UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

VINCENT E. FUREY, et al.,	***)***	
	)	
Plaintiffs	***)***	
	)	
v.	***)***	***Docket No. 01-03-P-C***
	)	
EXECUTIVE RISK INDEMNITY, INC.,	***)***	
et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON MOTION TO INTERVENE

Speltz Consulting LLC ("Speltz") seeks to intervene pursuant to Fed. R. Civ. P. 24 in the instant action seeking declaratory judgment regarding coverage of certain defense costs under two insurance policies and alleging breach of those contracts and bad faith by the insurers. Motion of Speltz Consulting LLC to Intervene ("Motion") (Docket No. 28). Both defendants object. Five of the thirteen named plaintiffs[1] purport to consent to the motion; the remaining plaintiffs have not responded and are therefore deemed to have waived objection. Local Rule 7(b). I recommend that the court deny the motion.

I. Intervention of Right

A would-be intervenor is entitled to intervention of right pursuant to Fed. R. Civ. P. 24(a)(2) upon a showing that (i) its application is timely, (ii) it has an interest relating to the property or transaction that is the subject of the action, (iii) it is so situated that the disposition of the action may as

[1] Specifically, plaintiffs Vincent Furey, James Kemer, Douglas Porter, Scott Taggersell and George Cooper. Plaintiffs' [sic] Response (*continued on next page*)

a practical matter impair or impede its ability to protect that interest, and (iv) its interest will not be adequately represented by existing parties. *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 637 (1st Cir. 1989). All four criteria must be met. *Id*.

A. Timeliness

The First Circuit identifies four factors relevant to evaluation of the timeliness of a petition to intervene: the length of time the petitioner knew or reasonably should have known of its interest before seeking intervention; prejudice to existing parties because of delay; prejudice to the petitioner if unable to intervene; and whether unusual circumstances militate for or against intervention. *Narragansett Indian Tribe v. Ribo, Inc.*, 868 F.2d 5, 7 (1st Cir. 1989).

The thirteen plaintiffs filed the complaint in this action on January 3, 2001. The motion to intervene was filed on June 11, 2001, over six months later. Speltz, which identifies itself as the successor in interest to Healthcare Accounting and Consulting Services, LLC as trustee of the JBI Creditors Trust in the consolidated Chapter 11 bankruptcy actions involving Jackson Brook Institute, Inc. and Viburnum, Inc., now pending in the bankruptcy court,[2] does not contend that it did not learn of the existence of this action at the time it was filed. Rather, it asserts that the present motion is timely because it was filed "within two and one-half months" of the filing of the defendant insurers' answers and "within weeks" of the filing of motions to dismiss by the defendants in a separate action brought in this court by Speltz's predecessor[3] seeking a declaratory judgment arising out of the same policies; deadlines for designation of expert witnesses and for discovery have not been reached; and there will be no prejudice to the existing parties if the motion is granted. Speltz Motion at 4. The defendants

---

to Motion to Intervene, etc. ("Furey Response") (Docket No. 35) at 1.

[2] The creditors' trust has brought an adversary proceeding in the bankruptcy court against the thirteen individuals who are plaintiffs in this action. In this action, those individuals seek a declaration that certain insurance policies issued by the defendants provide ongoing coverage for their defense costs as those costs are incurred in the adversary proceeding and a finding that the insurers' refusal to reimburse them for those costs constitutes breach of contract and bad faith. Complaint (Docket No. 1).

respond that the deadline set by the scheduling order for adding parties in this case was May 16, 2001, a month before the motion to intervene was filed, Royal's Objection to Motion of Speltz Consulting, LLC to Intervene ("Royal Objection") (Docket No. 32) at 6, and that each of the *Ribo* factors counsels against finding the motion to be timely, Opposition of Executive Risk Indemnity, Inc. to Motion of Speltz Consulting LLC to Intervene ("Executive Objection") (Docket No. 33) at 8-9.

While a non-party that seeks to intervene in a pending action in this court cannot automatically be deemed to have been aware of a deadline for adding parties to that action established by a scheduling order which would not have been served on it, under the circumstances of this case it is apparent that Speltz or its predecessor was aware that this action had been filed soon after its filing. Given the facts that this court's Local Rule 16.2(c) informs counsel that scheduling orders will issue in all civil cases which will, *inter alia*, establish deadlines to join parties and that Speltz is represented by counsel familiar with the practices of this court, which include setting a deadline for joinder of additional parties within a few weeks of the date on which the scheduling order is issued, it is also reasonable to conclude that Speltz may be deemed to have been aware that a motion to intervene filed six months after the complaint was filed in this action would be untimely. There will be some prejudice to the existing parties resulting from Speltz's delay in filing this motion if it is granted because a pending motion for summary judgment is fully briefed and ready for the court's consideration; if the motion to intervene is granted, additional delay will be necessary in order to allow Speltz to submit argument on that motion and for the other parties to respond to those arguments. However, that prejudice would affect the plaintiffs, who claim entitlement to reimbursement for ongoing legal expenses, more than it would the defendant insurers. The only prejudice to which Speltz argues that it would be subjected if not allowed to intervene is that its interest would be impaired and

