INSURER'S RIGHT TO INTERVENE

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I. INTRODUCTION

Any party may intervene by filing a pleading, subject to being struck by the court for sufficient cause on the motion of any party. Tex. R. Civ. P. 60. An intervenor is not required to secure the court's permission to intervene. *Guaranty Federal Savings Bank v. Horseshoe Operating Co*., 793 S.W.2d 652,657 (Tex. 1990). The party who opposed the intervention has the burden to challenge it by a motion to strike. A court may not strike the intervention on its own motion and abuses its discretion if it acts in the absence of a motion to strike. *Guaranty Federal*, at 657. It is an abuse of discretion to strike a plea in intervention if:

A. the intervenor could have brought some or all of the same action in its own name, or, if the action had been brought against it, it could defeat some or all of the recovery,

B. the intervention will not complicate the case by an excessive multiplication of the issues, and

C. the intervention is almost essential to effectively protect the intervenor's interest. *Guaranty Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990).

There have been several situations where insurers have been allowed to intervene both at the trial court level and the appellate level.

II. PREJUDGMENT INTERVENTIONS

Many liability insurers have intervened in third-party litigation to protect their subrogated interests such as reimbursement of attorney's fees paid. In addition, insurers have filed interventions because the existing parties in a lawsuit did not adequately represent an insurer's interests, the disposition may impair the insurer's interest, and to prevent retrying the same issues twice.

A. Intervene to Protect Subrogated Interests

Graco v. CRC, Inc. of Texas, 47 S.W.3d 742 (Tex. App.—Dallas, 2001, pet. denied)

Injured plaintiff, Lacina, brought a products-liability action against the manufacturer, Graco, and seller, CRC, of a hydraulic ram. CRC filed a cross claim for indemnity against the manufacturer. The underlying claim was settled. CRC's insurer, State Farm, intervened in the cross-claim, seeking attorney's fees that might be awarded to the seller. State Farm had incurred $107,859.82 in attorney's fees and expenses in defending CRC in the Lacina case. The court conducted a bench trial concerning damages in CRC's statutory indemnification claim. Carlyle Chapman testified that State Farm retained him and his law firm to represent CRC in the Lacina action. The trial court's final judgment awarded CRC $107,859.82 for attorney's fees and expenses and granted Graco's motion to strike State Farm's intervention. The court found that CRC retained Chapman and CRC incurred attorney's fees and expenses recoverable under the indemnification statute. *Graco,* 47 S.W.3d at 744.

Graco appealed, arguing that State Farm rather than CRC retained Chapman. According to Graco, the statute allows compensation only for losses incurred by sellers, not the sellers' insurance company. CRC therefore did not incur any compensable loss. CRC asserted the collateral source rule allows it to recover fees incurred by State Farm on CRC's behalf. Under the collateral source rule, Graco would not be relieved of its duty to pay CRC's attorney's fees merely because CRC's defense was provided by State Farm. The appellate court concluded that CRC incurred the legal fees and expenses that were provided by CRC's insurance company. *Id.* at 745.

When CRC purchased insurance from State Farm, CRC paid State Farm to provide legal representation for CRC in such litigation. Chapman, although retained and paid by State Farm, provided services to State Farm's insured, CRC, valued at $107,859.82. Graco's argument about disallowing payment of attorney's fees when the seller's defense was provided by its insurance carrier would defeat the purpose underlying the indemnification statute. It would encourage manufacturers to make bogus claims of negligence against innocent sellers in an attempt to avoid a duty to indemnify. Because the collateral source rule applies, the appellate court concluded that the evidence supported the trial court's finding CRC incurred $107,859.82 in legal fees and expenses in this cause. *Id.* at 746. The court explained that the claim for attorney's fees belongs to the litigant, not to his attorney. *Goodyear Tire & Rubber Co. v. Portilla*, 836 S.W.2d 664, 671 (Tex. App.—Corpus Christi 1992), aff'd, 879 S.W.2d 47 (Tex. 1994); *see also Transp. Ins. Co. v. Franco*, 821 S.W.2d 751, 755-756 (Texas. App.—Amarillo 1992, writ denied), although attorney's fees should be awarded to party rather than his attorney, defendant who has been ordered to pay attorney's fees has no standing to complain if fees are awarded directly to claimant's attorney. Likewise the court concluded in this case that the claim for attorney's fees belonged to CRC rather than to State Farm. *Id.* At 747.

