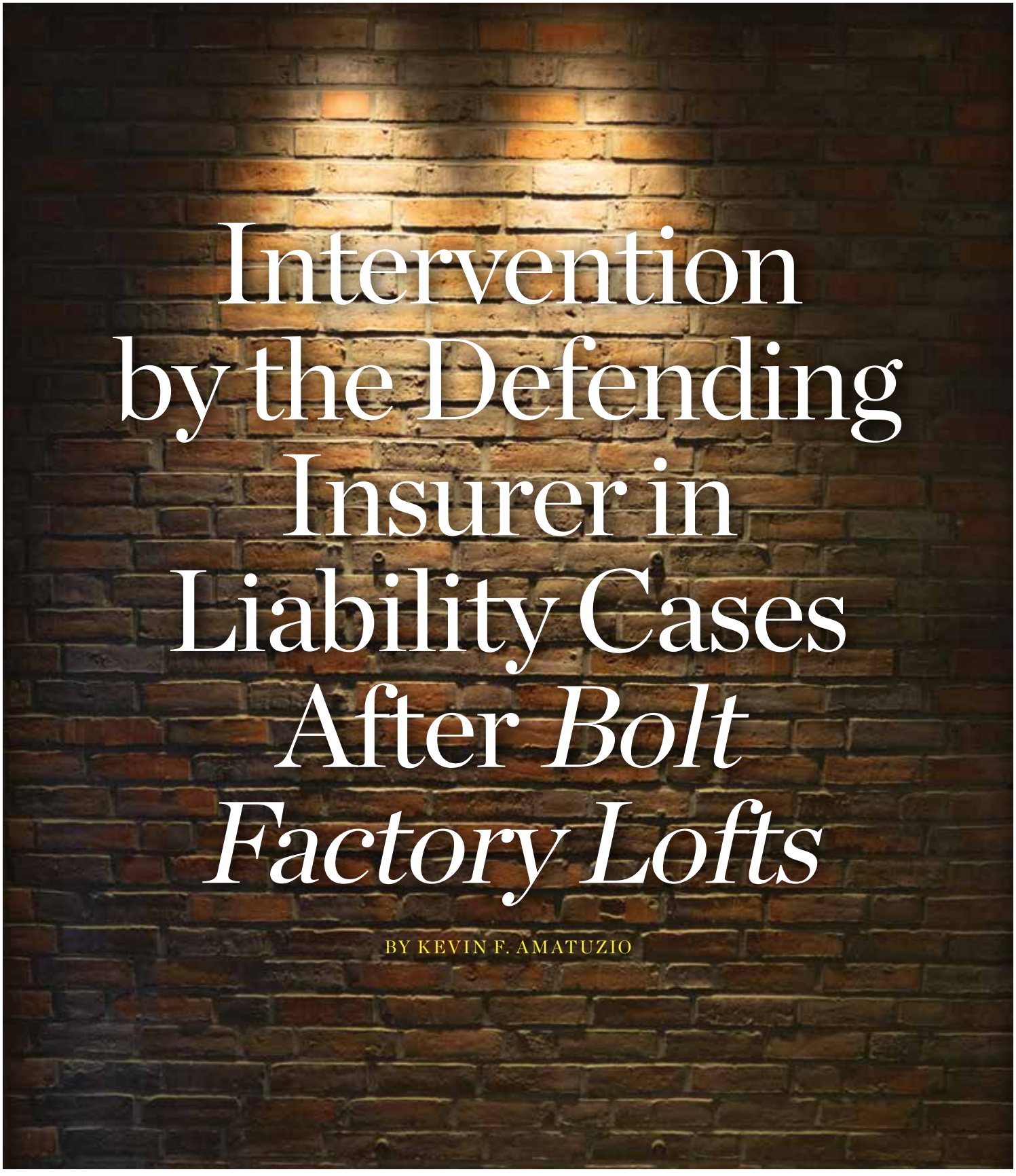

Intervention by the Defending Insurer in Liability Cases After *Bolt Factory Lofts*

BY KEVIN F. AMATUZIO

This article discusses the state of Colorado law regarding whether and when a liability insurer may intervene in the underlying liability case against the insured after the Colorado Supreme Court's recent decision in Auto Owners Insurance Co. v. Bolt Factory Lofts Owners Ass'n, Inc.

