IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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INTERNATIONAL PAPER COMPANY,

Plaintiff,

OPINION & ORDER
00-C-539-C

v.

CITY OF TOMAH, WISCONSIN and
UNITED STATES DEPARTMENT OF
VETERAN AFFAIRS,

Defendants.

- -

This is a civil action for monetary and declaratory relief arising out of the release of hazardous substances from a municipal landfill in the City of Tomah. On August 31, 2000, plaintiff International Paper Company filed a complaint, seeking contribution from defendants City of Tomah, Wisconsin and United States Department of Veteran Affairs pursuant to § 113(f) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C.§ 9613(f), and a binding declaration of defendants' equitable share of response costs and damages pursuant to § 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2).

On October 4, 2000, American States Insurance Company filed a motion to intervene

pursuant to Fed. R. Civ. P. 24 in order to seek both a stay of the proceedings and a declaratory judgment pursuant to 28 U.S.C. § 2201 to establish whether it has an obligation to defend or indemnify defendant City of Tomah. According to American States' proposed complaint, American States issued an insurance policy to defendant City of Tomah that was effective from July 14, 1962 to July 14, 1965. Defendant City of Tomah has tendered the defense of plaintiff's complaint to American States.

Defendant City of Tomah opposes the intervention, arguing that American States is not entitled to intervene under Rule 24(a) because it lacks a direct and legally protectible interest that will be impaired or not represented adequately in the existing litigation if it is not allowed to intervene. In addition, defendant City of Tomah argues that American States is not entitled to intervene under Rule 24(b) because there are no common legal issues and only limited common factual issues between the underlying CERCLA action and the insurance coverage dispute. Defendant contends that intervention will delay the proceedings and will not promote a prompt and efficient resolution of the underlying CERCLA issue or the insurance coverage dispute. Plaintiff adopts defendant city's brief in opposing intervention by American States, adding that the court should exercise its discretion under 28 U.S.C. § 2201 and decline to hear American States' claim for declaratory judgment. Defendant United States Department of Veteran Affairs takes no position on the proposed intervention. (For ease of reference, I will use

"defendant" to refer to defendant City of Tomah in the "opinion" section.)

Subject matter jurisdiction is present pursuant to 42 U.S.C. § 9613(b) and 28 U.S.C. § 1331. American States' motion to intervene will be granted because I find that it meets all four requirements for intervention as of right under Fed. R. Civ. P. 24(a)(2).

ALLEGATIONS OF FACT

Currently, defendant City of Tomah owns a landfill in the City of Tomah, and from approximately 1959 to 1977, it operated the landfill. Defendant city allowed, transported to and arranged for the disposal of municipal, commercial and industrial waste at the Tomah landfill. Defendant city generated and transported its own wastes to the landfill. Defendant city's actions damaged property that it did not own. Defendant United States Department of Veteran Affairs transported wastes to and disposed of wastes at the Tomah landfill. Plaintiff disposed of waste at the Tomah landfill.

In 1989, the Environmental Protection Agency placed the Tomah landfill on the national priorities list. Plaintiff has expended substantial funds on a remedial investigation and feasibility study for the Tomah landfill. Testing of groundwater at and in the vicinity of the Tomah landfill identified the release of hazardous substances to the environment and the migration of hazardous substances off defendant city's property. The principal hazardous

substances found in offsite groundwater are vinyl chloride and benzene. Plaintiff's waste is not the source of those hazardous substances in the groundwater. Plaintiff has paid and is paying for the cost of operating a landfill gas extraction system to prevent hazardous substances within the gases from migrating offsite and from further contributing to offsite groundwater contamination. Plaintiff has paid for the cost of designating a plan for further remediation of the Tomah landfill and groundwater contamination from the Tomah landfill and the EPA has directed plaintiff to implement that plan. It is anticipated that the cost of this remediation will exceed $3 million.

On August 31, 2000, plaintiff filed its complaint against defendants City of Tomah and the United States Department of Veteran Affairs and on September 8, 2000, defendant city tendered defense of this suit to American States. On October 4, 2000, American States filed a motion to intervene in this case.