B. Intervene because Existing Parties did not adequately represent Insurer's Interest

State Farm Fire v. Taylor, 832 S.W.2d 645 (Tex. App.—Fort Worth 1992), rehearing overruled 1992, writ denied)

During a heated and vigorous difference of opinion, Larry Anglin caused the discharge of a firearm. The result of such discharge was the death of Herman Taylor. Anglin was indicted for the offense of homicide and subsequently pled guilty to the offense of involuntary manslaughter and received a probated sentence of ten years.

The children and widow of the late Mr. Taylor filed suit against Anglin, alleging that Mr. Taylor's injuries and death were the result of Anglin's negligence. Anglin called upon his homeowner's insurer, State Farm, to defend and indemnify him in this suit. State Farm's insurance policy, while covering negligent acts of its insured, specifically excluded coverage for intentional acts. *Taylor* at 832 S.W.2d 647.

State Farm agreed to defend Anglin under a reservation of rights. Prior to trial, the insurance company filed an intervention in the lawsuit, claiming the right to do so as a means of advancing its claim that Anglin had intentionally (and thus, not negligently) brought about the demise of Mr. Taylor. The insurer sought a severance of this intervention and requested trial of same prior to the main trial. A severance was sought because the insurer was sure that counsel for the children and widow would not bring up "intentional" acts as such would defeat their recovery on the policy under negligence and also that counsel for Anglin could not bring up "intentional" acts as such would be inimical to his client's interest by defeating the insurance coverage upon which he depended to pay the loss (if any) resulting from the litigation.

Upon motion by the plaintiffs to strike the intervention, the trial court removed the insurer from the lawsuit. State Farm appealed the ruling of the trial court striking the intervention (and thereby refusing to sever the insurer's claim and to grant a preliminary trial testing the right of the insured to receive benefits under the policy). The appellate court held that current statutory and decisional law supported the action of the trial court in striking State Farm as intervenor. The insurance company nevertheless asked the appellate court to overrule such precedent on the broad constitutional ground that it had been denied access to the courts and thereby due process of law. State Farm cited a number of cases on collateral issues and the rights of a person or corporation to defend against liability. Because State Farm cited no settled legal precedent, the appellate court affirmed the trial court's decision on the intervention.

State Farm continued to defend Anglin in the underlying suit and it went to trial while State Farm's petition for writ of error in the matter of the denial of its plea for intervention was pending in the Texas Supreme Court. Taylor's estate obtained a judgment in excess of State Farm's policy limits based upon a finding of negligence in Anglin's shooting of Taylor.

State Farm initiated a declaratory judgment action, stating it had no liability for the judgment obtained in the wrongful death action because the shooting was intentional, and therefore excluded from coverage under the terms of the homeowner policy. *Taylor,* 832 S.W.2d at 647. Anglin subsequently brought a counterclaim against State Farm for violating Art 21.21 of the Insurance Code, alleging that State Farm failed to settle and therefore prejudiced him by allowing a judgment to be entered against him in excess of his policy limits. *See id* at 647. Anglin sought a declaration that State Farm was obligated to pay the judgment. The insured moved for summary judgment, alleging that State Farm, by foregoing a determination of the coverage question that it sought to raise through the declaratory judgment action and by providing a defense to its insured, is estopped from denying coverage. The insured also alleged that State Farm was estopped from proceeding with its declaratory judgment action because of assertions it made in its unsuccessful attempts to intervene in the wrongful death lawsuit, including its assertion that refusal to allow the intervention would leave the insured with no other remedy in law.

State Farm responded by asserting its right to have properly determined the issue of whether the insured intentionally shot the decedent. *Id*. at 648. The Court of Appeals held that State Farm was not estopped from proceeding with the declaratory judgment that its insured's actions were intentional rather than negligent, even though it did not seek to abate the wrongful death action until the declaratory judgment action determined. The court held the insurer's liability never became reasonably clear, as a matter of law, in view of its contention that its insured's actions were intentional; therefore, it did not violate article 21.21. *Id* at 650. Thus, the findings of negligence in the underlying wrongful death case were not determinative of the coverage issue, and the insurer was not precluded from asserting its coverage defense that its insured's actions were intentional, rather than negligent, despite the findings of negligence after an

adversarial trial in the wrongful death action. *Id.* At 650.