[3] *Healthcare Accounting & Consulting Servs., Inc. v. Executive Risk Indem., et al.*, Docket No. 01-103-P-C.

that its interest is not adequately represented by the existing plaintiffs. Motion at 4. For the reasons discussed below, neither of these assertions is persuasive. The parties have not drawn the court's attention to any unusual circumstances surrounding the pending motion that militate for or against granting it.

Relevant factors, accordingly, suggest that the motion is untimely, but that conclusion alone would not cause me to recommend that the motion be denied. Rather, I consider this conclusion along with my evaluation of the other elements set out in *Dingwell* as the basis for my recommendation.

B. Interest in Subject of Lawsuit

While "[t]here is no precise and authoritative definition of the interest required to sustain a right to intervene under Rule 24(a)(2)," the First Circuit has suggested that a would-be intervenor must demonstrate a "direct, substantial, and legally protectible" interest in the lawsuit in which it wishes to intervene. *Dingwell*, 884 F.2d at 638 (citations and internal quotation marks omitted). Here, Speltz asserts in conclusory fashion and without citation to authority that it is a beneficiary of the insurance policies at issue and therefore has a sufficient interest to be allowed to intervene. Motion at 5. Royal points out correctly that Speltz, which is not a party to either policy, cannot have any interest in Counts II and III of the complaint in this action, which allege breach of contract and bad faith, claims that are only available to parties to the insurance contract. Speltz in effect confirms this observation by arguing that "it is well-settled that a declaratory judgment action against an insurer is wholly different from a direct action, such as an action brought under Maine's reach and apply statute, and is not subject to the same conditions precedent with respect to final judgment." Reply Memorandum of Speltz Consulting LLC in Support of its Motion to Intervene ("Speltz Reply") (Docket No. 36) at 4. Even so limited, however, Speltz's argument, based on its unsupported assertion that it is a beneficiary of the policies at issue, must fail.

Speltz can only be considered a possible beneficiary of the policies if its claims against the individual plaintiffs are determined to be valid and if the policies provide coverage for those claims. Under Maine law, the first issue must be determined before the second may be reached.

> Whenever any person . . . recovers a final judgment against any other person for any loss or damage specified in section 2903, the judgment creditor shall be entitled to have the insurance money applied to the satisfaction of the judgment by bringing a civil action, in his own name, against the insurer to reach and apply the insurance money . . . .
>
> * * *
>
> No civil action shall be brought against an insurer to reach and apply such insurance money until 20 days shall have elapsed from the time of the rendition of the final judgment against the judgment debtors.

24-A M.R.S.A. § 2904. Speltz has yet to obtain any judgment against the plaintiffs. Speltz's citation of case law to the contrary from other jurisdictions, Motion at 5 n.1 & Speltz Reply at 4, cannot override governing Maine law in this action. The First Circuit requires that a would-be intervenor's interest be "direct, not contingent." *Dingwell*, 884 F.2d at 638. Speltz's interest in the insurance policies, as Speltz itself describes it, cannot at this point be anything other than contingent. Speltz's interest is no less contingent than was that of the insurer who denied coverage in *Dingwell*, although the basis for that contingency is obviously different. It should also be noted that to the extent that the plaintiffs in the current action seek declaratory relief as to their defense costs, Complaint ¶ 16, that is an item for which Speltz could not recover under the policies in any event. Finally, the federal court's declaratory judgment jurisdiction should not be employed to make an end run around a state statute's substantive requirements, where there is no assertion that the statute itself is unconstitutional or otherwise invalid.

The interest-in-the-subject-matter element of the *Dingwell* test accordingly weighs against the granting of the motion to intervene.

