

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

COUNTY OF WAKE

**SUPERIOR COURT DIVISION
CIVIL ACTION NO: 05-CVS-2500**

**HARCO NATIONAL INSURANCE
COMPANY,**

Plaintiff,

v.

GRANT THORNTON, LLP,

Defendant.

**ROSEMONT REINSURANCE LTD.'S
REPLY BRIEF IN SUPPORT OF
APPLICATION TO INTERVENE**

Petitioner, Rosemont Reinsurance Ltd. as Subrogee of Harco National Insurance Company (“Rosemont Re”), makes the following Reply In Support of its Application to Intervene:

I. INTRODUCTION

Rosemont Re suffered a loss of more than \$20 million when it paid that amount in reinsurance proceeds to Harco National Insurance Company (“Harco”). According to the allegations in this case, Grant Thornton LLP’s (“Grant Thornton”) negligence in auditing Capitol Bonding Corporation caused that loss. Having reimbursed Harco for more than \$20 million of the loss Harco suffered due to Grant Thornton’s negligence, Rosemont Re is subrogated to that portion (i.e., more than \$20 million) of Grant Thornton’s debt to Harco. It is extraordinary enough that Grant Thornton contends that it need not pay Rosemont Re, as Subrogee, or Harco, as Subrogor, for the \$20 million of loss caused by Grant Thornton’s negligence. Indeed, the proposition that Grant Thornton advances would stand on its head decades of subrogation and collateral source principals our courts have established: If Harco had self-insured its losses, so Grant Thornton suggests, the accounting firm would be required to pay damages for those losses,

but because Harco's losses were insured, Grant Thornton believes it can somehow avoid liability for them.

In opposing Rosemont Re's Application to Intervene, Grant Thornton takes that extraordinary proposition even further. Grant Thornton invites this Court to deprive Rosemont Re of payment for the \$20 million loss it undeniably suffered without allowing Rosemont Re to participate in that decision. Indeed, even though Grant Thornton has not filed a single brief supporting its extraordinary notions of subrogation and collateral source law, and even though this Court has not heard a single argument from any party concerning the propriety of Grant Thornton avoiding payment of a \$20 million loss its negligence allegedly caused, Grant Thornton asks this Court to make a dispositive ruling on this issue after kicking Rosemont Re out of the courtroom. Grant Thornton thus asks this Court, in effect, to award \$20 million to it rather than to Rosemont Re and to do so without allowing Rosemont Re to be heard on the issue.

Whether Grant Thornton can marshal any authority to support its novel view of subrogation and collateral sources principles is a question for another day. But, Rosemont Re suggests, neither the North Carolina Rules of Civil Procedure nor principles of due process and elemental fairness provide Grant Thornton with the right to preclude Rosemont Re from participating in the resolution of this question. In fact, the Court previously invited Grant Thornton to present this issue for a determination on the merits (see the Court's February 5, 2007 and April 20, 2007 Orders). Since Grant Thornton has not yet seen fit to seek such a determination, there is no undue prejudice to Grant Thornton on account of the timing of Rosemont Re's application. Grant Thornton's assertions of prejudice are window-dressing for its efforts to gain an unfair procedural advantage and avoid addressing the merits. Indeed, Grant Thornton seeks to exclude the party most directly interested in resolution of this \$20 million

question, presumably to facilitate a later argument that Harco is somehow seeking “a second recovery” for the amounts it was previously reimbursed by Rosemont Re.

Tellingly, Grant Thornton’s Brief never even addresses the North Carolina cases approving a subrogee’s pre-judgment intervention that Rosemont Re explained and relied upon in its initial Memorandum, including *Burgess v. Trevathan*, 236 N.C. 157, 161, 72 S.E.2d 231, 234 (1952) (Ervin, J.); *Kaminsky v. Sebile*, 140 N.C. App 71, 77, 535 S.E.2d 109, 113 (2000); *Colon v. Bailey*, 316 N.C. 190, 190, 340 S.E.2d 478, 479 (1986); *Taylor v. Green*, 242 N.C. 156, 87 S.E.2d 11 (1955); and *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 15, 362 S.E.2d 812, 821 (1987).