C. Disposition may Impair Insurer's Interest

American Home Assurance Co. v. Stephens, 130 F.3d 123 (5th Cir. 1997)

Ross filed suit against Stephens, her therapist, for negligence for failing to diagnose and treat her condition properly and that he had rendered improper treatment for her condition as a victim of child abuse and incest. Ross did not allege sexual misconduct. American Home, Stephens' professional malpractice insurer, agreed to defend Stephens pursuant to a reservation of rights. The reservation of rights letter quoted from the sexual misconduct provision and stated that any damages for sexual misconduct would be limited to $25,000. Nine months after filing suit, Ross filed a written complaint against Stephens with the Texas State Board of Medical Examiners of Professional Counselors, alleging among other incidents of misconduct, that Stephens had engaged her in sexual relations on five to seven occasions during their therapeutic relationship. Thereafter, Ross filed a motion in the malpractice action in which she stated that in addition to mishandling her treatment, Stephens used his position and influence over her to have her engage in sexual activities while acting in a position of fiduciary. Stephens admitted in his deposition that he had engaged in sexual intercourse with Ross while she was his client.

American Home filed a declaratory action seeking a declaration that its total liability under the policy was limited to $25,000 because Ross had asserted claims of sexual misconduct. American Home filed a summary judgment which was granted by the district court. Stephens appealed. The appellate court among other issues presented, addressed apportionment of damages between sexual and non-sexual claims that exist independently. The trier of fact has the task of separating multiple claims and apportioning damages. The court did state, "if needed, the insurer may intervene to defend its interest with regard to the damage apportionment." *American Home Assurance Co. v. Cohen,* 815 F. Supp. 365 (W.D. Wash. 1993). The appellate court held that the sexual misconduct exclusion was against public policy and reversed the trial court's decision. In the Supreme Court on certified question, the exclusion was held not to be against public policy. The Supreme Court held that parties are free to contract as they wish, and the court will enforce the terms of the contract as written. *American Home Assurance Co. v. Stephens*, 982 S.W.2d 370 (Tex. 1998).

D. Intervene to avoid Multiple Suits

Allstate Ins. Co. v. Hunt, 469 S.W.2d 151 (Tex.1971)

The issue before the court was a separate issue as to whether to allow an insurer to hire counsel for an uninsured motorist, but four dissenting judge in this case addressed the topic of intervention.

Hunt was an Allstate insured that was struck by Rose, an uninsured motorist. Allstate gave a letter in which it consented to a suit against the uninsured motorist and agreed without qualifications to be bound by the outcome of this suit.(A judgment against an uninsured motorist may be binding on an insurer providing uninsured motorist coverage in a subsequent action to recover under the uninsured motorist provision if the insured has complied with a policy requirement as to obtaining the consent of the insurer to maintain the action). Hunt then made Allstate a party defendant in its suit against the uninsured motorist. Allstate moved for separate trials, and their motion was granted.

Allstate's counsel attempted to participate in the uninsured motorist's separate trial, using evidence that Allstate had obtained from Hunt during its coverage investigation. Allstate's counsel had come in as leading counsel for Rose, with his consent. The trial court refused to allow Allstate's counsel to proceed. After being denied the right to represent Rose, Allstate attempted to withdraw its consent to the suit, but the court denied this request as well. A judgment of $20,000 was rendered against the uninsured motorist. The Texas Supreme Court held that due to the potential conflict of interest an insurer cannot appoint a lawyer for an uninsured motorist. The Court held that "the insurance company must refrain from representing the uninsured motorist or from intervening in an uninsured motorist case.

With respect to intervention, Justice Pope wrote on behalf of the dissent:

Other jurisdictions have freely permitted insurers to intervene on the side of the uninsured motorist so that the same issues need not be tried twice. Many have required the insurer to intervene, so strong is the effort to avoid duplication of litigation. The significance of these many precedents in other states is that they permit or require the insurer to make common cause with the uninsured motorist because the same issues must be decided either in one trial or separate trials, it the insurer to be is to be held. Widiss, in Section 7.15, Uninsured Motorist Coverage (1969) writes:

In the event the insured elects to bring an action against the uninsured motorist, many jurisdictions will the insurance company which has issued uninsured motorist coverage to intervene for the purpose of presenting defenses on behalf of the uninsured motorist or joining in the defense. Depending on the jurisdiction, such intervention may be a matter of right or may depend on permission of the court.