The existence and extent of a defendant's liability insurance coverage often depends on facts at issue in the underlying liability case. Additionally, pretrial settlements can involve stipulations, known as *Nunn* agreements,[1] between the insured defendant and the plaintiff with confessions of liability or for a consent judgment coupled with an assignment of rights against the insurer. Case law in Colorado has been mixed as to whether, and under what circumstances, a defending insurer has a right to intervene in the liability case against the insured to protect its own rights and interests. Much of this uncertainty was resolved by the Colorado Supreme Court's recent decision in *Auto Owners Insurance Co. v. Bolt Factory Lofts Owners Ass'n, Inc.*[2] (*Bolt*).

Bolt still left certain questions unanswered, including whether and when the liability insurer may intervene in the liability case to (1) advocate for using juror interrogatories and/or special verdict forms that may help establish the existence or extent of coverage for any damage award; or (2) protect its own interests as to any pretrial stipulated judgment or settlement. This article explores these issues and discusses arguments for and against such intervention after *Bolt*.

Intervention Under CRCP Rule 24

Intervention is governed by CRCP 24, which provides, in relevant part:

> (a) Intervention of Right. Upon timely application 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 he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Cases resolving motions to intervene hold that "Rule 24 should be liberally interpreted to allow, whenever possible and compatible with efficiency and due process, issues related to the same transaction to be resolved in the same lawsuit and at the trial court level."[3] Therefore, a court should liberally consider the movant's proffered interest in the subject property or transaction.[4] The interest prong "'is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'"[5]

Insurer Intervention in an Underlying Liability Case When the Insured Entered into a Pretrial Agreement

A defending insurer has an obligation to reasonably explore settlement.[6] An insured defended under reservation of rights facing exposure to a potentially uncovered damages award may seek to insulate itself from any ultimate judgment or settlement in exchange for certain concessions. Such concessions may include (1) a confessed or stipulated judgment, (2) an agreement not to introduce or contest evidence at trial, or (3) a confession of judgment for damages purportedly covered by the insurer's policy.[7] Such arrangements often include (1) a covenant not to execute a judgment in favor of the insured defendant, (2) an assignment of rights and claims against the defending insurer to the plaintiff, and/or (3) the insured agreeing to pursue its insurer for breach of contract or bad faith along with assignment of the proceeds of such claims to the plaintiff. The Colorado Supreme Court has recognized the validity of such agreements,[8] although in some cases has criticized them as potentially untrustworthy, collusive, and non-binding on an insurer that was not a party to the proceeding.[9] If the insured or settling plaintiff can prove that the defending carrier breached its duties to the insured in bad faith, however, the insurer may be liable to extend coverage for such a judgment or settlement.[10] Prior to *Bolt*, insurers disputing liability for such a judgment or settlement often sought to intervene, arguing that it was the best if not the only way to fully protect its rights. Parties in the underlying case often opposed intervention, arguing that intervention was unnecessary because the insurer has a right to challenge the insured's pretrial protective agreement in a later proceeding.[11]

Treatment of Insurer Intervention

Before the Supreme Court opinion in *Bolt*, several unpublished Colorado Court of Appeals cases held that an insurer that does not deny coverage has a right to intervene in cases in which its insured executes a *Nunn* agreement. In *Kuzava v. United Fire and Casualty Co.*,[12] decided in 2018, United Fire was defending its insured when, on the eve of jury trial, the insured and the plaintiff entered into a *Nunn* agreement by which the insured obtained a covenant not to execute and assigned all claims against the insurer to the plaintiff. The parties

further agreed to waive jury trial and submit their dispute to binding arbitration, which was not governed by the Colorado Rules of Evidence and had a limited right of appeal. The insurer sought leave to intervene. After a hearing attended and argued by the insurer but before a ruling on intervention, the trial court vacated the trial date and stayed proceedings for the parties to arbitrate. Shortly thereafter, the insurer filed its motion to intervene, which the court ultimately denied as moot. A substantial award was entered in the arbitration. On appeal, the Court of Appeals reversed. The court held that the insurer, which did not reserve the right to deny coverage, should have been granted intervention as a matter of right because (1) it had a direct interest in the lawsuit, (2) its interests were not protected by the insured under the *Nunn* agreement, and (3) there was no alternative forum (including the arbitration in which the insurer declined plaintiff's invitation to participate)[13] in which the insurer could protect its interest.