Instead of responding to these authorities, Grant Thornton’s Brief attempts to “gin up” a bunch of issues that are beside the point. Notwithstanding Grant Thornton’s contrary assertions, (1) in its papers, Rosemont Re, as Harco’s Subrogee, has given notice of its interest in the case and of its desire and intention to join in all of the counts of Harco’s amended complaint against Grant Thornton; (2) the Application to Intervene was not untimely and will not unduly prejudice the other parties; and (3) Rosemont Re has met the standards for intervention as of right and permissive intervention.

II. ARGUMENT

A. No New Complaint or Cause of Action Is Required Because Rosemont Re, as Harco’s Subrogee, Will Join in Harco’s Amended Complaint

In its Memorandum of Law in Support of its Application to Intervene, Rosemont Re observed that it “does not attempt to assert a new cause of action ... it merely seeks to protect its subrogation interests arising from the indivisible cause of action Harco has filed against Grant Thornton ... Encompassed in both Harco’s initial and its amended complaints are the losses for which Harco was indemnified by Rosemont. Accordingly, Harco’s intervention here would

require no special amendment to the complaint.” (Mem., pp. 2-3). In doing so, Rosemont Re relied upon the holding in *Burgess*, 236 N.C. at 160, 72 S.E.2d at 233, that its subrogation interest is part of a “single and indivisible cause of action against the tort-feasor for the total amount of the loss.”

None of the cases relied upon by Grant Thornton involved intervention by a subrogee seeking to protect its subrogation interest in a single indivisible cause of action. Subrogation was not at issue in *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 248 S.E.2d 904 (1978), where the court held that the plaintiff was not a proper party to collect country club dues from homeowners pursuant to a personal covenant (as opposed to a covenant running with the land) and intervention was denied because the putative intervener, a homeowner’s association, offered nothing to cure this fatal defect. *Gaskin v. Pennsylvania*, 231 F.R.D. 195 (E.D. Pa. 2005), is similarly inapposite as it involved parents of disabled students who reached a settlement agreement with the Pennsylvania Department of Education and the putative interveners only sought to scuttle the settlement.

By contrast with the interveners in those cases, Rosemont Re has a \$20 million stake in the amount of compensable damages includible in Harco’s claims against Grant Thornton. Rosemont Re’s Application to Intervene clearly stated both the grounds and the limited scope of the intervention it requested and that it would stand on Harco’s pleadings. Thus, Rosemont Re has complied with Rule 24(c).¹

B. Rosemont Re’s Application To Intervene Was Not Untimely and Will Cause No Undue Prejudice

¹ Grant Thornton also has objected to Rosemont Re’s Application to Intervene on the basis that intervention would introduce collateral issues into the proceeding. Thus, it is worth noting that Rosemont Re’s approach of seeking to join Harco’s pleadings as Harco’s subrogee (i.e., incorporating them by reference in its application) avoids introducing new issues.

“As a general rule, motions to intervene made prior to judgment are seldom denied. Conversely, motions to intervene made after judgment has been rendered are disfavored and are granted only after a finding of extraordinary and unusual circumstances” *State Employees’ Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 264, 330 S.E.2d 645, 648 (1985). Thus, under North Carolina law, the evaluation of timeliness and prejudice in connection with motions to intervene is forward-looking and intervention by interested parties is generally favored until the time judgment is entered, so long as there is no undue prejudice to the other parties. *See, e.g., Taylor v. Abernethy*, 149 N.C.App. 263, 267-68, 560 S.E.2d 233, 236 (2002) (“A motion to intervene is rarely denied as untimely prior to the entry of judgment, and may be considered timely even after judgment is rendered if ‘extraordinary and unusual circumstances’ exist.”); *Hamilton v. Freeman*, 147 N.C.App. 195, 201, 554 S.E.2d 856, 859-860 (2001) (same).