If the insurance company intervenes as a defendant in the insured's action against the uninsured motorist, by necessity the issued of (1) whether insured is legally entitled to recover from the uninsured motorist and (2) the amount of such recover will definitely be resolved as between the insured and the company (as well as between the insured and the uninsured motorist). Therefore, in all probability nothing is left for a subsequent arbitration or litigation. *Id*. At 156-157.

III. POST JUDGMENT INTERVENTIONS

Recent decisions by the Fifth Circuit Court of Appeals and the Texas Supreme Court affirm that an insurer has the right to seek intervention at the appellate stage to challenge the underlying judgment against its insured, if certain criteria are met.

A. Virtual Representation

Generally the right to appeal is only available to parties of record. The virtual representation doctrine is an exception to this rule. Virtual representation allows non-parties to an action to exercise the right of appeal. The Fifth Circuit Court of Appeals has stated that virtual representation comes into play when "a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative." *Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir.), cert denied, 423 U.S. 908 (1975). Similarly, Texas courts have consistently recognized intervention via the virtual representation doctrine in limited situations. *See Motor Vehicle Bd. of the Tex. v. El Paso Indep. Auto. Dealers Ass'n, Inc.*, 1 S.W.3d 108, 110-11 (Tex. 1999) (generally an appeal is only available to parties of record, but an exception exists when the appellant is deemed to be a party under the doctrine of virtual representation); *Gunn v. Cavanaugh*, 391 S.W. 2d 723, 725 (Tex. 1965) (a person who is a party under doctrine of virtual representation may appeal); *Robertson v. Blackwell Zinc Co.*, 390 S.W.2d 472, 472 (Tex. 1965) (parties who are not named defendants, but considered parties under doctrine of virtual representation may appeal by a writ of error); *Smith v. Gerlach*, 2 Tex. 424, 426 (1847) ("one whose privity of estate, title or interest appears from the record...or who may be the legal representative of such party may appeal"); *Specia v. Specia*, 292 S.W. 2d 818, 819 (Tex. Civ. App.—San Antonio 1956, writ ref'd n.r.e.) (beneficiary in a will contest was a party even though not personally named as a party); *Knioum v. Slattery*, 239 S.W.2d 865, 868 (Tex. Civ. App.—San Antonio 1951, writ ref'd) (in a case involving a restrictive covenant, a person bound by the judgment and not named as party may appeal under the virtual representation doctrine). Although virtual representation has been recognized in Texas for quite some time, it has only been recently that the doctrine has been expanded to include insurers.

B. Party bound to the Judgment

The Texas Supreme Court held that the most important consideration in determining whether a non-party should be allowed to assert its rights on appeal was whether that party was bound to the judgment in the case. *City of San Benito v. Rio Grande Valley Gas Co.,* 109 S.W.3d 750, 754-55 (Tex. 2003).

Dwayne Ross, et al. v. Matthew Curtis Marshall, et al., 426 F.3d 745 (5th Cir. 2005)

In a first-of-its-kind ruling, the Fifth Circuit Court of Appeals held recently that an insurer can intervene post-judgment in a suit against its insured, because the insured abandoned his appeal. The decision reverses a $10 million judgment awarded to an African-American family victimized by a cross-burning incident in 2000. The judgment was awarded against the father of one of the perpetrators. The three-judge panel of the 5th Circuit held that Allstate Texas Lloyds Insurance Co. had a right to intervene in the suit to challenge the judgment against its insured, a father whom the trial court held vicariously liable for his son's act of "racial terrorism."

In its opinion, the 5th Circuit noted the following: Kent Mathews' son, Wayne, was a 20-year-old college student when he gathered with a group of friends for a night of drinking outside his parents' home in Katy on June 18, 2000. The father instructed his son to "wrap things up" and then went to bed around 10:30 p.m. Instead, Wayne Mathews and Matthew Curtis Marshall, the named defendants in the suit, and several of their friends decided to build a wooden cross using materials from the Mathews' garage, and burned it in front of the Ross family home. The cross-burning incident occurred in the early morning hours of June 19 -- known as Juneteenth, which celebrates the day in 1865 when a Union general read the Emancipation Proclamation in Galveston, freeing the slaves in Texas. Mathews pleaded guilty in connection with the cross-burning incident and received a sentence of 15 months

in a federal prison. After Wayne Mathews pleaded guilty, the Ross family filed the civil suit against Wayne Mathews, Marshall and their friends, alleging various intentional torts and civil rights violations. The Rosses also named Wayne Mathews' parents as defendants in the civil suit. Wayne Mathews' parents owned a homeowner's insurance policy issued by Allstate that covered "damages because of bodily injury … caused by an occurrence" for which coverage was provided. The Rosses sought to recover damages from Wayne Matthews' parents on the grounds they "knew or should have known that their properties and household effects were being used in a reckless and negligent manner."

