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BASHOR/NUNN AGREEMENTS: CAN AN INSURER INTERVENE IN A LAWSUIT BETWEEN A PLAINTIFF AND INSURED DEFENDANT UNDER COLORADO LAW?

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Snaking through the courts of many jurisdictions are important under-the-radar lawsuits, the outcomes of which are critically important to insurers. Imagine this: you are an insurer and one of your insured is involved in an accident in which a third-party is injured. The third-party sues the insured for injuries resulting from the accident. However, you, the insurer, are not a party to the lawsuit. During pre-trial settlement negotiations, the third-party and the insured enter into a private agreement that you are excluded from. The agreement assigns all of the insured's rights and interest in any claim for insurance the insured may have against the insurer to the third-party. In exchange for this, the third-party agrees to not execute or attempt to enforce any judgment against the insured. Moreover, the third-party and insured agree to a quick liability and damage determination, if it is not stipulated to in the agreement, before a court or arbitrator. The third-party and insured carry out this determination without your involvement. The third-party then pursues its claim against you in a separate bad faith lawsuit. You had no participation in the underlying lawsuit, but are nevertheless thus stuck fighting against the stigma of the liability and/or damages determination from the previous suit in the subsequent bad faith action.

Needless to say, this is not a position in which insurers like to find themselves, but this is happening across multiple jurisdictions, including the State of Colorado. This article explores the legal background of these agreements and argues that, though this is an issue of first impression in Colorado, insurers likely meet all Rule 24 intervention requirements and should be allowed to intervene in underlying tort actions in order to promote public policy goals such as fairness and judicial economy.

BASHOR/NUNN AGREEMENTS

The Colorado Supreme Court first expressly permitted agreements between insureds and third-parties in the decision *Northland Insurance Co. v. Bashor*.[1] In *Bashor*, a third-party sued an insured and obtained a judgment in excess of the insured's liability policy limits.[2] Subsequently,

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1. 494 P.2d 1292 (Colo. 1972).
2. *Id.* at 1293.

the insured and third-party executed an agreement in which the insured agreed to: (1) pay a portion of the judgment; (2) pursue the remainder against the insurer through a bad faith claim for breach of the duty to settle; and (3) pay any judgment obtained in the bad faith litigation to the third-party.[3] In exchange, the third-party agreed to not collect on the judgment against the insured.[4] After the insurer challenged the insured and third-party's agreement, the Colorado Supreme Court held that the agreement was valid.[5] Thus, the *Bashor* decision permits an insured and third-party to enter into a post-trial agreement involving a covenant not to execute on a judgment that has been determined by a neutral fact-finder.

The Colorado Supreme Court reinforced this ruling by finding a similar type of agreement valid in *Old Republic Insurance Co. v. Ross*.[6] In *Old Republic*, the insureds and third-parties entered into an agreement related to a lawsuit for injuries resulting from an airplane accident.[7] In the agreement, the insureds consented to a stipulated judgment against them for over $5 million and the third-parties agreed to not collect on that stipulated judgment.[8] In return, the insureds agreed to pursue bad faith claims against their insurer so as to satisfy the stipulated judgment.[9] In response, the insurer challenged the stipulated judgment claiming that it was not enforceable.[10] The Colorado Supreme Court concluded that the stipulated judgment was not binding on the insurer in the subsequent bad faith litigation unless bad faith was found, in which case the stipulated judgment could be enforceable.[11] Although the Supreme Court emphasized that the insurer must be found liable for bad faith in order for the stipulated judgment to be enforceable, the Court expressly declined to hold that all pretrial stipulated judgments are per se unenforceable,[12] leaving insurers financially exposed to pre-trial agreements in which they were not included.

Finally, the Colorado Supreme Court further clarified the scope and enforceability of these agreements and stipulated judgments in *Nunn v. Mid-Century Insurance Co*.[13] In *Nunn*, a third-party sued the insured for personal injuries sustained in an automobile accident.[14] Before trial, the insured and third-party entered into a settlement agreement in which the

3. *Id.*
4. *Id.*
5. *Id.* at 1294.
6. 180 P.3d 427 (Colo. 2008).
7. *Id.* at 429.
8. *Id.*
9. *Id*.
10. *Id.* at 431.
11. *Id.* at 433–34.
12. *Id.*
13. 244 P.3d 116 (Colo. 2010).
14. *Id.* at 118.