C. Impairment of Ability to Protect Interest

Speltz contends, again only in conclusory terms, that, if it is not permitted to intervene in this action, it will "in all likelihood" be without an adequate remedy if it succeeds in its claims against the plaintiffs in the adversary proceeding. Motion at 6. It speculates that the insurance policies "may provide the only funds to satisfy a substantial judgment" if it obtains one in the adversary proceeding. *Id*. Royal does not address this argument. Executive contends that the existence of a reach-and-apply action under state law is sufficient, and that Speltz's success in the adversary proceeding is far from assured. Executive Objection at 8. Neither of the latter arguments addresses the possibility that this court may find that the policies at issue provide no coverage at all for the claims made by Speltz in the adversary proceeding, an outcome that may well impair Speltz's ability to protect its own interests, particularly if the court assumes the validity of Speltz's unsupported assertion that the individual plaintiffs lack the resources to satisfy the judgment that it seeks in the adversary proceeding. While this factor may thus be deemed to support the granting of the motion to intervene, it must be noted that the force of Speltz's argument is undercut when existing parties adequately represent its position, *International Paper Co. v. Town of Jay, Maine*, 887 F.2d 338, 344-45 (1st Cir. 1989), a factor which I discuss below.

D. Adequate Representation by Existing Parties

Speltz contends that the existing plaintiffs will not adequately represent its interest in obtaining coverage for the claims that it makes in the adversary proceeding because the plaintiffs "do not have the financial resources to argue fully and vigorously their rights under the . . . policies." Motion at 7. In support of this assertion, Speltz cites the affidavits submitted by three of the plaintiffs in support of their motions for summary judgment and makes the unsupported statement that "counsel to [all of the plaintiffs in this action] represented in the bankruptcy adversary proceeding that [the plaintiffs] did not have the resources to fund an adequate defense." *Id*. Speltz also argues that it alone can adequately

present its "unique legal status and bankruptcy history" to this court in connection with arguments made with respect to the pending motion for partial summary judgment on the "insured vs. insured" exclusion in both insurance policies. *Id*. at 7-8.

When an existing party shares "the same ultimate goal" as a would-be intervenor, the adequacy of representation is presumed. *Moosehead Sanitary Dist. v. S. G. Phillips Corp*., 610 F.2d 49, 54 (1st Cir. 1979). To overcome that presumption, a would-be intervenor must ordinarily demonstrate "adversity of interest, collusion, or nonfeasance." *Id*. Speltz provides nothing to suggest that its interest in obtaining a declaration that insurance coverage exists for its claims against the plaintiffs is at all adverse to the interest of the plaintiffs, that the plaintiffs are in any way colluding with the defendants, or that, having filed this action, the plaintiffs are failing to pursue it adequately. The affidavits to which Speltz refers establish only that the three affiants are incurring defense costs in the adversary proceeding, not that they are financially unable to proceed further. Affidavits of Lorraine Bouchard, George L. Cooper and Alexander J. Hoinsky, Items F, G & I in Appendix to Plaintiffs' Statement of Materials [sic] Facts in Support of Plaintiffs' Motion for Partial Summary Judgment. The five plaintiffs who responded to the motion to intervene do state that the costs that they are incurring in the adversary proceeding "are putting [them] to financial hardship" and that "absent an affirmative decision by this Court on Plaintiffs' motion for partial summary judgment, many — probably most — of the Plaintiffs will not have the resources to fund a vigorous defense against the Proposed Intervenor's claims against them in bankruptcy court," Furey Response at 2-3,[4] but these unsworn assertions do not help Speltz. First, the five plaintiffs cannot speak for the remaining eight plaintiffs on this point, who may well be able to finance a vigorous prosecution of their claims in this action, as, for all that appears from the submissions to date, all of the plaintiffs have done. Next, financial

[4] The five plaintiffs' "consent" to the motion to intervene is conditioned upon the court's ordering Speltz to file its brief on the pending
(*continued on next page*)

hardship does not equal an inability to proceed with adequate representation in this case. Finally, inability to present a vigorous defense in the adversary action will only serve Speltz's interests in that case, and will not affect the representation of its common interest with the plaintiffs here. "A party that seeks to intervene as of right must produce some tangible basis to support a claim of purported inadequacy." *Public Serv. Co. of New Hampshire v. Patch*, 136 F.3d 197, 207 (1st Cir. 1998). Speltz has not produced such a basis and has not made the "strong affirmative showing" that is necessary to overcome the presumption of adequacy in this case. *Id*.

Considering all of the *Dingwell* factors as set forth above, I conclude that Speltz is not entitled to intervention as of right in this proceeding.

II. Permissive Intervention

Speltz seeks intervention, in the alternative, pursuant to Fed. R. Civ. P. 24(b)(2). Motion at 1, 9. To qualify for permissive intervention under this subsection of the rule, a petitioner must satisfy the requirement of timeliness and assert claims or defenses that have "a question of law or fact in common" with the main action. The court must also "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 249b). The First Circuit imposes the additional threshold requirement of proving independent

motion for summary judgment within seven days of the court's order granting the motion to intervene. Furey Response at 2.

jurisdictional grounds for the claims or defenses. *International Paper*, 887 F.2d at 346. The court retains discretion to refuse permissive intervention even if all minimal requirements are met. *Amoco Oil Co. v. Dingwell*, 690 F. Supp. 78, 83-84 (D. Me. 1988), *aff'd*, 884 F.2d 629 (1st Cir. 1989).

