IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CITIZENS BANK,

Plaintiff,

v.

STOKES CHEVROLET, INC. and FREDERICK STOKES,

Defendants.

OPINION AND ORDER

99-C-0523-C

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In this civil action for monetary relief, plaintiff Citizens Bank filed a complaint on August 25, 1999, alleging that defendants Stokes Chevrolet, Inc., Frederick Stokes and Claudia Imrie engaged in a check kiting scheme in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 - 1968. In addition, plaintiff alleges state law claims of civil conspiracy in violation of Wis. Stat. § 134.01; property damage or loss in violation of Wis. Stat. §§ 895.80 and 943.20(1)(a); conversion; unjust enrichment; negligence; and violations of the Wisconsin Organized Crime Control Act, Wis. Stat. §§ 946.80 - 946.88. Plaintiff alleges the additional state law claim of drawer's liability against defendant Stokes Chevrolet under Wis. Stat. § 403.414(2). In response, defendants Stokes Chevrolet, Inc. and Frederick Stokes

filed an answer. Defendant Claudia Imrie filed an answer as well as a cross-claim against defendants Stokes Chevrolet and Frederick Stokes for contribution or indemnification. On January 27, 2000, plaintiff stipulated to the dismissal of all claims against defendant Imrie and defendant Imrie stipulated to the dismissal of her cross-claims against defendants Stokes Chevrolet, Inc. and Frederick Stokes.

On November 26, 1999, Regent 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 establishing whether it has an obligation to defend or indemnify any of the defendants. According to Regent's proposed complaint, Regent issued insurance policies to defendant Stokes Chevrolet, Inc. for the policy periods October 1, 1997 to October 1, 1998 and October 1, 1998 to October 1, 1999. Defendants Stokes Chevrolet, Inc. and Frederick Stokes have tendered the defense of plaintiff's complaint to Regent. Plaintiff has stipulated to Regent's intervention. Defendants Stokes Chevrolet, Inc. and Frederick Stokes oppose the intervention, arguing that (1) intervention will unduly delay the progress of the case; (2) Regent's defenses at trial would be adverse to their position; and (3) they adequately represent Regent's interests.

Subject matter jurisdiction is present pursuant to 28 U.S.C. §§ 1331, 1367. Regent's 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).

OPINION

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." 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)).

A. 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). Regent filed a motion to intervene on November 26, 1999, approximately three months after plaintiff filed its complaint on August 25, 1999. Although it is unclear when defendants tendered the defense to Regent, it does not appear that Regent waited an unreasonable amount of time to file a motion to intervene after learning of the suit and defendants do not contend that it is prejudiced by any such delay.

Defendants Stokes Chevrolet, Inc. and Frederick Stokes contend that intervention will unduly delay the progress of the case. According to the Preliminary Pretrial Conference Order dated October 18, 1999, discovery is to be completed by June 30, 2000 and a jury trial is to commence on August 7, 2000. With almost seven months remaining before trial, there is sufficient time to decide whether Regent has a duty to defend and indemnify defendants. I find that Regent's motion to intervene is timely.

B. Regent's Interest

To be entitled to intervention as of right, Regent must have a direct and legally protectible interest in the proceedings. See Security Ins. Co. of Hartford, 69 F.3d at 1377. There is no dispute between the parties that Regent has an interest in the underlying litigation. Because Regent's 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 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). Regent has an obligation to defend its insureds, defendants Stokes Chevrolet, Inc. and

Frederick Stokes, until a determination is made whether Regent may be responsible under the terms of its policies if defendants are found to be liable. As a result, Regent has a "direct, significant, legally protectable" interest in the underlying suit. Security Ins. Co. of Hartford, 69 F.3d at 1377 (quoting American Nat'l Bank v. City of Chicago, 865 F.2d 144, 146 (7th Cir. 1989)).

C. Impairment of Regent's 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), Regent must show that its ability to protect its interest may be affected or impaired, as a practical matter, by the disposition of the action. Because Regent 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 defendants. Regent contends that if it is not allowed to intervene, it would be forced to bring a separate declaratory judgment action in state court to determine coverage. Disposition of the underlying action would impair Regent's ability to protect its interest in avoiding the costs of defending Stokes Chevrolet, Inc. and Frederick Stokes if plaintiff's claims are determined to fall outside the policy coverage.

D. Representation of Regent's Interest

The fourth and final test for Rule 24(a)(2) intervention is that no existing party will adequately represent Regent's 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)). Defendants assert that they can represent Regent's interest and then it can be determined after trial whether Regent has a defense to indemnification under the relevant policies. Defendants' argument is unpersuasive. Regent 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. There is no existing party that will adequately represent Regent's interest in obtaining such a judgment.

Although resolving the coverage issue before liability may delay trial preparation in this case as defendants argue, Wisconsin case law strongly favors allowing an insurer to have coverage determined before incurring the costs of defending its insureds or breaching its duty to defend. Allowing Regent to intervene in the underlying lawsuit in order to decide coverage before liability (1) addresses defendants' concern that Regent's position at trial may be adverse

to their own; (2) avoids a concurrent lawsuit in state court; (3) expedites this litigation by disposing of the entire controversy; and (4) protects Regent's interest in avoiding the expenditure of legal fees in the underlying action if it does not have a duty to defend.

In order to allow Regent to obtain a determination of its duty to defend and indemnify defendant Stokes Chevrolet, Inc. and Frederick Stokes, Regent must file a declaratory judgment motion on the coverage issue by March 6, 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." Elliot, 169 Wis. 2d at 318, 485 N.W.2d at 406. I will stay discovery in the underlying case until April 3, 2000, so that Regent does not incur the costs of defending Stokes Chevrolet, Inc. and Frederick Stokes during that period. If this stay means that the dispositive motion deadline of April 7 must be continued, the parties may ask for a new scheduling conference.

Because I find that Regent 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 whether permissive intervention also would be appropriate under Rule 24(b)(2).

ORDER

IT IS ORDERED that the motion of Regent Insurance Company to intervene pursuant

to Fed. R. Civ. P. 24(a)(2) is GRANTED. Regent Insurance Company will have until March 6, 2000, to file and serve a motion for a declaratory judgment regarding

insurance coverage. Liability proceedings will be STAYED until April 3, 2000.

Entered this _____ day of February, 2000.

BY THE COURT:

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BARBARA B. CRABB
District Judge