OPINION

A. Rule 24(a)(2)

Rule 24(a)(2) provides that "anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as

a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." See also 42 U.S.C. § 9613(i)(providing for intervention as of right in CERCLA cases); United States v. Pitney Bowes, Inc., 25 F. 3d 66, 70 (2d Cir. 1994) ("The conditions for intervention under § 113(i) are 'virtually identical' to those necessary for intervention under Rule 24(a)(2)."); United States v. Alcan Aluminum, Inc., 25 F.3d 1174 (3d Cir. 1994) (same). In order to intervene under Rule 24(a)(2), an applicant must demonstrate that "(1) the application is timely; (2) the applicant has an 'interest' in the property or transaction which is the subject of the action; (3) disposition of the action as a practical matter may impede or impair the applicant's ability to protect that interest; and (4) no existing party adequately represents the applicant's interest." Security Ins. Co. of Hartford v. Schipporeit, 69 F.3d 1377, 1380 (7th Cir. 1995) (citing United States v. City of Chicago, 798 F.2d 969, 972 (7th Cir. 1986)).

1. Timeliness

"The test for timeliness is one of reasonableness: 'potential intervenors need to be reasonably diligent in learning of a suit that might affect their rights, and upon so learning of a suit that might affect their rights, they need to act reasonably promptly.'" Reich v. ABC/Yorks-Estes Corp., 64 F.3d 316, 321 (7th Cir. 1995) (quoting Nissei Sangyo America,

Ltd. v. United States, 31 F.3d 435, 438 (7th Cir. 1994)). In deciding whether a motion to intervene is untimely, "the most important consideration . . . is whether the delay in moving for intervention . . . will prejudice the existing parties to the case." People Who Care v. O'Brien, 68 F.3d 172, 176 (7th Cir. 1995) (quoting Nissei Sangyo, 31 F.3d at 439). American States filed a motion to intervene on October 4, 2000, approximately five weeks after plaintiff filed its complaint on August 31, 2000, and approximately four weeks after defendant tendered defense of this suit to American States on September 8, 2000. American States did not wait an unreasonable amount of time to file a motion to intervene after learning of the suit and neither plaintiff nor defendant contends that it is prejudiced by any such delay.

2. American States' interest

To be entitled to intervention as of right, American States must have a direct and legally protectible interest in the proceedings. See Security Ins. Co. of Hartford, 69 F.3d at 1380. Because American States' policies were issued in the state of Wisconsin, Wisconsin law is applicable in determining the nature of its interest in this suit. See Lexington Ins. Co. v. Rugg & Knopp, Inc., 165 F.3d 1087, 1091 (7th Cir. 1999). An insurance company has a duty to defend when the relevant policies would provide coverage if the allegations within the four corners of plaintiff's complaint are proven. School Dist. of Shorewood v. Wausau Ins. Cos., 170

Wis. 2d 347, 364, 488 N.W.2d 82, 87 (1992); see also Sola Basic Industries, Inc. v. United States Fidelity & Guaranty Co., 90 Wis. 2d 641, 695, 280 N.W.2d 211, 213 (1979). The duty to defend is broader than the duty to indemnify because the duty to defend is triggered by arguable, as opposed to actual, coverage. See Newhouse v. Citizens Sec. Mut. Ins. Co., 176 Wis. 2d 824, 834-35, 501 N.W.2d 1, 5 (1993). The Supreme Court of Wisconsin has held that where an insurer is not named in the underlying lawsuit, insurance coverage may be determined by either a separate declaratory judgment action or by the insurer's intervention in the underlying action followed by a bifurcated trial. See Fire Ins. Exchange v. Basten, 202 Wis. 2d 74, 89, 549 N.W.2d 690, 696 (1996).