Inasmuch as I have determined, for the reasons stated above, that Speltz's motion to intervene as of right is untimely, that Speltz has not demonstrated that it has a present interest in the subject matter of this action and that whatever interest Speltz may have is adequately represented by the current plaintiffs, I recommend that the motion for permissive intervention be denied as well.

III. Conclusion

For the foregoing reasons, I recommend that the motion to intervene filed by Speltz Consulting LLC be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 26th day of June, 2001.

David M. Cohen
United States Magistrate Judge

VINCENT E FUREY
plaintiff

ROBERT S. FRANK, ESQ.
HARVEY & FRANK
TWO CITY CENTER
P.O. BOX 126

PORTLAND, ME 04112
207-775-1300

GEORGE COOPER ROBERT S. FRANK, ESQ.
plaintiff (See above)

JAMES KEMER ROBERT S. FRANK, ESQ.
plaintiff (See above)

SCOTT TAGGERSHELL ROBERT S. FRANK, ESQ.
plaintiff (See above)

DOUGLAS PORTER ROBERT S. FRANK, ESQ.
plaintiff (See above)

FREDERICK J THACHER PETER J. DETROY, III
plaintiff 774-7000
NORMAN, HANSON & DETROY
415 CONGRESS STREET
P. O. BOX 4600 DTS
PORTLAND, ME 04112
774-7000

.
ROBERT SPIEGEL PETER G. CARY, ESQ.
plaintiff [MITTEL, ASEN, HUNTER & CARY LLC
P. O. BOX 427
PORTLAND, ME 04112
775-3101

KENNETH OLSON LAWRENCE C. WINGER, ESQ.
plaintiff ATTORNEY AT LAW
75 PEARL STREET
SUITE 217
PORTLAND, ME 04101

207/780-9920

JAMES LOW KAREN FRINK WOLF
plaintiff 761-0900
FRIEDMAN, BABCOCK & GAYTHWAITE
SIX CITY CENTER
P. O. BOX 4726
PORTLAND, ME 04112-4726
761-0900

JEFFREY A. DRETLER, ESQ.

PRINCE, LOBEL, GLOVSKY & TYE,
LLP
585 COMMERCIAL STREET
BOSTON, MA 02109-1024
(617) 456-8000

ALEXANDER HOINSKY MICHAEL A. NELSON
plaintiff 775-7271
JENSEN, BAIRD, GARDNER & HENRY
TEN FREE STREET
P.O. BOX 4510
PORTLAND, ME 04112
775-7271

SABIN R. THOMPSON, ESQ.
WILLIAM & PROCHASKA, P.C.
401 CHURCH STREET
SUITE 2600
NASHVILLE, TN 37219
615/242-0060

ELIA LIPTON, MD JAMES P. CLOUTIER

plaintiff CLOUTIER, BARRETT, CLOUTIER &
CONLEY

465 CONGRESS STREET
8TH FLOOR
PORTLAND, ME 04101
775-1515

NANCY IRVING DANIEL AMORY
plaintiff 772-1941

DRUMMOND, WOODSUM & MACMAHON
245 COMMERCIAL ST.
P.O. BOX 9781
PORTLAND, ME 04101
207-772-1941

LORRAINE BOUCHARD DANIEL AMORY
plaintiff (See above)

v.

EXECUTIVE RISK INDEMNITY, INC. ROBERT J. KEACH
defendant [BERNSTEIN, SHUR, SAWYER, &
NELSON
100 MIDDLE STREET
P.O. BOX 9729
PORTLAND, ME 04104-5029
207-774-1200

KIM V. MARRKAND, ESQ.
NANCY D. ADAMS, ESQ.

MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY & POPEO
ONE FINANCIAL CENTER
BOSTON, MA 02111
617-542-6000

ROYAL INDEMNITY COMPANY LOUISE K. THOMAS, ESQ.
defendant 773-6411
PIERCE, ATWOOD
ONE MONUMENT SQUARE
PORTLAND, ME 04101-1110
791-1100

LEE E. BERGER, ESQ.
SCOTT A. SCHECHTER, ESQ.
KAUFMAN, BORGEEST & RYAN
747 3RD AVENUE
27TH FLOOR
NEW YORK, NY 10017
(212) 980-9600

==========

SPELTZ CONSULTING LLC SETH W. BREWSTER
intervenor-plaintiff VERRILL & DANA
1 PORTLAND SQUARE
P.O. BOX 586
PORTLAND, ME 04112
(207) 774-4000