insured agreed to pay $100,000, his insurance policy limit, to the third-party and also stipulated to an additional judgment totaling $4,000,000.[15] The insured further agreed to assign his bad faith claims against the insurer to the third-party.[16] The third-party agreed not to execute on the stipulated judgment.[17] Subsequently, the third-party brought a bad faith action against the insurer for failure to accept a reasonable settlement offer.[18] The insurer successfully moved for summary judgment, arguing that the third-party did not have actual damages despite the stipulated judgment and the covenant not to execute.[19] On appeal, the Colorado Supreme Court reversed the two lower courts and concluded that the stipulated judgment could in fact serve as proof of actual damages.[20] The Court explained that the stipulated judgment was not automatically binding on the insurer and that it would have an opportunity to defend the reasonableness of its settlement decisions in the subsequent bad faith action.[21] Consequently, in the bad faith action, the third-party was required to prove not only that the insurer acted in bad faith, but also that the stipulated judgment was "a reasonable reflection of the worth of [the third-party's] injury claims against [the insured], and thus the proper measure of damages for [the third-party's] bad faith claim against [the insurer]."[22] "As such, the particular amount of the stipulated judgment merely serves as evidence of the value of Nunn's claims as bargained for and does not represent the presumptive value of the actual damages in the bad faith case."[23]

These cases illustrate the Colorado Supreme Court's affirmation of the validity of these types of agreements between insureds and third-parties, to the detriment of insurers. These agreements, which can result in stipulated judgments without any neutral fact-finder adjudicating the claims or judgment amount, can serve as evidence in subsequent bad faith proceedings against the insurer. With juries already predisposed to a general distrust of insurance companies, these stipulated judgments potentially have a significant prejudicial effect on insurers in bad faith litigation, litigation in which insurers are already accused of acting unreasonably. So, how does an insurer attempt to protect itself in these situations? Currently, the most feasible way for an insurer to protect itself in these situations is by intervening in the underlying tort action between the insured and the third-party.

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15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 118–19.
20. *Id.* at 122–23.
21. *Id.* at 123.
22. *Id.*
23. *Id.*

RULE 24 AND THE ABILITY TO INTERVENE

A party may intervene as a matter of right if: (1) the applicant claims an interest in the subject matter of the litigation; (2) the disposition of the case may impede or impair the applicant's ability to protect that interest; and (3) the interest is not adequately represented by existing parties.[24]

The first prong of this 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."[25] The second "impairment" prong questions whether there is a clear alternative venue in which the proposed intervener may pursue relief.[26] Once an intervener can point to an "interest relating to the transaction" that is the basis of the ongoing lawsuit, the intervening party should be allowed to participate if it appears that all of its interests may not otherwise be adequately represented by those already parties to that lawsuit.[27]

Although no published decision from a Colorado court has opined on an insurer's ability to intervene pursuant to Rule 24 in this context, other states have allowed such intervention. This article argues that the circumstances underlying *Bashor/Nunn* agreements as well as the interests of, and potential prejudice to, an insurer in such context leans in favor of permitting intervention.

CASE LAW CONCERNING AN INSURER'S ABILITY TO INTERVENE IN THE *BASHOR/NUNN* CONTEXT

In states that have recognized agreements like Colorado's *Bashor/Nunn* agreements, insurers are permitted to intervene in an underlying tort suit where the damages component of the insurer's potential liability for later bad faith claims is being litigated.[28]

The Arizona Supreme Court's decision in *H.B.H. v. State Farm Fire and Casualty Company* is instructive and persuasive on an insurer's ability to intervene.[29] In *H.B.H.*, the third-party and insured entered into a

24. COLO. R. CIV. P. 24(a); Feigin v. Alexa Grp., Ltd., 19 P.3d 23, 26 (Colo. 2001).

25. Cherokee Metro. Dist. v. Meridian Serv. Metro. Dist., 266 P.3d 401, 404 (Colo. 2011) (quotations and citations omitted).

26. *See* Mauro by & through Mauro v. State Farm Mut. Auto. Ins. Co., No. 12CA1509, 2013 WL 3943247, at *3 (Colo. App. Aug. 1, 2013).

27. *See, e.g.*, O'Hara Grp. Denver, Ltd. v. Marcor Hous. Sys., Inc., 595 P.2d 679, 688 (Colo. 1979) (en banc).

