UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN MILWAUKEE DIVISION

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| ZAZA PACHULIA and TINATIN ALAVIDZE,Plaintiffs,v.RANDY USOW ACCOUNTING, INC. and RANDY USOW,Defendants. | Case No.: 16-cv-1531 |

# CIVIL L. R. 7(H) EXPEDITED NON-DISPOSITIVE MOTION TO INTERVENE

Pursuant to Fed. R. Civ. P. 24(a) and Civil L. R. 7(h), Carolina Casualty Insurance Company ("Carolina Casualty") moves to intervene in the above action for the purpose of seeking a determination of the insurance coverage issues raised therein.

# BACKGROUND

Plaintiffs Zaza Pachulia and Tinatin Alavidze ("Plaintiffs") have filed suit against Defendants Randy Usow Accounting, Inc. and Randy Usow ("Defendants"), alleging breach of contract, negligence, breach of fiduciary duty, and fraud/intentional misrepresentation related to preparation of their tax returns. Carolina Casualty issued an Accountants Professional Liability insurance policy to Randy Usow Accounting, Inc., with effective dates of coverage from December 31, 2015 to December 31, 2016. (Kugler Aff., ¶ 2.) Defendants notified Carolina Casualty of the complaint and tendered their defense to Carolina Casualty on November 21, 2016. (Kugler Aff., ¶ 3.) Carolina Casualty has accepted the tender and is providing a defense under a reservation of rights. (*Id*.) Carolina Casualty believes it has meritorious coverage

defenses to the claims asserted in the Amended Complaint and wishes to assert such defense and obtain a declaratory ruling concerning its indemnity obligations. (Kugler Aff., ¶ 4.)

# ARGUMENT

Rule 24(a) governs intervention of right. *See* Fed. R. Civ. Proc. 24(a). Under Rule 24(a)(2), a party is permitted to intervene as a matter of right if it demonstrates satisfaction of the following four requirements: "(1) the application is timely; (2) the applicant has an 'interest' in the property or transaction which is the subject of the action; (3) disposition of the action as a practical matter may impede or impair the applicant's ability to protect that interest; and (4) no existing party adequately represents the applicant's interest." ***Security Ins. Co. of Hartford v. Shipporeit***, 69 F.3d 1377, 1480 (7th Cir. 1995) (internal citations omitted); *see also* ***David and Goliath Builders, Inc. v. Kramer***, Case No. 09-CV-0621, 2010 WL 145849, at \*1 (E.D. Wis. 2010). Carolina Casualty has the right to intervene because it has satisfied all four requirements.

First, this motion is timely. There is no "set time frame" under Rule 24(a), and the timeliness requirement serves "to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal." ***Midland Plastering Co., Inc. v. M&I Marshall & Ilsley Bank***, Case No. 06- CV-1251, 2008 WL 4282592, at \*2 (E.D. Wis. 2008) (citations omitted). This court has found motions to intervene filed before dispositive motions to be timely. *See* ***id.*** If permitted to intervene, Carolina Casualty is prepared to abide by the January 26, 2017 scheduling order in place. (Kugler Aff., ¶ 5.) Moreover, since Carolina Casualty does not seek bifurcation and stay of the merits portion of the lawsuit, this lawsuit will not be delayed by intervention.

Second, Carolina Casualty has a clear interest in the present action. Carolina Casualty has agreed to defend Defendants under a reservation of rights, and in the event of an adverse judgment, Defendants will likely look to Carolina Casualty for indemnification. Several of the

coverage defenses Carolina Casualty will assert, such as the policy exclusion for damages arising from fraudulent acts or omissions, would not apply until after there is a judgment on Plaintiffs' claims against Defendants. During the pendency of the litigation between Plaintiffs and Defendants, Carolina Casualty's intervention is necessary to allow Carolina Casualty to participate in discovery, motion practice, and submission of special verdict questions addressing possible coverage defenses. Moreover, if facts are developed during discovery to support Carolina Casualty's prior knowledge defense, application of this defense could be decided on summary judgment, without prejudicing the status of the merits portion of the lawsuit.

Third, disposition of the present action would impair or impede Carolina Casualty's ability to protect its monetary interests. As the Wisconsin Supreme Court has held, intervention and bifurcation of the insurance coverage issues from the trial on the merits is the preferred procedure in Wisconsin because it protects both the interests of the insured and the insurer where coverage is disputed. *See, e.g.,* ***Mowry v. Badger State Mut. Cas. Co.***, 129 Wis. 2d 496, 523, 385 N.W.2d 171 (1986); *see also* ***U.S. v. Thorson***, 219 F.R.D. 623, 626 (W.D. Wis. 2003)

(recognizing that when an insurance policy is issued in Wisconsin, Wisconsin law applies to determine the nature of the insurer's interest in the lawsuit under the Rule 24(a) analysis). While federal district courts do not frequently permit bifurcation and stay, Seventh Circuit courts and this Court have approved of Wisconsin's procedure permitting intervention. *See* ***HK Systems, Inc. v. Admiral Ins. Co.***, Case No. 03-C-0795, 2005 WL 1563340, at \*11 (E.D. Wis. 2005);

***Thorson***, 219 F.R.D. at 626-28; ***Quad/Graphics, Inc. v. One2One Communications, LLC***, Case No. 09-CV-99, 2010 WL 3937961, at \*1, 1 n. 1 (E.D. Wis. 2010); ***Bradley Corp. v. Zurich Ins. Co.***, 984 F. Supp. 1193, 1198 (E.D. Wis. 1997). Granting Carolina Casualty's motion will protect the interests of both Carolina Casualty and the Defendants.

Fourth, Carolina Casualty's interests are not represented by the existing parties to this litigation. Neither Plaintiffs nor Defendants, Carolina Casualty's insureds, represent Carolina Casualty's interests with respect to its duties to defend and indemnify Defendants.

# CONCLUSION

For the reasons set forth above, Carolina Casualty respectfully requests that the Court grant its motion to intervene pursuant to Rule 24(a). A proposed complaint for declaratory judgment is filed as **Exhibit A** to the affidavit filed in support of this motion.

Dated this 26th day of May, 2017.

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| /s/ Mollie T. Kugler |
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