None of the cases relied upon by Grant Thornton involved intervention by a subrogee, and the different factual circumstances in those cases make their holdings inapplicable here. In *Holly Ridge Assocs., LLC v. N. Carolina Dep’t Env’tl. & Nat. Res.*, 361 N.C. 531, 648 S.E.2d 830 (2007), for example, the North Carolina Supreme Court held that business and environmental associations were not proper parties to a “contested case” administrative hearing where a property owner was appealing a fine imposed on it by a state agency. The Court’s holding makes quite clear that the prospective intervener’s lack of a direct interest in the subject of the case, not timeliness, was the deciding factor in the Rule 24(a) analysis. *See id.* at 538, 836 (“[T]he injuries alleged are not the kind of direct interest required for intervention of right here.”). In fact, the Court strongly implied that it viewed the motion as timely. *See id.* at 537, 835 (“We share the ALJ’s disquiet about the tardy filing but acknowledge that, in practice, “[a]s

a general rule, motions to intervene made prior to trial are seldom denied.” (citing *State Employees’ Credit Union*, 75 N.C. App. at 264)).

In *Berta v. State Highway Comm’n*, 36 N.C. App. 749, 245 S.E.2d 409 (1989), an inverse condemnation case, the court also denied intervention primarily because the prospective interveners had no claim and were not proper parties. *Loman Garrett, Inc. v. Timco Mech., Inc.*, 93 N.C. App. 500, 378 S.E.2d 194 (1989), was a garnishment case where intervention was denied because the same attorney that represented the defendant who had no defenses waited until the long-scheduled trial date to file an appearance on behalf of a third-party creditor and attempt to create an entirely new case on the day of trial. Finally, in *Wooten v. Moore*, 42 F.R.D. 236 (E.D.N.C. 1967), a civil rights era case where the only issue was whether a restaurant was involved in interstate commerce and thus subject to Federal civil rights laws, the court granted the United States Attorney General leave to file an *amicus* brief rather than allow him to intervene on the eve of an oft-delayed trial.

Given the timing and limited scope of Rosemont Re’s participation, there will be little if any impact on the current proceeding. Harco’s motion to amend its pleadings and Grant Thornton’s motion regarding choice of law issues currently are pending before the Court and will be resolved imminently. There still are several months before the deadline for summary judgment motions and it may be up to a year or more before trial and the time judgment is rendered. With regard to fact discovery, Grant Thornton already has obtained Rosemont Re’s arbitration documents and had ample opportunity to take third-party discovery with respect to any issues supporting its affirmative defenses. From Rosemont Re’s viewpoint, the damages issue is a matter of law for the Court to decide and there is no need to re-open fact discovery for any party.

As for the timing of the Application to Intervene, Rosemont Re lacked standing to intervene when Harco commenced this action in 2005 because Rosemont Re and other reinsurers were then engaged in an arbitration proceeding to rescind the Reinsurance Agreement and had not yet reimbursed Harco's losses. Soon after that arbitration concluded and Grant Thornton successfully moved to compel disclosure of arbitration material (see the Court's December 27, 2006 Order), Harco protected Rosemont Re's subrogation interest by seeking clarification (which was given in the Court's February 5, 2007 Order) that the resolution of the discovery dispute was not intended to, and did not, address the substantive damages issue. Additionally, as evidenced in the excerpt from the deposition transcript of David Pirrung of Harco attached as an Exhibit to the Affidavit of Kerrin M. Kowach, Harco and Rosemont Re were engaged in settlement discussions throughout this time.

As Grant Thornton concedes, the legal issue upon which Rosemont Re seeks to be heard has not yet been briefed, let alone decided. *See* Brief in Opposition at 5 n. 3 ("The issue of whether Harco may recover amounts that it had been reimbursed by others also was mentioned in other discovery motion briefing *but has not yet been the subject of full briefing.*") Indeed, the first exhibit Grant Thornton attached to its Brief in Opposition was filed less than one month before Rosemont sought to intervene. *See id.* at 3 (quoting Harco's Fifth Amended Answers to Grant Thornton's First Set of Interrogatories, filed November 24, 2008). Because the legal issue upon which Rosemont seeks to intervene has not yet been briefed, argued, or decided, Grant Thornton's claim that intervention is untimely or prejudicial has no merit in the context of these proceedings. *See* N.C. R. Civ. Proc. 24, comment to Section (a) ("What will be 'timely' will depend on the circumstances of the case.") Accordingly, although the parties' divergent positions on the damages issue have been known and made of record for some time, sufficient

time remains to address the issue on the merits in advance of the final hearing and judgment without prejudice to the existing parties.