Allstate provided an attorney to defend Wayne Matthews' parents subject to a reservation of the insurance company's rights. Allstate also filed a declaratory judgment suit asking the judge to find that the insurance company had no obligation under the homeowner's policy to indemnify or defend the parents against the Rosses' suit.

At the trial of the Rosses' suit, the jury found Wayne Mathews and his friends liable for $10 million in damages and also found that Kent Mathews was negligent when he delegated authority over the Mathews' property to his son on the night of the cross-burning. However, the jury found that the negligent delegation of authority did not cause the cross-burning.

The trial judge originally entered a take-nothing judgment as to Kent Mathews but subsequently amended the judgment, finding as a matter of law that the father was vicariously liable for the son's conduct. Kent Mathews, through an attorney hired by Allstate, filed a notice of appeal, and Allstate filed a supersedeas bond for $300,000 -- the limit in Kent Mathews' homeowner's policy. Allstate also filed its post judgment answer, notice of appeal and a motion to intervene in the case. The trial judge struck Allstate's answer and notice of appeal and denied the insurer's motion to intervene and Kent Mathews' motion to amend the judgment.

Kent Mathews changed his mind about pursing an appeal. After reaching an agreement with the Ross family, the father fired the appellate attorney Allstate had hired to represent him, dropped his appeal and agreed to assign his rights against the insurance company to the Rosses. Allstate then appealed to the 5th Circuit,

In deciding whether intervention was proper in this case, the court points out that in the absence of a federal statute, a motion to intervene as of right is governed by Federal Rule of Civil Procedure 24(a)(2). *Id.* at 753:

> A motion to intervene under Rule 24(a)(2) is proper when: (1) the motion to intervene is timely, (2) the potential intervener (sic) asserts an interest that is related to the property or transaction that the forms the basis of the controversy in the case into which she seeks to intervene; (3) the disposition of that case may impair or impede the potential intervener's ability to protect her interest; and (4) the existing parties do not adequately represent the potential intervener's interest. [citation omitted] *Id.*

In applying the above rule, the first task is to determine whether the motion to intervene is timely. The Fifth Circuit Court of Appeals cited four factors to consider in evaluating the timeliness of a motion to intervene. The four factors are:

> Factor 1. The length of time during which the would-be intervenor actually or reasonably should have known of his interest in the case before he petitioned for leave to intervene.
>
> Factor 2. The extent of prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case.
>
> Factor 3. The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied.
>
> Factor 4. The existence of unusual circumstances militating either for or against a determination that the application is timely.

Id. at 754 (citation omitted).

In finding Allstate's motion for intervention timely, the court noted that Allstate filed its appeal after the rendering of the judgment and not before it because up until that point its interests were being properly represented. *Id.* at 754. It was only after the judgment and within the time a named party could have taken an appeal that Allstate sought to intervene to protect its interests. The court cites several cases in support of the timeliness of Allstate's motion to intervene and seems to establish that a motion to intervene is timely when the intervenor's interests are no longer protected by the named parties, the granting of the motion would not prejudice the named parties

and the intervention would not interfere with the orderly processes of the court. *Id.* at 755.

In applying the second factor, the court concludes that the additional resources and inconvenience associated with Allstate filing an appeal are not prejudicial to the parties, but those commonly associated with defending a ruling or judgment on appeal. *Id.* at 755-56. Further, the essence of the second factor is really whether the parties will suffer prejudice as a result of Allstate's failure to intervene earlier. *Id.*

The third factor focuses on whether Allstate would suffer prejudice if not allowed to intervene. *Id.* at 756. Initially, Allstate did not post a supersedeas bond and on a later attempt the district court rejected this action. As such, the contention is that Allstate no longer has a stake in the present suit. However, the court concluded that Allstate will suffer substantial prejudice if it is not allowed to intervene because an uncontested judgment may expose Allstate to significant liability both in a subsequent coverage suit and in a suit for extra-contractual damages. *Id.* The court stated:

