effectively achieve intervention by filing the separate declaratory judgment action in the same venue and seeking consolidation. Known third-parties can be named in the declaratory judgment action to achieve broadly binding effect.

For insureds, naming their insurer as a third-party defendant and seeking a declaration as to coverage is an option in response to suit by the third-party. For an insurer, filing an early declaratory judgment action may be desirable when coverage issues arise early. An insurer may be able to avoid considerable monitoring and defense expense if coverage is determined not to apply early on. Filing, however, may result in a counterclaim for bad faith which might not otherwise have been made because it is a compulsory counterclaim. *Colelli & Assoc. Inc. v. Cincinnati Ins. Co.*, 5th Dist. No. 2004-AP-04-0029, 2004-Ohio-6924.

Intervention: Determining factual issues at trial.
While the insured is necessarily a party to any coverage litigation, third-party claimants may sometimes find it useful to intervene in coverage actions between the insurer and insured. While relatively rare, an insured may be defunct, unable, or unwilling to vigorously litigate a coverage issue. In those circumstances, a third-party claimant may wish to intervene to protect its interest in the existence of coverage.

For an insurer, the alternative to filing a declaratory judgment action is intervening in an already pending liability suit against the insured. Late in the litigation, the only way for an insurer to protect its interests is to either intervene or reach an agreement with the insured to propound jury interrogatories on the issues relevant to coverage. While the latter is both less

expensive and more desirable, it is not always possible to reach mutual agreement while still protecting the interests of all involved.

Intervention is permitted of right in both federal and state courts upon "timely" application where an insurer "is so situated that the disposition of the action may as a practical matter impair or impede ability to protect [its] interest[s]." Ohio Civ.R. 24(A)(2). Generally, the preclusive effect of an underlying judgment under *Howell* establishes the insurer's right to intervene. The determinative factor is, thus, whether the motion to intervene is made "timely."

The factors considered in the determination of timeliness are: (1) how far the suit has progressed; (2) the purpose for intervention; (3) how long the intervener "knew or reasonably should have known of his interest in the case"; (4) any delay or prejudice to the original parties; and (5) any other relevant "unusual circumstances." *Crittenden Court Apt. Assoc. v. Jacobson/Reliance*, 8th Dist. Nos. 85395 & 85452, 2005-Ohio-1993, at ¶ 16. Generally, the controlling factor is prejudice or delay. Prejudice precluding intervention does not include allowing the insurer to establish facts which will allow it to dispute coverage. *Filippi v. Ahmed*, 8th Dist. No. 86927, 2006-Ohio-4368, ¶10-14. The scope of the insurer's request to intervene is often determinative. If it is for a limited purpose, such as only propounding jury interrogatories, intervention may be allowed even within a month of trial. Often, the insured will oppose intervention on the basis of prejudice. A narrowly tailored motion which interjects no delay and makes the insurer only a nominal party for a limited purpose will generally alleviate the insured's concerns.

Moving to intervene is not without adverse risks. Unlike federal court, the denial of a motion to intervene is generally not immediately appealable in state court. *Gehm v. Timberline Post & Frame*, 112 Ohio St. 3d 514, 518-519 (2007). However, an insurer denied intervention may file a separate declaratory judgment action and "*Howell*, which imposed collateral estoppel" will not apply. *Gehm*, 112 Ohio St. 3d at 518-519 (2007). Filing the declaratory action in the same venue as the liability suit against the insured naming all parties to the liability action may result in consolidation.

The advantages of intervention are: (1) all parties to the litigation involving the insured will be bound; (2) duplicate litigation and discovery can be avoided; and (3) it may be effective late in the underlying liability litigation against the insured. Intervention does, however, pose its own problems. If sought late in the litigation it is generally permitted only on a limited basis, such as to propound jury interrogatories. The party seeking intervention has no role in selection of venue. And intervention to propound jury interrogatories will often not be an inexpensive option because the substance of the interrogatories will remain fluid until the close of trial. Thus, attendance at trial will be required along with continual modification of the proposed interrogatories throughout the course of trial to reflect the case that goes to the jury.

Probably the best course is agreement between insurer and insured as to jury interrogatories on key coverage issues, but such an agreement is often impossible. Absent agreement, filing an independent declaratory judgment action is often most advantageous for both insureds and insurers where the coverage issues are recognized early. On the other hand, intervention is often most advantageous where coverage issues arise late in liability litigation. In any event, careful consideration of the coverage issues presented as well as the benefits, risks, and limitations of both procedural methods is necessary before the final strategic choice is made.

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