Relying on Travelers Indemnity Co. v. Dingwell, 884 F. 2d 629 (1st Cir. 1989), and Restor-a-Dent Dental Laboratories, Inc. v. Certified Alloy Products, Inc., 725 F.2d 871 (2d Cir. 1984), defendant contends that American States does not have a legally cognizable interest sufficient to meet the requirements of Rule 24(a)(2) because its interest is contingent upon a finding that its insured is liable and that its policy extends coverage in this case. In Dingwell, 884 F.2d 629, the Court of Appeals for the First Circuit affirmed the district court's denial of an insurance company's motion to intervene in a suit against its insured. The insurance company had agreed to defend its insured with a reservation of rights. The court held that the insurer's interest in minimizing its insured's liability was an insufficient interest because it was

contingent on the resolution of the coverage issue, reasoning that, "Allowing the insurer to intervene to protect its contingent interest would allow it to interfere with and in effect control the defense." Id. at 638-639. The court rejected as insufficient the insurer's interest in establishing that the claims against its insured were either not covered by the insurance policy or that any claims that existed had been waived because those interests were not related to the subject matter of the underlying action. Finally, the court held that the insurer's interest in obtaining a stay of the indemnification action pending the resolution of the declaratory judgment action to determine coverage was insufficient to establish grounds for intervention.

In Restor-A-Dent, 725 F. 2d 871, an insurance company moved to intervene in a case against its insured in order to submit proposed interrogatories on damages for the jury to answer. In denying the insurer's request to intervene under Rule 24(b)(2), the Court of Appeals for the Second Circuit held that the insurer did not have an interest in the underlying action and that the insurer's interest was contingent upon a judgment against its insured and a finding that the insurer is responsible for indemnification of certain types of losses under the terms of the policy. Id. at 875. In American Home Products Corp. v. Liberty Mutual Insurance Co., 748 F.2d 760, 766 (2d Cir. 1984), the Second Circuit seemed to limit its holding in Restor-A-Rent, stating that "that case dealt only with the insurer's liability for damages in the event that judgment was entered against its insured in an underlying suit" and

that the present case "includes an obligation to defend the [u]nderlying [s]uits as well."

American States contends that its interest in the underlying lawsuit is significant because of the severe consequences if it breaches its duty to defend. See, e.g., Newhouse v. Citizens Security Mutual Insurance Co., 176 Wis. 2d 824, 501 N.W. 2d 1 (1993) (holding that insurer was liable for amount in excess of policy limits because it breached its duty to defend); Patrick v. Head of Lakes Cooperative Electric Association, 98 Wis. 2d 66, 72, 295 N.W.2d 205 (1980) (holding that insurer must pay for defense after it declined to provide a defense and coverage was found to exist); Carney v. Village of Darien, 60 F.3d 1273, 1277 (7th Cir. 1995) (applying Wisconsin law) ("An insurer that breaches its duty to defend waives its right to later challenge coverage"); Hamlin Inc. v. Hartford Accident & Indemnity Co., 86 F.3d 93, 95 (7th Cir. 1996) (applying Wisconsin law) ("Insurance companies that refuse in bad faith to honor their undertakings are liable for punitive damages.")

"The 'interest' required by Rule 24(a)(2) has never been defined with particular precision. . . . It is something more than a mere 'betting' interest but less than a property right." Security Ins. Co. of Hartford, 69 F.3d at 1380-81. Courts have not agreed on the meaning of "significantly protectible" interest. See Eunice A. Eichelberger, Annotation, *What is "Interest" Relating to Property or Transaction Which Is Subject of Action Sufficient to Satisfy That Requirement For Intervention As Matter of Right Under Rule 24(a)(2) of Federal Rules of Civil Procedure*, 73 A.L.R.

448 (1985 & Supp. 1999). In addition to setting forth only vague contours of the definition of "significantly protectible" interest, the Seventh Circuit has stated that "[w]hether an applicant has an interest sufficient to warrant intervention as a matter of right is a highly fact-specific determination, making comparison to other cases of limited value." Security Ins. Co. of Hartford, 69 F.3d at 1381.

The goal of the interest requirement of Rule 24(a)(2) is "to dispose of lawsuits by involving as many concerned parties as is compatible with efficiency and due process." 6 Moore's Federal Practice § 24.03(2)(a) (Matthew Bender 3d ed.). Guided by this, I am persuaded that American States' interest in the underlying lawsuit is sufficient to allow for intervention. If American States' refusal to defend is found to have been wrongful, it will be forced to cover any damages awarded to plaintiff because it will not be allowed to present any non-coverage defenses. If American States defends under a reservation of rights, it will be forced to pay attorney fees for which it may not be liable under the terms of its policy. If American States defends without a reservation of rights, it will waive policy defenses and cannot contest coverage.