C. Rosemont Re Has Met the Standards for Intervention as of Right and for Permissive Intervention

Grant Thornton's objections that Rosemont Re fails to meet the standards for intervention as of right and for permissive intervention are equally misplaced. Grant Thornton relies on a series of inapplicable cases which hold that an insurer cannot intervene in an underlying liability action when the insurer simultaneously is denying coverage to its insured. *See Restor-A-Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871 (2d Cir. 1984), *Cincinnati Ins. Co. v. Young*, 852 N.E.2d 8 (Ind. App. Ct. 2006), and *Nieto v. Kapoor*, 61 F.Supp.2d 1177 (D.N.M. 1999). Since it was ordered to reimburse its share of Harco's losses and has paid more than \$20 million of those losses, Rosemont Re holds a direct and substantial interest in this case. *See Burgess*, 236 N.C. at 161, 72 S.E.2d at 234 ("Since an insurance company which pays the insured for a part of the loss is entitled to share to the extent of its payment in the proceeds of the judgment in the action brought by the insured against the tort-feasor to recover the total amount of the loss, *it has a direct and appreciable interest in the subject matter of the action . . .*" (emphasis added)).

Grant Thornton's assertion that an intervener's interest is rendered "contingent" because the intervener could lose on the merits, if accepted, would preclude any intervention by a subrogee. It is a truism that all litigants' rights are uncertain until a final judgment has been rendered and all appeals have been exhausted, but this uncertainty alone is insufficient to deny intervention. Certainly, the possibility that the Court may rule in favor of Grant Thornton and against Rosemont Re on the damages issue does not render Rosemont Re's interest "contingent" for purposes of denying its Application to Intervene.

Second, it would be hard to overstate the impairment of Rosemont Re's subrogation interest, as a practical matter, should the Court decide the damages issue in Grant Thornton's favor. Grant Thornton asserts that Rosemont could protect its interest by filing a separate action. *See, e.g.*, Brief in Opposition at 14 ("The existence of other means of redress warrants against intervention."). But the idea that Rosemont Re should be required to file a separate action to protect the interest being decided in this case runs contrary to the policy reasons supporting intervention. *See, e.g., Holly Ridge*, 361 N.C. at 540, 648 S.E.2d at 837 (describing "the laudable purpose of Rule 24 intervention" as the promotion of efficiency and the avoidance of a multiplicity of suits). Contrary to Grant Thornton's assertions, Rosemont's intervention provides the most direct and efficient means to resolve this dispute. In fact, it is difficult to conceive of what alternative procedural avenue would be open to Rosemont Re to pursue recovery of the more than \$20 million of Harco's losses that it has reimbursed.

Third, the burden of showing a lack of adequate representation is a minimal one, and the United States Supreme Court has held that an applicant who has raised a doubt about the adequacy of representation has satisfied the requirement. *See Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972) ("The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as *minimal*." (emphasis added)). As acknowledged by Harco in its Reply to Grant Thornton's Opposition, the fact that a damages verdict excluding Rosemont Re's payments to Harco would fully compensate Harco but not Rosemont Re, Harco's subrogee, amply demonstrates that Harco does not adequately represent Rosemont Re's interests with regard to this issue.

Finally, with respect to permissive intervention, Rosemont Re's claim, as Harco's Subrogee, is part of a single, indivisible cause of action, so it clearly "shares a common question of law or fact with the pending action" as required by Rule 24(b).

III. CONCLUSION

For all of the foregoing reasons, Rosemont Reinsurance Ltd. respectfully requests that the Court grant its Application to Intervene in this matter.

This 26th day of January, 2009.

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CERTIFICATE OF COMPLIANCE WITH RULE 15.8

The undersigned attorney for Rosemont Reinsurance Ltd. hereby certifies that this brief complies with the requirements contained in Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court.

/s/ David C. Wright, III
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **REPLY BRIEF IN SUPPORT OF ROSEMONT REINSURANCE LTD.'S APPLICATION TO INTERVENE** was served on each of the parties to this action via electronic transmission addressed as follows:

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This 26th day of January, 2009

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