28. *See, e.g.,* Himes v. Safeway Ins. Co., 66 P.3d 74, 78 (Ariz. Ct. App. 2003) (insurer permitted to intervene of right prior to entry of stipulated judgment); Purvis v. Hartford Acc. & Indem. Co., 877 P.2d 827, 831 (Ariz. Ct. App. 1994) (insurer properly intervened of right where insured did not tender defense to insurer and insurer became aware of suit after insured was already represented by counsel); Anderson v. Martinez, 762 P.2d 645, 648 (Ariz. Ct. App. 1988) (insurer permitted to intervene of right because it would generally be bound in a later suit by injured party by collateral estoppel effect of determination of insured's liability and plaintiff's damages in underlying case).

29. 823 P.2d 1332 (Ariz. Ct. App. 1991).

"Damron" agreement, which is comparable to a *Bashor/Nunn* Agreement.[30] In the agreement, the third-party agreed to limit the insured's personal liability and collect the remainder of any judgment in the underlying litigation from the insurer.[31] Prior to a hearing on damages, the insurer moved to intervene pursuant to Arizona Rule of Civil Procedure 24(a), which was denied.[32] In holding that the insurer had a right to intervene pursuant to Rule 24(a) for the purpose of contesting the reasonableness of any damages award, the Arizona Supreme Court analyzed multiple Arizona decisions allowing insurers to intervene including *Anderson v. Martinez*.[33] The court concluded that because a hearing on damages would be completely one-sided in favor of the plaintiff due to the Damron agreement, and because the insurer had a right to question the reasonableness of the agreement, the most appropriate time for the insurer to intervene was during the underlying litigation.[34]

Though intervention in this context is still a matter of first impression in Colorado, it is likely that insurers would be able to successfully intervene in an insured and third party's tort lawsuit in order to properly protect their interests. To start, an insurer can argue that it should be permitted to intervene as a matter of right because it has a real and direct interest in the subject matter of the underlying case because the amount of judgment issued in that case can be used as evidence against it in a subsequent bad faith action. Further, by entering into the *Bashor/Nunn* Agreement, the insured defendant abrogates any real interest in defending against liability and damage claims. Thus, as a practical matter, an insurer is not be protected by either party in the underlying tort litigation. These concerns are particularly important where the parties simply stipulate to a judgment or agree to submit the underlying tort claim to an alternative dispute resolution process, such as arbitration or mediation. By making these arguments in favor of intervention in combination with the supporting case law, insurers have a legitimate chance of being allowed to intervene so they may protect their interests in underlying tort litigation.

In addition, Colorado public policy concerning judicial economy and settlement favors intervention. Courts that have recognized the right of intervention by insurers in similar circumstances (*i.e.*, involving *Bashor/Nunn*-like agreements) did so, in part, because intervention promotes judicial economy.[35] Allowing an insurer to intervene so that the

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30. *Id.* at 1333.
31. *Id.* at 1333–34.
32. *Id.* at 1334.
33. Anderson v. Martinez, 762 P.2d 645, 650 (Ariz. 1988).
34. *H.B.H.*, 823 P.2d at 1338–39.
35. *See Anderson*, 762 P.2d at 650 (allowing an insurer to intervene and holding that, because an insurance company must be given an opportunity to contest the reasonableness of a *Bashor/Nunn*-type settlement between a plaintiff and insured, including whether or not it was fraudulent or collusive, "it would serve the purpose of judicial economy to permit the insurer to take this opportunity

issue of a judgment's reasonableness is dealt with in a single proceeding promotes judicial economy and similarly increases the likelihood that the parties will, once intervention is allowed, attempt a global settlement of the dispute. This saves judicial resources, time, and money for all parties involved.

CONCLUSION

The Colorado Supreme Court has affirmed the validity of *Bashor/Nunn* agreements between insureds and third-parties, allowing the insured to trade his own liability in exchange for his rights to sue an insurer. This leaves the insurer, which had no participation in the underlying lawsuit, stuck fighting against the stigma of the liability and/or damages determination from the previous suit in any subsequent bad faith action. In states, such as Arizona, that have recognized agreements like Colorado's *Bashor/Nunn* agreements, insurers are regularly permitted to intervene in an underlying tort suit where the damages component of the insurer's potential liability for later bad faith claims is being litigated.

Colorado law permitting an insurer's intervention in underlying tort litigation between a third-party and an insured is still unsettled and evolving. Though intervention in this context is still a matter of first impression in Colorado, it is likely that insurers meet all Rule 24 intervention requirements and can successfully argue to be allowed to intervene in underlying tort actions in order to promote public policy goals such as fairness and judicial economy.

when all of the parties are involved and can present evidence to the court on the issue at one hearing"); *H.B.H.*, 823 P.2d at 1337–38 (citing *Anderson,* 762 P.2d at 650) (finding error where trial court failed to allow insurer to intervene).