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### Summary of Rocker v. KPMG LLP, 122 Nev. Adv. Op. No. 101, 148 P.3d 703

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*Nevada Law Journal*

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***Rocker v. KPMG LLP*, 122 Nev. Adv. Op. No. 101, 148 P.3d 703  
(Dec. 21, 2006)<sup>1</sup>**

**CIVIL PROCEDURE – PERSONAL JURISDICTION &  
PLEADING FRAUD WITH PARTICULARITY**

**Summary**

Appeal from an order of the Eighth Judicial District Court, State of Nevada, granting motion to dismiss for lack of personal jurisdiction and failure to plead with particularity.

**Disposition /Outcome**

Vacated in part, reversed in part and remanded with instructions. Vacated to the extent that the district court's order rests upon lack of personal jurisdiction and remanded to the district court for further consideration and to make findings of fact. Reversed to the extent that the district court's order was based on individual consumers' noncompliance with Nevada Rule of Civil Procedure ("NRCP") 9(b)'s specificity requirement.<sup>2</sup>

**Factual and Procedural History**

Automobile dealerships sold individual automobile consumers extended vehicle service contracts ("VSCs"), under which these individual consumers could make claims for covered repairs. The Delta Group promoted and marketed the VSCs to automobile dealerships.

Automobile dealerships sold individual consumers the VSCs as insurance products insured by National Warranty Insurance Corporation, Risk Retention Group ("NWIG"). The automobile dealers, promoters, and marketers took as much as 85 to 90 percent of the premium on each VSC as a commission, and allocated the remaining amount to an insurance reserve for paying claims. Sellers included the cost of a VSC in the cost of an automobile, and individual consumers financed the cost of a VSC through consumer loans. Lenders required NWIG to maintain an "A-" or better rating from A.M. Best, an organization that reviews and rates an insurer's financial condition. Without an "A-" or better rating, lenders would not finance a VSC as part of an automobile purchase.

The Delta Group and automobile dealers were members of NWIG. KPMG LLP ("KPMG") provided accounting services to NWIG. Several large-volume VSC sellers established offshore reinsurance companies to qualify for Internal Revenue Service ("IRS") tax exemptions, which the IRS made available to small, offshore insurance companies. KPMG marketed these IRS tax exemptions to VSC sellers. NWIG obtained reinsurance on the VSCs and used the reinsurers' names in its advertising materials.

In early 2003, NWIG and Pacific Fiduciary Investment Corporation ("Pacific") entered into a Bordereaux Assignment, Assumption and Trust Agreement ("Bordereaux Agreement"). NWIG assigned its VSC liability for those automobiles with more than 80,000 miles to Pacific.

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<sup>1</sup> Summarized by Matt Lay.

<sup>2</sup> NEV. R. CIV. P. 9(b) (2005). NRCP 9(b) reads in pertinent part, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

KPMG advised NWIG on the Bordereaux Agreement. NWIG would have been insolvent had it not assigned liability for VSCs on automobiles with more than 80,000 miles to Pacific, and would have lost its “A-” or better rating from A.M. Best. The Delta Group subsequently purchased Pacific’s liability under the Bordereaux Agreement and later refused to satisfy claims from VSC purchasers.

As a result of the Delta Group’s repudiation of VSC claims purchased by owners of vehicles with more than 80,000 miles, NWIG assumed responsibility for approximately \$100 million in unpaid VSC claims. Moreover, combined with other liabilities, the \$100 million in unpaid VSC claims outstripped NWIG’s assets. A.M. Best subsequently lowered NWIG’s rating to a “B,” and lenders were unwilling to finance VSCs guaranteed by NWIG, thereby reducing NWIG’s trade in VSCs.

In May 2003, NWIG ceased paying for repairs covered under the VSCs and transferred its reserves out of the United States. Then, in June 2003, NWIG commenced insolvency proceedings in the Grand Cayman Islands. NWIG retained KPMG as its trustee/liquidator in the insolvency proceedings.

Initially, individual consumers filed two separate lawsuits against various defendants, which were ultimately consolidated. In November 2003, the individual consumers filed a class action consolidated complaint against various parties involved in the VSC scheme, including auto dealerships, insurance and reinsurance companies, promotion and marketing companies, and accounting and actuarial firms, including KPMG. Several of the defendant parties moved to dismiss the consolidated complaint for failure to plead fraud with particularity as mandated by NRCP 9(b). The district court denied the defendants’ motion and granted the individual consumers leave to amend their class action consolidated complaint.

KPMG then moved to dismiss the individual consumers’ first amended consolidated complaint. KPMG alleged that the district court lacked personal jurisdiction over KPMG. Moreover, KPMG cited the individual consumers’ failure to plead fraud with particularity as required by NRCP 9(b). Finally, although the individual consumers’ first amended consolidated complaint included causes of action for fraud and unjust enrichment against KPMG, KPMG challenged the complaint for failure to state a claim for unjust enrichment as required by NRCP 12(b)(5).<sup>3</sup> After a hearing, the district court granted KPMG’s motion to dismiss and later certified the order as final. The individual consumers timely filed an appeal from the order granting KPMG’s motion to dismiss.

## **Discussion**

On appeal, the individual consumers argued that the district court had personal jurisdiction over KPMG, the individual consumers pleaded with particularity, and the district court erred in granting KPMG’s motion to dismiss for lack of personal jurisdiction.