In another unpublished opinion issued in 2016, a different panel of the Court of Appeals decided *Blair v. Fred Loya Insurance Co.*,[14] which held, similarly to *Kuzava*, that the trial court committed reversible error in failing to grant intervention of right to an insurer whose insured had made a *Nunn* agreement, where the insurer did not reserve a right to deny coverage.

The Court of Appeals and Supreme Court Decisions in *Bolt*

On August 1, 2019, the Court of Appeals announced its decision in *Bolt*.[15] In *Bolt*, the insurer was defending its insured under a reservation of rights when the insured settled the claims against it using a *Nunn* Agreement,[16] under which the insured ultimately did not contest the evidence against it at trial. At the start of that trial, the insurer moved to intervene seeking to contest the settlement, continue the trial, and protect its rights under the policy. The trial court denied the insurer's motion to intervene, and the Court of Appeals affirmed. The Court of Appeals determined that the insurer's interest in the suit was contingent because it was defending under reservations,[17] and the insurer therefore lacked a sufficient "interest in the subject matter" to be granted intervention as a matter of right under Rule 24(a)(2).[18] The court agreed with the trial court's finding that the insurer's interests would be sufficiently protected by its filing of a declaratory judgment action.[19]

The Colorado Supreme Court granted certiorari and affirmed in a 4-3 decision, noting that intervention of right under Rule 24(a)(2) requires a fact-specific and liberally applied analysis.[20] The Court recognized that the party seeking intervention of right must prove (1) a claimed interest relating to the subject transaction, (2) that the disposition of the underlying action may impair its ability to protect its interest, and (3) that its interest is not adequately represented by existing parties.[21] The Court recognized its prior approval of *Nunn*-type agreements and also reaffirmed that pretrial stipulated judgments cannot be enforced against the insurer absent bad faith.[22] The majority in *Bolt* concluded that the agreement between the plaintiff and defendant was permissible under *Nunn,* although the trial court was not required to allow this process and could have required a standard *Nunn* agreement instead of determining damages during a bench trial.[23]

The Supreme Court affirmed the Court of Appeals' denial of the insurer's motion to intervene because the parties' agreement did not impair the insurer's interests. The insurer could protect its interests through a separate coverage declaratory judgment action (which the carrier in *Bolt* had in fact already filed), or by asserting defenses to any assigned claims brought against it by the plaintiff.[24] The Court held that the bench trial was similar to a stipulated judgment under *Nunn*, and therefore does not bind the insurer "until it has an opportunity to challenge the judgment and advance its defenses before a neutral factfinder."[25]

In a spirited dissent, Justice Samour, joined by Justices Hood and Boatright, criticized the bench trial between the plaintiff and defendant to secure the damage award, stating, "Make-believe or pretend play is fine in daycare centers and elementary schools. But it has no place in a court of law."[26] The dissent noted the non-adversarial nature of the bench trial: the defendant appeared but called no witnesses, failed to cross-examine the plaintiff's witnesses, presented no evidence, made no motions and gave no closing, and even announced to the judge that because of its agreement with plaintiff, the defendant was "not presenting a defense."[27] The plaintiff and defendant, the dissent explained, used a "bogus proceeding" to obtain an unopposed $2.5 million award, which the trial court ultimately endorsed.[28]

Notably, the dissent did not conclude that intervention should have been granted and the Court of Appeals decision reversed. Rather, the dissent urged that the case should be remanded to the trial court to give the plaintiff two choices: "enter into a true *Nunn* agreement with Bolt Factory or defend (through Auto-Owners' counsel) against Bolt Factory's claims in a good faith trial."[29]

Bolt's Impact on Insurer Intervention in Cases Involving Pretrial Settlements

It appears clear that after *Bolt*, absent materially different facts, insurers do not have the right to intervene in cases involving pretrial agreements. Notably, *Bolt* did not address permissive intervention under Rule 24(b). Permissive intervention is discretionary and requires a showing of common questions of law or fact and consideration of possible prejudice to the existing parties.[30] Ultimately, it seems likely that after *Bolt*, courts may hesitate to grant permissive intervention in cases where the insurer can protect its interests in other proceedings.

Insurer Intervention to Seek Guidance Regarding Covered and Uncovered Claims and Damages

Claims against an insured may seek damages that, depending on resolution of disputed facts in the liability case, may or may not be covered. *Bolt* did not address whether an insurer may intervene to help determine which, if any, damages awarded at trial are covered by its policy. Not all jurisdictions that have reached the issue agree on whether insurer intervention for this purpose is proper.[31] Some courts have suggested that insurer intervention may be appropriate, if not required, to obtain the jury's guidance regarding claimed covered and uncovered damages that could be awarded at trial.[32] This article next discusses insurer intervention in this context and the extent to which *Bolt* impacts such intervention.

When there is clearly no coverage for the claims against the insured, the insurer may disclaim coverage at the outset and decline to defend.[33] But sometimes disputed facts in the underlying liability case may impact coverage determinations, including the application of policy exclusions or other coverage issues. In that situation, the liability insurer will typically issue a Reservation of Rights (ROR) letter to its insured, advising that it will defend the insured in the lawsuit subject to a reservation of rights to ultimately decline coverage.[34] This may occur when the facts alleged in the complaint are vague or unclear as to whether covered damages are sought or if there is "some doubt" as to whether any part of the lawsuit could be covered.[35] When the facts relevant to determining coverage are not "independent of and separable from" the relevant facts in the liability case, those facts cannot be litigated until the tort suit against the insured is over to avoid prejudicing the insured's defense.[36]

Consistent with general contract principles, the party seeking benefits under an insurance contract typically bears the burden of proof. The insured has the burden to prove coverage exists, and the insurer has the burden to prove that an exclusion negates coverage.[37] When a case is tried to a verdict involving potentially covered or uncovered claims or damages, and a general verdict is entered, it may be impossible for a party to meet its burden to show whether or to what extent the verdict includes damages covered by the policy.[38]

Courts in other jurisdictions have held that an insurer who informs its insured of the need to submit special verdict forms may not be bound by a general verdict that does not apportion liability or damages between covered or uncovered claims. In contrast, even if post-verdict apportionment is not possible, the insurer may be liable for coverage if it did not advise the insured before trial that special verdict forms could help resolve the coverage issue and advocate for using them. As one court has stated:

> [The insurer's] notification of defense under a reservation of rights was not a sufficient notification to the insureds that they should protect their interest by requesting an appropriate verdict. The reservation was no more than a general warning, sufficient to preserve [the insurer's] right to litigate coverage but too imprecise to shield [the insurer] at a suit on the policy by the plaintiff's onerous burden of proving allocation.[39]

While no Colorado reported decision has addressed this issue, the Colorado Court of Appeals considered it in an unpublished opinion, *Gaffigan and Associates, LLC v. American Family Mutual Insurance Co.*[40] In *Gaffigan*, the insurer defended the insured in a construction defect suit under a ROR. A general verdict was entered and reduced to judgment, and the insurer denied coverage. In subsequent coverage litigation, the insurer argued that the insured's inability to apportion any covered damages precluded any coverage. The trial court rejected that argument and entered judgment for the insured. The Court of Appeals affirmed, observing that (1) the allocation burden shifts to the insurer when the insurer has a duty to defend, and (2) the insurer who controls the insured's defense should itself request special interrogatories or a special verdict. This duty applied even though the insured had personal counsel throughout the liability case. Because the insurer did not advocate for a special verdict in the liability case, its liability for the entire judgment was affirmed.

However, whether Colorado will recognize the rules articulated in *Gaffigan* and reported decisions from other jurisdictions remains unclear. Unpublished Court of Appeals decisions can be cited to other courts[41] and can have persuasive authority, but they cannot be cited in cases before the Court of Appeals[42] and have "no value as precedent."[43]

“Without special interrogatories and verdict forms, determining the coverage issues may require additional legal proceedings—such as a garnishment of the policy proceeds or a declaratory judgment action—in which the parties would need to prove which of the awarded damages are covered and which are not.”

Arguments for Insurer Intervention Because of Covered and Uncovered Claims and Damages

An insurer may argue that it has an interest in protecting itself in any proceeding that subjects it to potential liability. Both the insured and the plaintiff may desire to maximize coverage for any award, supporting an argument that the insurer's interests are not adequately represented by any party. While intervention of right was recently found inappropriate under Rule 24(a), the insurer may argue that Rule 24(b) authorizes permissive intervention because the claims and damages involve common questions of fact as to both liability and coverage.

An insurer may argue that a general verdict in the underlying liability case that does not correlate damages to claims for relief or separate covered and noncovered components might not resolve coverage issues. Thus, insurers may assert that the liability case jury is best equipped to determine facts relevant to resolving coverage questions and that special verdict forms or interrogatories will help guide those determinations.

Without special interrogatories and verdict forms, determining the coverage issues may require additional legal proceedings—such as a garnishment of the policy proceeds or a declaratory judgment action—in which the parties would need to prove which of the awarded damages are covered and which are not.[44] The judge or jury in such a proceeding may have to speculate as to the bases for the bare damage award. Disclosing liability insurance coverage creates a risk of prejudice against the defendant insured, so the insurer's intervention, if granted, need not and should not be disclosed to the jury.[45] An insurer seeking intervention might argue that no prejudice would result to any party if it is allowed to intervene for the limited purpose of advocating that jurors use special interrogatories and verdict forms to establish the existence and extent of insurance coverage for any verdict against the insured. An insurer might also argue that this process would ensure greater certainty and support judicial and litigant economies. Finally, the insurer could argue that granting intervention would prevent prejudice to either the insurer or the insured caused by a failure to seek such relief under case authorities such as *Gaffigan,* discussed above.

Arguments Against Insurer Intervention Because of Covered and Uncovered Claims and Damages

The insured and/or the plaintiff in the liability case may oppose insurer intervention. The insured may argue that the insurer's improper conduct, such as breaching a duty to defend or to reasonably pursue settlement, estops the insurer from seeking to intervene.[46] Such a prior breach arguably precludes the insurer from defeating an insured's arguments opposing intervention by citing to the policy's cooperation clause.[47] An insured may dispute an insurer's position that its and the plaintiff's interests are aligned in maximizing coverage because, where there is a *Nunn* agreement, the insured may focus more on facts needed to establish bad faith and less on establishing coverage.

An insured or plaintiff may also argue that the proffered "common questions of law or fact" are insufficient to warrant intervention. They might argue that multiple juror interrogatories and/or special verdict forms could cause inconsistent verdicts and/or juror confusion by interjecting issues not framed by the parties' claims or defenses, suggesting to jurors that insurance proceeds are available or otherwise impacting the jury's award.

Some courts deny intervention on the grounds that the insurer's interest depends on the plaintiff recovering and/or the insurer is not bound by coverage-related facts determined in the underlying trial and can protect its rights in a separate action.[48] Parties opposing intervention may argue that there are better ways to determine the extent of coverage, such as a post-verdict garnishment action on the policy, a declaratory judgment action by the insurer, or a breach of contract/bad faith action against the insurer by the insured. A party opposing intervention can argue that the trial court judge will also hear that same evidence and can determine any coverage issues in a subsequent garnishment action. On the other

hand, in a coverage declaratory judgment action or a breach of contract/bad faith action, some courts, particularly federal district courts applying an abstention doctrine, have declined to hear insurer coverage declaratory judgment actions when a parallel state court proceeding may resolve state law issues.[49]

Finally, parties opposing intervention may argue that intervention is unnecessary because the insurer is defending under a reservation of rights, is not itself a party to the case, and accordingly may not be bound by determinations made in the case.[50] Instead, the insurer is free to assert its coverage defenses in any other appropriate forum or proceeding.[51]

Applying *Bolt* to Intervention Due to Uncovered Claims or Damages

Although arising in a different context, certain principles articulated in *Bolt* may apply here. *Bolt*'s conclusion that the insurer had adequate protections available in other forums could well lead a trial court to reach the same result in this context. One arguable distinction with uncovered claims and damages is that the jury may be in the best position to answer those questions, and accurately allocating a general verdict afterward may be difficult, if not impossible. On the other hand, courts have done exactly that in cases where it was found to be possible.[52]

Additionally, *Gaffigan* and other cases suggest that an insurer that fails to affirmatively seek intervention on this basis might be deemed to have waived or be estopped from asserting the insured has the burden to prove coverage for the damage award. This arguably suggests the lack of an adequate remedy if intervention is not granted.

Some of the above authorities suggest that a defending insurer should put the insured on notice that covered and uncovered claims and damages may go to the jury, along with special verdict forms to help determine whether or to what extent covered damages are awarded. The ROR should note the insured's burden to prove coverage (unless the burden is not imposed on the insured), and that using a general verdict may deprive the insured of that ability. Prudent practice suggests that the insured should also be advised that the insurer may seek to intervene in the liability case to advocate for the use of special verdict forms. But because retained defense counsel may be conflicted from taking a position on whether to advocate for using special verdict forms,[53] the insured should be encouraged to seek legal advice on this issue from personal counsel. In some instances, the insurer and the insured might agree on the utility and substance of special verdict forms. Absent that, however, the insurer may seek permissive intervention. While the cases do not suggest a bright-line rule, they do support cogent arguments both for and against insurer intervention for this purpose.

Legal Authority for Intervention in Other Contexts

Because *Bolt* may not always apply to intervention with respect to covered damages or claims, case law on insurer intervention generally is instructive. *Bolt* was principally decided in the context of a *Nunn* agreement and based on the insurer's adequate remedy elsewhere, so case law considering insurer intervention in other contexts may be useful in arguing both for and against insurer intervention regarding coverage for claims and damages.

Colorado courts have allowed insurer intervention in various situations. In the workers' compensation context, where the existence of insurance is an integral part of the case, the compensation insurer has a right, and possibly a duty, to intervene in the injured worker's tort lawsuit against the negligent third party to protect its subrogation interest.[54] Similarly, an uninsured/underinsured motorist insurer has the right to intervene in the insured's tort action against the negligent driver to protect against possible collusion and to assure a vigorous and complete defense for the allegedly uninsured or underinsured defendant.[55] Intervention also prevents the UM/UIM insurer from being bound by the judgment entered against the defendant without the opportunity to participate in the lawsuit.[56] An insurer that has paid accident-related benefits to the insured may be able to intervene in the insured's lawsuit against responsible third parties to assert and protect its subrogation claim.[57]

In the specific context of liability insurance, there is precedent both granting and denying a liability insurer's request to intervene in the tort action against the insured defendant. In *Lahey v. Benjou*,[58] an auto accident victim sued the minor driver for negligence and the driver's parents for negligent entrustment and negligent supervision, and the parents' homeowners insurer intervened. In a declaratory judgment action, the insurer established that a policy exclusion precluded coverage for the parents in *Lahey*. In a case applying federal procedural law and Colorado substantive law, a partially subrogated insurer was held to be a real party in interest in the insured's lawsuit against the tortfeasor and was joined in the suit upon motion by the tortfeasor-defendant.[59]

Conclusion

Bolt makes clear that an insurer presented with a *Nunn*-type agreement will not be granted intervention in the liability case as a matter of right. While permissive intervention was not specifically addressed in *Bolt*, it seems likely that a court considering permissive intervention would be strongly influenced by that decision and deny permissive intervention under Rule 24(b) as well.

An insurer's right to intervene to advocate for special interrogatories or verdict forms does not appear to be controlled by *Bolt*, but the opinion provides fuel for argument on both sides. Trial courts likely retain discretion regarding intervention for claims coverage and specified damages, weighing the impact of *Bolt* on these issues on a case-by-case basis.

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NOTES

1. *Nunn v. Mid-Century Ins. Co.*, 244 P.3d 116 (Colo. 2010).

2. *Auto Owners Ins. Co. v. Bolt Factory Lofts Owners Ass'n, Inc.*, 487 P.3d 276 (Colo. 2021).

3. *Feigin v. Alexa Grp., Ltd.*, 19 P.3d 23, 26 (Colo. 2001) (citing and quoting *O'Hara Grp. Denver, Ltd. v. Marcor Hous. Sys., Inc.*, 595 P.2d 679, 686 (Colo. 1979)).

4. *Cherokee Metro. Dist. v. Meridian Serv. Metro. Dist.*, 266 P.3d 401, 404 (Colo. 2011).

5. *O'Hara Grp. Denver, Ltd.*, 595 P.2d at 687.

6. *Aetna Cas. & Sur. Co. v. Kornbluth*, 471 P.2d 609, 611 (Colo.App. 1970).

7. *Old Republic Ins. Co. v. Ross*, 180 P.3d 427, 431 (Colo. 2008).

8. *Nunn*, 244 P.3d at 119.

9. *Old Republic Ins. Co.*, 180 P.3d at 432 (citing cases).

10. *Nunn*, 244 P.3d at 119.

11. *Id.*

12. *Kuzava v. United Fire and Cas. Co.*, No. 17CA1085 (Colo.App. Aug. 23, 2018), *cert. den.*, 2019 WL 2746955. The author represented United Fire and Casualty Company in this case.

13. *Id.* at ¶ 16.

14. *Blair v. Fred Loya Ins. Co.*, No. 15CA0398, 2016 WL 5266601 (Colo.App. Sept. 22, 2016).

15. *Bolt Factory Loft Owners Ass'n, Inc., v. Auto Owners Ins. Co.*, 487 P.3d 1105 (Colo.App. 2019).

16. *Nunn*, 244 P.3d 116.

17. *Bolt*, 487 P.3d at 1109 ¶ 14.

18. *Id.* at 1109 ¶ 15.

19. *Id.* at 1110 n. 6.

20. *Auto Owners Ins. Co.*, 487 P.3d at 281.

21. *Id.* at 281–82.

22. *Id.* at 282–83.

23. *Id.* at 283.

24. *Id.* at 284.

25. *Id.*

26. *Id.* at 285.

27. *Id.*

28. *Id.* at 285–86.

29. *Id.* at 287.

30. CRCP 24(b).

31. *Compare Thomas v. Henderson*, 297 F.Supp.2d 1311, 1324 (S.D.Ala. 2003) (noting that courts had gone both ways on the issue but granting intervention without deciding if the proffered verdict forms would actually be given to the jury) *and Armor Screen Corporation v. Storm Catcher, Inc.*, No. 07-81091, 2009 WL 10667863 (S.D.Fla. 2009) (weighing factors and granting intervention) *with Nieto v. Kapoor*, 61 F.Supp.2d 1177, 1195 (D.N.M. 1999) (denying permissive intervention due to carrier's antagonistic position in relation to the plaintiff and potential to prejudice the defense, holding that a declaratory judgment action was preferable), *aff'd on other grounds*, 268 F.3d 1208 (10th Cir. 2001).

32. *See Thomas v. Henderson*, 297 F.Supp.2d 1311; *Armor Screen Corp.* 2009 WL 10667863.

33. *Hecla Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083, 1090 (Colo. 1991).

34. *Id.* at 1089.

35. *Id.*

36. *Constitution Assocs. v. N.H. Ins. Co.*, 930 P.2d 556, 562 (Colo. 1996). The author represented amicus curiae, Colorado Defense Lawyers Association, in this case.

37. *Colo. Intergovernmental Risk Sharing Agency v. Northfield Ins. Co.*, 207 P.3d 839, 842 (Colo.App. 2008), *Cf.* CRS § 13-20-808(6) (placing burden on insurer of a construction professional's alleged construction defect to prove a policy's limitation, exclusion, or condition bars or limits coverage and exceptions to the limitation, exclusion, or condition do not restore coverage under the policy).

38. *Cf. Jones v. Holiday Inns., Inc.*, 407 So.2d 1032, 1034 (Fla.App. 1981) (where party seeking contractual indemnification failed to request special verdict, general verdict barred indemnification because it was "impossible to deduce" the liability theory supporting the judgment); CRS § 13-20-808(6).

39. *Duke v. Hoch*, 468 F.2d 973, 979 (5th Cir. 1972) (applying Florida law and collecting cases). *See Pharmacists Mut. Ins. Co. v. Myer*, 993 A.2d 413 (Vt. 2010); *Magnum Foods, Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491, 1498 (10th Cir. 1994).