Allstate's interest in protecting itself from liability by minimizing the liability of its insured is strong, particularly in light of the fact that Allstate provided Mathews with a defense in this case subject to a reservation of rights and is bound by the district court's judgment. [footnote omitted] Allstate will suffer considerable prejudice if it is denied the opportunity to challenge this judgment on appeal. *Id.*

The fourth factor weighs any unusual circumstances present in the case that may point for or against the timeliness of the intervention. *Id.* The court found Allstate's motion to be timely precisely because of the unusual circumstances in this case. Those circumstances include the insured abandoning his appeal and firing his appellate counsel as the behest of the plaintiffs and the plaintiff's subsequent attempt to deny Allstate the opportunity to seek appellate review of the district court's amended judgment. *Id.*

After determining that a motion to intervene is timely, the next task is whether the intervenor has an interest related to the property or transaction at issue in the case. *Id.* at 757:

The Court explained that in order to meet this requirement an applicant must point to an interest that is "direct substantial, [and] legally protectable." [footnote omitted] This requires a showing of something more than a mere economic interest; rather, the interest must be "one which the substantive law recognizes as belonging to or being owned by the applicant." [footnote omitted] In addition, "the intervenor should be the real party in interest regarding his claim." [footnote omitted] Despite these requirements, the court observed that "the interest 'test' is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." [footnote omitted] *Id.*

The court concluded Allstate had a sufficient interest in this matter because it is potentially liable for the amount of the judgment against its insured up to its policy limits and possibly beyond. *Id.* In deciding this issue, the court noted that it was a close call. The court did not directly conclude whether the posting of a supersedeas bond would have given Allstate a greater interest in this matter. The court did state that "[w]ithout question, an insurer has a financial stake in securing a favorable outcome for its insured in a lawsuit alleging potentially covered claims." *Id.* Further, the financial interest is substantial when the insurer is given the opportunity to defend the suit against its insured.

Secondly, the court concluded that although Allstate still has the pending coverage action that could potentially allow it to avoid liability for the judgment, this contingency is insufficient to preclude liability. *Id.* at 759. In the cases from the Second and First Circuit Courts of Appeal the insureds had two contingencies available to them; their respective coverage actions and the ability to prevent or influence the judgment against their insured. *Id.* In this regard, their interests diverged from those of their insured and precluded intervention. *Id.* The court reasoned that because Allstate is already bound by the judgment and not able to re-litigate its insured's liability in a subsequent lawsuit, intervention at the appellate stage is necessary to protect its interests. *Id.*

In discussing this concept further, the court acknowledged that there is a dearth of authority on whether an insurer that reserves its rights has a sufficiently direct interest to intervene as of right in a suit against its insured for the purpose of appealing the judgment. *Id.* The court noted that a handful of courts have held that "insurers may intervene to contest various aspects of judgments entered against their insured following a reservation of rights." *Id.* at 760. The court stated:

These cases point up the absence of a monolithic opposition to insurers intervening in cases brought against their insured, and are consistent with the toleration shown in our case law for some degree of

contingency in the interests of persons seeking intervention as of right. [footnote omitted] *Id.*

Finally, the court stated that because the insured assigned his rights to the plaintiff, Allstate's interest in challenging the judgment on appeal is that much more significant. *Id.* Thus, the court held that Allstate had a sufficient interest to merit intervention as of right for the purpose of appealing the judgment against its insured.

The third criterion centers on whether the disposition of the case may impair or impede the potential intervener's ability to protect her interest. *Id.* The court concluded that the disposition of the underlying suit significantly affects Allstate's interests because once its insured settled with the plaintiffs after entry of judgment Allstate was left with a potential liability exposure in its coverage suit up to its policy limits and with "potential liability exposure for additional amounts in a bad faith suit-all without being afforded the opportunity to appeal a judgment in a suit which it defended." *Id.* at 761.