American States has an obligation to defend its insured, defendant City of Tomah, until a determination is made whether American States may be responsible under the terms of its policies if defendant is found to be liable. See, e.g., Davila v. Arlasky, 141 F.R.D. 68, 71 (N.D.

Ill. 1991) (discussing insurance company's dilemma and holding that insurers' interest was sufficient but denying intervention on other grounds). As a result, American States has a "'direct, significant, legally protectible'" interest in the underlying suit. Security Ins. Co. of Hartford, 69 F.3d at 1380 (quoting American Nat'l Bank v. City of Chicago, 865 F.2d 144, 146 (7th Cir. 1989)).

3. Impairment of American States' ability to protect its interest

In order to prove the third element of the test for intervention as of right under Rule 24(a)(2), American States must show that as a practical matter, its ability to protect its interest may be affected or impaired by the disposition of the action. Because American States has an interest in avoiding the expenditure of legal fees in the underlying action, it plans to move for both a stay of the proceedings and a declaratory judgment that it has no duty to defend or indemnify defendant city.

Defendant contends that the issue whether American States has a duty to defend or indemnify should be resolved in a related case in Monroe County Circuit Court. In January 1995, Tower Insurance Company filed an action for a declaration that it had no duty to defend or indemnify the City of Tomah against claims relating to the municipal landfill in Tomah. According to defendant, the state court action has been dormant since the time it was filed. On October 4, 2000, defendant City of Tomah filed a third party complaint against American

States in the state court action, seeking a declaration that American States has a duty to defend and indemnify the city in this case. Defendant contends that allowing American States to intervene creates the possibility of inconsistent judgments between the state and federal courts on the coverage issue. However, defendant filed a third-party complaint in the state court case *after* American States had moved to intervene in this case.[1] Defendant cannot create the risk of duplicative proceedings and then point to it as a reason to deny American States' motion to intervene. Furthermore, the pace at which the state court case is moving diminishes the likelihood that American States could obtain a decision in state court on its duty to defend and indemnify before this case goes to trial.

American States contends that if it is not allowed to intervene, it will be forced to incur substantial costs defending City Tomah pending resolution of the coverage issue because the state court would not have the authority to stay the underlying action in this court. American States must abide by its duty to defend the City of Tomah or risk the consequences of refusing to provide a defense. Disposition of the underlying action would impair American States' ability to protect its interest if plaintiff's claims are determined to fall outside the policy coverage.

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[1]According to defendant city, it filed a third-party complaint in state court after American States moved to intervene in this case, even though both motions were docketed on October 4, 2000. See Dft.'s Brf. Opp. M. Int. at 2.

4. Representation of American States' interest

The fourth and final prong of the test for Rule 24(a)(2) intervention is that no existing party will adequately represent American States' interest. The showing of inadequate representation "is satisfied if the [intervenor] shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." Lake Investors Development Group, Inc. v. Egidi Development Group, 715 F.2d 1256 (7th Cir. 1983) (quoting Trbovich v. United Mine Workers of America, 404 U.S. 528, 538 n.10 (1972)). Defendant asserts that its interest in avoiding liability to American Paper is greater than American States' interests. Although this may be true, American States wants to intervene in order to determine that it has no duty to defend before trial so it will not be forced to incur the costs of defending the underlying suit or risk being penalized for wrongfully denying its obligations, not to minimize the city's liability or risk penalties for breaching its duty to defend. There is no existing party that will adequately represent American States' interest in obtaining such a judgment.

Although resolving the coverage issue before liability may delay trial preparation in this case, as defendant argues, Wisconsin case law strongly favors allowing an insurer to have coverage determined before incurring the costs of defending its insured or breaching its duty to defend. See Newhouse, 176 Wis. 2d at 832, 501 N.W.2d at 5 ("[T]he proper procedure for

an insurance company to follow when coverage is disputed is to request a bifurcated trial on the issues of coverage and liability and move to stay any proceedings on liability until the issue is resolved. When this procedure is followed, the insurance company runs no risk of breaching its duty to defend.") (citing Elliott v. Donahue, 169 Wis. 2d 310, 318, 485 N.W.2d 403, 406 (1992)). Allowing American States to intervene in the underlying lawsuit allows for resolution of the coverage issue before the liability issue, expedites this litigation by disposing of the entire controversy and protects American States' interest in avoiding the expenditure of legal fees in the underlying action if it does not have a duty to defend.