### **1. Whether the district court had personal jurisdiction over KPMG.**

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<sup>3</sup> NEV. R. CIV. P. 12(b)(5). NRCP 12(b)(5) states in pertinent part, “[e]very defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (5) failure to state a claim upon which relief can be granted.”

The Nevada Supreme Court noted that the district court's order proffered no findings of fact indicating why the district court granted KPMG's motion to dismiss for lack of personal jurisdiction, and the Court was unable to determine on what legal ground the district court based its order. Thus, since the determination of personal jurisdiction is a fact-intensive inquiry, the Nevada Supreme Court could not determine whether the district court erred in granting KPMG's motion to dismiss for lack of personal jurisdiction.<sup>4</sup>

2. Whether the individual consumers pleaded with particularity.

An order granting a motion to dismiss for failure to state a claim is subject to a rigorous standard of review on appeal.<sup>5</sup> The Court must regard all factual allegations in the complaint as true and make all inferences in favor of the nonmoving party.<sup>6</sup>

Pursuant to Nevada Rule of Civil Procedure 9(b), a plaintiff must plead circumstances constituting fraud with particularity so as to "afford adequate notice to the opposing part[ies]," and aver to the "time, the place, identity of the parties involved, and the nature of the fraud."<sup>7</sup> The Court found that the individual consumers complaint lacked specificity about KPMG's action. Thus, KPMG could deny only a general allegation of wrongdoing, rather than specific charges of malfeasance. Thus, the individual consumers' complaint failed to meet the particularity requirements of NRCP 9(b).

Yet, the Court found that because KPMG and other defendants retained much of the information at issue in this case, the individual consumers were unable to comply with the specificity requirements of NRCP 9(b).

The Court noted that Federal Rule of Civil Procedure ("FRCP") 9(b) contains language identical to NRCP 9(b).<sup>8</sup> Moreover, the federal courts have recognized an exception to the FRCP 9(b) specificity requirement when the facts necessary for particularized pleading are "within the defendant's knowledge or are readily obtainable by him."<sup>9</sup> Thus, under these circumstances, a plaintiff may not merely allege suspicious circumstances, but must "state the factual basis for the belief."<sup>10</sup>

In *Dominicus Americana Bohio v. Gulf & Western*, the United States District Court for the Southern District of New York considered whether plaintiff, Dominicus Americana Bohio ("Dominicus"), averred fraud in a manner consistent with the strict requirement of FRCP 9(b).<sup>11</sup> The federal district court found that the plaintiff's allegation did not meet the strict pleading requirement of FRCP 9(b). However, because the circumstances surrounding the alleged fraud were "peculiarly within the defendant's knowledge," the court applied the relaxed standard, allowing the plaintiffs to conduct discovery, amend their complaint, and meet FRCP 9(b)'s specific pleading requirements.<sup>12</sup>

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<sup>4</sup> MGM Grand, Inc. v. Dist. Ct., 107 Nev. 65, 67-68, 807 P.2d 201, 202 (1991).

<sup>5</sup> Hampe v. Foote, 118 Nev. 405, 408, 47 P.3d 438, 439 (2002).

<sup>6</sup> *Id.*

<sup>7</sup> *Hampe*, 118 Nev. at 408, 47 P.3d at 439; *Brown v. Kellar*, 97 Nev. 582, 583-84, 636 P.2d 874 (1981).

<sup>8</sup> FED. R. CIV. P. 9(b). FRCP 9(b) reads in pertinent part, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

<sup>9</sup> *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993).

<sup>10</sup> *Id.*

<sup>11</sup> 473 F.Supp. 680 (S.D.N.Y. 1979).

<sup>12</sup> *Id.* at 693.

The Nevada Supreme Court noted that the federal district court's relaxed standard in *Dominicus* struck a reasonable balance between NRCP 9(b)'s stringent pleading requirement and a plaintiff's inability to allege the full factual basis concerning fraud where the information is solely in the defendant's possession and cannot be secured without formal discovery. Thus, the Court adopted the relaxed standard of the federal court in those situations where the facts necessary for pleading with particularity "are peculiarly within the defendant's knowledge or are readily obtainable by him."<sup>13</sup>

The Nevada Supreme Court found that offshore insurance requires complex accounting, KPMG advised NWIG on the Bordereaux Agreement, provided staffing for NWIG in an accounting capacity, promoted offshore reinsurance companies, and served as NWIG's liquidator/trustee, subsequently refusing to pay any VSC claims. Thus, the Court concluded that the individual consumers pleaded sufficient facts in their complaint to support a strong inference of fraud.

### **Conclusion**

The district court should apply the relaxed standard where the facts necessary for pleading with particularity, as required by NRCP 9(b) "are peculiarly within the defendant's knowledge or are readily obtainable by him."<sup>14</sup> In these circumstances, a plaintiff must aver that this standard is appropriate, and demonstrate in his complaint that he cannot plead with greater specificity because the defendant possesses the required information. The district court must allow the plaintiff time to conduct discovery only if the court finds the relaxed standard appropriate. The defendant must renew his motion to dismiss the plaintiff's complaint because it continues to fail NRCP 9(b)'s pleading requirement.

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<sup>13</sup> *Neubronner*, 6 F.3d at 672.

<sup>14</sup> *Id.*