The final criterion an intervenor must satisfy is whether the existing parties adequately represent his interest. *Id.* This burden is minimal and the intervenor need only show that representation by the existing parties may be inadequate. *Id.* (citation omitted). Allstate met this burden by showing that its insured abandoned the appeal and fired the appellate counsel provided by Allstate. The court states that it does not matter that these events occurred after the district court denied Allstate's motion to intervene because Allstate's motion was based on the well-founded belief that the insured had ceased to cooperate and would not pursue an appeal. *Id.*

After undertaking this analysis, the court concluded that Allstate had a sufficient interest in the suit to merit intervention as of right for the purpose of appealing the judgment against its insured. The court held that the trial judge erred in denying the insurance company's motion to intervene in the suit. The Fifth Circuit also held that the trial court abused its discretion when it amended the judgment in Ross to hold, as a matter of law, that Kent Mathews was vicariously liable for his son's conduct in the cross-burning incident. The Fifth Circuit reversed the trial court's order denying intervention and the judgment against Kent Mathews and remanded Ross to the trial court with instructions that the Rosses take nothing in their suit against Kent Mathews.

In re Lumbermens Mutual Casualty Company, No. 04-0245, 49 Tex. Sup.Ct. at 329, 2006 WL 249979 (Tex. 2006)

On February 3, 2006, the Texas Supreme Court decided *In re Lumbermens Mutual Casualty Company*, 2006 WL 249979 (Tex. Feb. 3, 2006), permitting an insurer to intervene in an appeal and file a separate brief raising an argument that had been abandoned by its insured. The *Lumbermens* decision stemmed from Cudd's agreement to indemnify, and to secure coverage for, Sonat in connection with well-servicing operations. When Cudd employees sued Sonat for personal injury, Cudd refused to indemnify Sonat, and Cudd's insurer, Lumbermens, refused to provide coverage. Given this breach, Sonat settled with the injured employees and pursued indemnity against Cudd. It also filed a separate breach of contract action against Lumbermens and Cudd.

Sonat prevailed on its indemnity claim, causing Lumbermens to put up a $29 million supersedeas bond for Cudd for an appeal. Meanwhile, in the other breach of contract action, Sonat was pressing on certain claims for which Cudd would not have coverage. Thus, they worked a deal. Sonat would dismiss certain uncovered claims in the breach of contract suit, and Cudd would agree not to pursue the choice-of-law issue on appeal in the indemnity action. This was a pivotal decision, for under Louisiana law, the indemnity claim would be unenforceable, yet it would be valid under Texas law.

Once Cudd filed a brief of appellant that did not attack choice-of-law, Lumbermens sought leave to intervene on appeal. (The ten-week delay in seeking leave was not found by the court to be material in this case). The court of appeals denied leave to intervene, and Lumbermens filed a petition for writ of mandamus with the Texas Supreme Court. The writ of mandamus was conditionally granted.

The Texas Supreme Court held that the insurer was entitled to intervene and file a brief separately attacking the choice-of-law issue, and the court of appeals had abused its discretion in denying the intervention. While the court cautioned that intervention was required "under the unique facts presented," the reality is that the *Lumbermens* decision may frequently provide a basis for intervention in suits where potential coverage issues intertwined the facts—and not just on appeal. The court concluded that contractual defenses for non-cooperation or a potential declaratory judgment action regarding coverage were not sufficient legal remedies to avoid mandamus relief. Thus, while Texas Rules of Civil Procedure 38(c) and 51(b) generally prevent the joinder of an insurer, the practicalities of the situation—coupled with the

Lumbermens decision—may prompt even more involvement and control for the insurer.

Finally, in discussing the public policy implications in allowing an insurer to intervene on appeal or at the trial level, the court explained:

We agree that every disagreement between an insured and its liability insurer would not justify separate appeals. As we recently acknowledged, the insurance policy determines whether an insurer or its insured has the right to control litigation, a contract right that would be defeated if every disagreement between the two justified each in filing its own appeal. [citation omitted] However, our procedural rules favor the resolution of cases based upon substantive principles. [citations omitted] We reiterate that whether a would-be intervenor is entitled to appeal under the virtual-representation doctrine is an equitable determination that must be decided on a case-by-case basis. Our decision today is limited to the situation presented. *Id.*

IV. CONCLUSION

An insurer should be allowed to intervene in a prejudgment lawsuit if the insurer has a requisite interest in the case, disposition of the case has the potential to impair the insurer's interest, the existing parties do not adequately represent the insurer's interest, and to prevent retrying the same issues twice.

In addition, the recent decisions by the Fifth Circuit Court of Appeals and the Texas Supreme Court affirm that an insurer now has the court recognized right in Texas to seek intervention at the appellate stage to challenge the underlying judgment against its insured if certain criteria are met.