Because I find that American States has met the four requirements for intervention as of right under Rule 24(a)(2), its motion to intervene will be granted. As a result, it is unnecessary to address the issue of permissive intervention under Rule 24(b)(2).

B. 28 U.S.C. § 2201

Plaintiff argues that even if I grant American States' motion to intervene, I should decline to hear American States' declaratory judgment action because (1) there is an action pending in state court to address coverage issues; (2) American States has no independent basis for jurisdiction; and (3) the amount of coverage at issue does not warrant a delay of the underlying case. A district court may stay or dismiss an action seeking a declaratory judgment

pursuant to 28 U.S.C. § 2201(a) in "the sound exercise of its discretion." Wilton v. Sevens Falls Co., 515 U.S. 277, 288 (1995); see also Sta-Rite Industries, Inc. v. Allstate Ins. Co., 96 F.3d 281, 287 (7th Cir. 1996). As the Supreme Court explained in Wilton, 515 U.S. at 288, "In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration." In that case, the Supreme Court found no abuse of discretion when a district court stayed a decision on insurance coverage while the same coverage issues were litigated between the same parties in state court. See id. at 290.

In Sta-Rite, 96 F.3d at 287, the court of appeals found that the district court had discretion to decline to exercise jurisdiction over a declaratory judgment action brought by an insured against its insurers because there was a more comprehensive parallel state case proceeding, the case presented issues of first impression under Wisconsin law and the federal case had made little progress. In this case, by contrast, defendant City of Tomah filed a third-party complaint in state court after American States moved to intervene in this case, thereby creating a parallel proceeding in a case that has made little progress. Given the pace of the Monroe County Circuit Court case, it is unlikely that plaintiff would be able to obtain a declaration of its duties to defend and indemnify defendant in this case before liability has been established, by which time it will have incurred considerable expense in defending its insured.

If American States' duty to defend and indemnify is determined in state court, International Paper would be required to participate in the state court case because

> when an insurer, not named in the underlying suit, seeks a judicial declaration of its rights and obligations under a contract of insurance in accord with Wis. Stat. § 806.04, the plaintiff and any other party who has brought a claim against the insured in the underlying lawsuit, is an 'interested person' for purposes of Wis. Stat. § 806.04(11) and required to be made party to the separate declaratory judgment proceeding.

Fire Insurance Exchange v. Basten, 202 Wis. 2d 74, 95, 549 N.W.2d 690 (1996). In addition, plaintiff has not argued that this case presents issues of first impression under Wisconsin law that would make it more appropriate for a state court to resolve the coverage issue.

Plaintiff's argument that American States lacks an independent basis for jurisdiction is relevant only to permissive intervention under Rule 24(b)(2). Its argument that the amount of coverage at issue does not warrant a delay of the underlying case overlooks the significant costs involved with defending the City of Tomah in a contribution claim under CERCLA. Although there is a pending state court case on coverage because of defendant's third-party complaint against American States, plaintiff has failed to show that it has an interest that outweighs American States' interest in litigating the coverage issue before and in the same case as the underlying case.

In order to allow American States to obtain a determination of its duty to defend and

indemnify defendant City of Tomah, American States must file a declaratory judgment motion on the coverage issue by December 22, 2000. Under Wisconsin law, "the insurer should not only request a bifurcated trial on the issues of coverage and liability, but it should also move to stay any proceedings on liability until the issue of coverage is resolved." Elliott, 169 Wis. 2d at 318, 485 N.W.2d at 406. I will stay discovery in the underlying case until January 21, 2000, so that American States does not incur the costs of defending City of Tomah during that period.

ORDER

IT IS ORDERED that the motion of American States Insurance Company to intervene pursuant to Fed. R. Civ. P. 24(a)(2) is GRANTED. American States Insurance Company will have until December 22, 2000, to file and serve a motion for a declaratory judgment regarding insurance coverage. Liability proceedings will be STAYED until January 21, 2000.

Entered this 30th day of November, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge