

Can an Intervening Insurance Company Sue for Breach of Contract?

If a party in litigation has a default judgment entered against it, can its insurance company still file a motion to intervene and use the same defenses that would have been available to the insured if not procedurally barred as a result of the default? In [*Western Heritage Ins. Co. v. Superior Court*](#), 199 Cal.App.4th 1196 (2011), the Court determined the answer to be “yes.”

In that matter involving a developer who entered into construction contracts with subcontractors, the court noted, among other things, that (a) An intervening party is not bound by another party's procedural defaults; and (b) Cases permitting insurers to intervene do so in order to allow the insurers to litigate liability and damages issues their insureds are prevented from litigating.

A recent [article](#) about *Western Heritage* argues an intervening insurance company has a right, as part of such an intervention, to bring a breach of contract action against subcontractors for failure to obtain additional insured endorsements, if the breach of contract action can be considered a defense, and that this holds true even if the insurer is not a party to such contracts.

When determining if a breach of contract action by an insurer under these circumstances is permitted, the following inquiries should be made:

1. Will a windfall or alternative recovery occur if the insurer pursues the breach of contract claim? (If so, the claim should not be permitted.)
2. Is the breach of contract claim directly and contractually linked to the damages sought by plaintiffs? (If not, the claim should not be permitted.)

Subcontractors should be aware of potential limitations that apply to actions brought by insurers who intervene, and take steps to ensure that the process is appropriate to the underlying action.

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