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Practice and Procedure - Intervention by Insured in Actions Brought Under the Direct Action Statute

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meet the Board's monetary standards; but the plaintiff fails to present his case to the NLRB, the Board's General Counsel refuses to issue a complaint, or the Board finds no violation of the Labor Management Relations Act. In such cases it would appear that existing preemption principles will remain valid; and consequently, state court or state agency action will be precluded.

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PRACTICE AND PROCEDURE — INTERVENTION BY INSURED IN ACTIONS BROUGHT UNDER THE DIRECT ACTION STATUTE

Following a two-car collision, plaintiff, driver of one car, brought a direct action for damages against the other driver's insurer. The insured intervened, claiming damages against the plaintiff on the ground that the plaintiff's negligence was the cause of the collision. Plaintiff's objection to the intervention was overruled by the trial court. On appeal, the Orleans Court of Appeal held that the intervention should have been dismissed.[1] On certiorari to the Louisiana Supreme Court, *held*, reversed. In a suit against an insurer under the Direct Action Statute,[2] the insured is an interested party and can intervene to assist in proving plaintiff's fault and to recover damages from the plaintiff for injuries sustained in the collision. *Emmco Insurance Company v. Globe Indemnity Company*, 236 La. 286, 111 So.2d 115 (1959).

Article 390 of the Louisiana Code of Practice provides that a prospective intervener must have "an interest in the success of either of the parties to the suit, or an interest opposed to both."[3] The term "interest" has not been clearly defined by the jurisprudence.[4] It has been suggested, however, that it must be

1. Emmco Ins. Co. v. Globe Indemnity Co., 105 So.2d 748, 752 (La. App. 1958): "The so-called intervention in the instant suit being an independent claim asserted by intervenor against one of the plaintiffs, it seems to us it does not meet the test of law that the intervention must be one that must fall in the event of the dismissal of plaintiff's suit. This intervention, if such were authorized by law, could only have been dismissed in the event the plaintiffs were successful in their suit against the defendant!"

2. LA. R.S. 22:655 (1950).

3. LA. CODE OF PRACTICE art. 390 (1870), now LA. R.S. 13:390 (1950).

4. See Blodgett Construction Co. v. Board of Commissioners, Caddo Levee District, 153 La. 623, 96 So. 281 (1922) (contractor was allowed to intervene in suit by subcontractor against levee board to recover balance due on work done); Fortner's Heirs v. Pine Good Lumber Co., 146 La. 11, 83 So. 319 (1919) (person

more than the "real and actual interest" required for a separate action.[5] Having shown the required interest, the intervener must take the suit as he finds it[6] and must not cause an undue delay in the original proceedings.[7] Further, since the intervention is considered theoretically to rest upon the main demand, it has been held that it must fall when the main demand is dismissed or discontinued.[8] The latter rule has been criticized on various grounds. The theoretical basis for this result in inter-

in possession of land cannot intervene in an action to establish title between two other parties); Howell v. Mundy, 145 La. 291, 82 So. 274 (1919) (intervenor was allowed to intervene in a suit against his attorney); Rives v. Gulf Refining Co., 133 La. 178, 62 So. 623 (1913) (persons claiming a real right to land leased to the defendant in an action may intervene); Besson v. Mayor of Donaldsonville, 49 La. Ann. 273, 21 So. 262 (1897) (intervenor allowed to intervene, and set up title in themselves, in an action of slander of title by the plaintiff); Lincoln v. New Orleans Express Co., 45 La. Ann. 729, 12 So. 937 (1893) (ordinary creditor cannot intervene in an action by another ordinary creditor); H. B. Claflin Co. v. B. Feibelman and Co., 44 La. Ann. 518, 10 So. 862 (1892) (creditor allowed to intervene alleging a prior attachment on property); Jemison v. Barrow, 24 La. Ann. 171 (1872) (vendee of land not allowed to intervene in action between two mortgagees of the land); O'Brien v. Police Jury of Concordia, 2 La. Ann. 355 (1847) (plaintiff sued for contract price for building a levee, material furnisher not allowed to intervene as he was not a party to the contract).

5. LA. CODE OF PRACTICE art. 15 (1870), now LA. R.S. 13:15 (1950). Proposed Louisiana Code of Civil Procedure art. 1091, comment (a).

6. General Motors Acceptance Corp. v. Jordan, 65 So.2d 627 (La. App. 1953); Bonnabel v. Police Jury, 216 La. 798, 44 So.2d 872 (1950); Parish v. Holland, 166 La. 24, 116 So. 580 (1928); Cahn v. Ford, 42 La. Ann. 965, 8 So. 477 (1890). These rules are codified in the Proposed Louisiana Code of Civil Procedure, art. 1094: "An intervener cannot object to the form of the action, to the venue, or to any defects and informalities personal to the original parties." See also Fortner's Heirs v. Pine Good Lumber Co., 146 La. 11, 83 So. 319 (1919) (person in possession of land was not allowed to intervene in an action to establish title as it would have changed the form of the action).

7. Urania Lumber Co. v. Louisiana Tax Commissioner, 171 La. 973, 132 So. 650 (1931); Seib v. Cooper, 170 La. 105, 127 So. 380 (1930) (intervention could not be disposed of in advance as this would retard the principal suit); Jones v. Lawrence, 4 La. Ann. 279 (1849) (intervenor was held to have abandoned his action and court stated that when the principal demand had been tried no further proceedings could be had).

8. Holley v. Butler Furniture Co., 217 La. 8, 45 So.2d 747 (1950) (plaintiff had no right of action; therefore the intervention fell with the main demand); Miller v. Board of Commissioners of Port of New Orleans, 199 La. 1071, 7 So.2d 355 (1942) (the right to sue the Board of Commissioners had not been given; therefore plaintiff's action was dismissed and the intervention fell); Hodges v. General Motors Acceptance Corp., 141 So. 783 (1932) (reaffirmed the rule that the right to bring a separate suit is reserved to the intervener though he is dismissed when the plaintiff's action falls); St. Bernard Trappers' Ass'n v. Michel, 162 La. 366, 110 So. 617 (1926) (plaintiff made the motion that the suit be dismissed; on granting the motion, the court held the intervention fell with the main demand); Erskine v. Gardiner, 162 La. 83, 110 So. 97 (1926) (even though the plaintiff was dismissed as an imposter the intervention fell with the main demand); J. Meyers and Co. v. Birotte, 41 La. Ann. 745, 6 So. 607 (1889) (plaintiff's motion to dismiss was granted and court held that there was no difference between dismissal caused by defendant and one caused by plaintiff); Walmsley, Carver & Co. v. Whitfield, 24 La. Ann. 258 (1872) (plaintiff's suit dismissed on motion by the defendant and intervention fell); Todd v. Shouse, 14 La. Ann. 426 (1859) (suit dismissed when attachment on which suit rested was dissolved; intervention fell).

vention could apply also to third opposition and reconventional demand. Yet, the third opposition and reconventional demand do not fall when the main demand is dismissed or discontinued.[9] Further, when this rule is applied, the intervener has no chance of obtaining relief unless he joins the plaintiff in asserting a right against the defendant. When the intervener joins the defendant asserting a claim against the plaintiff or asserts a claim against both parties and is successful in getting the plaintiff's demand dismissed, his intervention falls.[10] Also, the intervention will fall in the event the plaintiff discontinues his suit.[11] The rule that the intervention falls with the main demand has been defended on the ground that the intervener retains his right to institute a separate action, but this is a hollow remedy since in most cases the intervener is prejudiced by the additional delay.

The instant case presented the court with a new setting in which to apply the above rules pertaining to intervention. Prior to the enactment of the Direct Action Statute[12] the insured was a necessary party in an action against his insurer,[13] and could reconvene for damages. However, this statute allows an action to be brought directly against the insurer without naming the insured as a party defendant. Thus, if the insured wishes to participate in a suit between his insurer and another party, his only remedy is the intervention which the insured sought to use in the instant case. The trial court found for the intervener on the merits, which resulted in the dismissal of the plaintiff's claim. Thus, the possibility of applying the rule that intervention must fall when the plaintiff's suit is dismissed was presented. However, the court refused to dismiss the intervener,[14] distinguishing the earlier cases on the basis that they did not deal with a "real party at interest (as contradistinguished from a stranger

9. Atkins v. Smith, 204 La. 468, 15 So.2d 855 (1943) (held that a third opposition does not fall with a dismissal of the main demand). The rule under the present law is the same in reconventional demands. Senseley v. First National Life Ins. Co., 205 La. 61, 16 So.2d 906 (1944); Rives v. Starcke, 195 La. 378, 196 So. 657 (1940); Stringfellow v. Nowlin Bros., 157 La. 683, 102 So. 869 (1925).

10. McMAHON, LOUISIANA PRACTICE 114, n. 58.2 (Supp. 1956).

11. St. Bernard Trappers' Ass'n v. Michel, 162 La. 366, 110 So. 617 (1926); J. Meyers and Co. v. Birotte, 41 La. Ann. 745, 6 So. 607 (1889); LA. CODE OF PRACTICE art. 491 (1870), now LA. R.S. 13:491 (1950).

12. LA. R.S. 22:655 (1950).

13. Edwards v. Fidelity and Casualty Co., 11 La. App. 176, 123 So. 162 (1929).

14. The Supreme Court stated that the result was "in keeping with our modern jurisprudence and recent legislative enactments which generally sanction procedural results tending to avoid a multiplicity of suits." 237 La. 286, 291, 111 So.2d 115, 117 (1958).

to a suit)."[15] This language might be questionable since the Code of Practice requires that all interveners have an interest in the controversy,[16] and if an interest had not been shown in those earlier cases the interventions would have fallen for that reason alone. Justification for the decision is found, however, in the fact that the insured had an interest in joining the defendant in resisting the plaintiff's demand. Thus the decision appears to fall within the letter and spirit of Article 390 of the Code of Practice. It would seem, however, that the court limited the holding of the instant case to actions brought under the Direct Action Statute,[17] and the old rule will continue to be applied in the other intervention cases not involving a use of the statute. It is perhaps unfortunate that the court failed to take advantage of this opportunity to overturn the rule requiring that the intervention fall upon the dismissal of the plaintiff's demand.

In the proposed Louisiana Code of Civil Procedure the question of who may intervene will be covered in Article 1091.[18] The principal change recommended is that the right sought to be enforced will have to be "related to or connected with the object of the pending action."[19] Furthermore the Louisiana State Law Institute has recommended that the federal rule, allowing the intervention to stand after the main demand has been dismissed, be adopted in Louisiana.[20] The other federal rules on the subject[21] were thought not to be acceptable to Louisiana practice.

15. 237 La. 286, 291, 111 So.2d 115, 117 (1958).

16. LA. CODE OF PRACTICE art. 390 (1870), now LA. R.S. 13:390 (1950).

17. 237 La. 286, 291, 111 So.2d 115, 117 (1958): "[T]he procedure receiving our approval herein is peculiarly applicable to those suits brought under the direct action statute where the intervener is a real party at interest. Incidentally, in effect it is the same procedure as that employed and recognized prior to the enactment of such statute."

18. "A third person having an interest therein may intervene in a pending action to enforce a right related to or connected with the object of the pending action against one or more of the parties thereto by:

"(1) Joining with the plaintiff in demanding the same or similar relief against the defendant;

"(2) Uniting with defendant in resisting the plaintiff's demand; or

"(3) Opposing both plaintiff and defendant."

19. Proposed Louisiana Code of Civil Procedure art. 1091. This requirement of connexity, taken from the Italian Code of Procedure, is both broader and more flexible than the test of a "common question of law or fact" of the federal practice.

20. Federal Rule 41(a); Proposed Louisiana Code of Civil Procedure art. 1039.

21. Intervention in the Federal Rules is divided into two groups, intervention of right and permissive intervention. 4 MOORE, FEDERAL PRACTICE, Rule 24, at 1 (2d ed. 1950). Besides the general provisions for intervention of right and permissive intervention there are also statutes granting each of these in specific instances. *Id.* paragraph 24.06 at 25 and paragraph 24.10 at 64. Professor Moore distinguishes the absolute and discretionary rights of intervention by stating: "The main practical difference between absolute and discretionary rights of intervention is that only in the absolute type will an appeal lie from the order refusing

Another change in the present law will be a broadening of intervention to include Louisiana's present third opposition.[22] Under the proposed Code of Civil Procedure an intervener may join with the plaintiff "in demanding the same or similar relief against the defendant," unite with the defendant "in resisting the plaintiff's demand," or oppose both the plaintiff and defendant.[23] These rules will probably provide a more definite test of the interest required to intervene without taking away the trial judge's right to use his discretion in certain cases.[24]

The adoption of the federal rule allowing the intervention to stand even though the main demand has been dismissed will effect a legislative overruling of cases which the court found it necessary to distinguish in the instant case. At the same time it will very appropriately result in the legislative adoption of the rule of the instant case without retaining the restriction imposed by the court.

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ROYALTY PER SE — WHO BENEFITS UPON ITS PRESCRIPTION

In 1943, Niblett Farms, owner of a tract of land with the minerals thereon, conveyed a 1/24th royalty interest to various persons. In 1948, Niblett Farms sold the land to the defendant Broussard, retaining a 3/32nd royalty interest which included the outstanding 1/24th royalty interest, and reserving 1/2 of all the minerals. The act of sale stipulated that in the event of production 2/3 of the total royalty interest was payable out of the mineral interests held by the vendor and 1/3 out of that held by

intervention, and there need be no independent ground of federal jurisdiction." *Id.* paragraph 24.07 at 32. Intervention of right is provided for the case in which a person will be "adversely affected by a distribution or other disposition of property in the custody of the court." *Id.* paragraph 24.08 at 35; paragraph 24.09 at 45. An applicant may be permitted to intervene if his claim has some question of law or fact in common with the main suit. *Id.* paragraph 24.10 at 59. The court exercises its discretion in these cases to determine whether the intervention will unduly delay or prejudice the adjudication. As regards the problem considered in the instant case, under the federal rules, the intervention does not fall with the dismissal of the plaintiff's action. Federal Rule 41(a)(2). This source was partially relied on for the rule of the Louisiana Law Institute in the Proposed Louisiana Code of Civil Procedure.

22. Proposed Louisiana Code of Civil Procedure art. 1092; LA. CODE OF PRACTICE art. 396 (1870), now LA. R.S. 13:396 (1950).

23. Proposed Louisiana Code of Civil Procedure art. 1091.

24. *Id.* art. 1091, comment (a).