40. *Gaffigan & Assocs., LLC v. Am. Family Mut. Ins. Co.*, No. 13CA0997, 2014 WL 2885971 (June 26, 2014). The author represented American Family Mutual Insurance Company in this case.

41. *Patterson v. James*, 454 P.3d 345, 353 ¶¶ 38–40 (Colo.App. 2018).

42. Citation Policies, Policy Concerning Citation of Unpublished Opinions, Colorado Judicial Branch, https://www.courts.state.co.us/Courts/Court_Of_Appeals/Forms_Policies.cfm.

43. *Welby Gardens v. Adams Cty. Bd. of Equalization*, 71 P.3d 992, 999 (Colo. 2003).

44. The Colorado Supreme Court has indicated that post-verdict allocation may be possible in some circumstances but not others. *Bohrer v. Church Mut. Ins. Co.*, 965 P.2d 1258 (Colo. 1998).

45. *Jacobs v. Commonwealth Highland Theatres, Inc.*, 738 P.2d 6, 12 (Colo.App. 1986).

46. *Cf.* CBA Ethics Comm., Formal Ethics Op. 91, *Ethical Duties of Attorney Selected by Insurer to Represent its Insured* (Jan. 1993, addendum issued 2013) (hereinafter CBA Op. 91) (lawyer retained by insurer carrier "cannot ethically take any position which is potentially disadvantageous to the insured").

47. *Compare Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1109 (9th Cir. 2011) (applying Alaska law) with *Nelson v. Progressive Nw. Ins. Co.*, No. 15-7454, 2016 WL 880506 *5–6 (D.Kan. 2016) (expressing doubt whether a breach by the insurer of any duty other than the duty to settle will relieve the insured of the duty to cooperate).

48. *Hartford Ins. Grp. v. Dist. Court for Fourth Judicial Dist.*, 625 P.2d 1013, 1017 (Colo. 1981) ("If, on the other hand, the insurers furnish a defense to Red Ball, Hailey, and Johnson in the negligence action, and it is there determined that Johnson was not negligent, the insurer avoids any judgment liability under its insurance contract. In the event Cheney prevails in his negligence action against the named defendants, that determination will have no preclusive effect in the subsequent declaratory proceeding."). *See also Shelter Mut. Ins. Co. v. Vaughn*, 300 P.3d 998, 1001 (Colo. App. 2013) ("An insurer can defend a personal injury lawsuit 'without risking any adverse collateral consequences to [its] declaratory action from an unfavorable result in the [personal injury action].'"). *See also Kuzava v. United Fire*, No. 17CA1085 at n. 13; *Mut. Assur., Inc. v. Chancey*, 781 So.2d 172 (Ala. 2000).

49. *See Gov't Emps. Ins. Co. v. Rivas*, 573 F.Supp.2d 12, 14–15 (D.D.C. 2008); *Allstate Ins. Co. v. Best*, 728 F.Supp. 1263, 1268 (D.S.C. 1990).

50. *Colo. Farm Bureau Mut. Ins. Co. v. Snowbarger*, 934 P.2d 909, 912 (Colo.App. 1997).

51. *See Auto Owners Ins. Co.*, 487 P.3d at 284.

52. *See Duke v. Hoch*, 468 F.2d 973, 984 (5th Cir. 1972); *TIG Ins. Co. v. Premier Parks, Inc.*, No. Civ.A.02C04126, 2004 WL 728858, at *8 (Del. Super.Ct. Mar. 10, 2004) ("The Court can envision no further competent evidence of the jury's intentions beyond the verdict form and the trial transcript.").

53. *See* CBA Op. 91.

54. *Eckhardt v. Vill. Inn (Vicorp)*, 826 P.2d 855, 861–62 (Colo. 1992).

55. *Briggs v. Am. Family Mut. Ins. Co.*, 833 P.2d 859, 863 (Colo.App. 1992).

56. *Id.* at 864.

57. *Hauck v. Michelin N. Am., Inc.*, 343 F.Supp.2d 976 (D.Colo. 2004).

58. *Lahey v. Benjou*, 759 P.2d 855 (Colo.App. 1988).

59. *Cont'l Bus Sys., Inc. v. Rohwer*, 172 F.Supp. 487 (D.Colo. 1959).

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