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State Farm Mut. Auto. Ins. Co. v. Hansen, 131 Nev. Adv. Op. 74 (Sept. 24, 2015)

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CONTRACT: INSURANCE LAW

Summary

An attorney provided by the insurance company developed an attorney-client relationship with both the insured and the insurer, who had opposing interests in the litigation. Under RPC 1.7(a) “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.” If a conflict of interest between the insurer and insured arises, Nevada requires insurers to provide independent counsel for the insured. Additionally, reservation of rights does not create a per se conflict of interest. Courts must analyze on a case-by-case basis whether there is an actual conflict of interest.

Background

Plaintiff Hansen was injured when Brad Aguilar stuck Hansen’s vehicle. Aguilar was insured by State Farm Mutual Auto Insurance Co. (“State Farm”), who agreed to defend Aguilar under a reservation of rights. Aguilar and Hansen agreed to a settlement, in which Aguilar assigned his rights against State Farm to Hansen.

Hansen filed suit in federal district court, alleging that State Farm Mutual Auto Insurance Co. (“State Farm”), through its representation of Brad Aguilar, breached a contract, contractually or tortuously breached an implied covenant of good faith and fair dealing, and violated the Nevada Unfair Claims Practices Act when Aguilar struck Hansen’s vehicle.

The federal district court held that under the *Cumis* rule, State Farm breached its contractual duty to defend by not providing Aguilar with independent counsel of his choosing. *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc’y, Inc.*, holds that if an insurance company’s interests conflict with the insured’s, the insurance company must provide the insured with independent counsel.² State Farm moved for reconsideration and because these are issues of first impression in Nevada, the Nevada Supreme Court granted certiorari under NRAP5.

Discussion

The outcome of litigation may also determine the amount of insurance coverage. Nevada is a dual representation state, meaning that counsel appointed by the insurance company represents both the insurer and the insured.³ Accordingly, when an insurer provides counsel to the insured, a conflict of interest may arise. Under the *Cumis* rule, an insurer must pay for independent counsel of the insured’s choosing when a conflict of interest arises.⁴ Additionally, under the rules of professional conduct, an attorney cannot represent two clients with competing

¹ By Kristen D. Matteoni.

² 208 Cal. Rptr. 494, 506 (Ct. App. 1984), *superseded by statute as stated in* United Enters., Inc. v. Super. Ct., 108 Cal. Rptr. 3d 25 (App. 2010).

³ See *Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Ct.*, 123 Nev. 44, 52, 152 P.3d 737, 742 (2007).

⁴ *Id.* at 506.

interests.⁵ The Court, relying on both the *Cumis* rule and the rules of professional conduct, held that in order for the insurer to satisfy its contractual duty, it must provide the insured with independent counsel of their choosing when a conflict of interest between the insurer and the insured arises.

A jurisdictional divide exists as to whether reservation of rights creates a per se conflict of interest. Some jurisdictions maintain that reservations of rights creates a per se conflict while others look to whether there an actual conflict of interest exists.⁶ The Court adopts the view that a reservation of rights does not create a per se conflict and instead focuses on whether there is an actual conflict. Under this view, there is no conflict of interest if a reservation of rights is based on ancillary issues. Accordingly, an insurer is only required to provide independent counsel when an actual conflict of interest exists.

Conclusion

Under Nevada law, an insurer is required to provide independent counsel of the insured choosing when a conflict of interest arises between the insured and the insurer. A reservation of rights fails to create a per se conflict of interest. Instead, the courts must analyze on a case-by-case basis whether an actual conflict exists. Only if an actual conflict exists, must an insurer be obligated to provide the insured with independent counsel.

⁵ MODEL RULES OF PROF'L CONDUCT r. 1.7

⁶ See *Patrons Oxford Ins. Co. v. Harris*, 905 A.2d 819, 825-26 (Me. 2006). 7; *Cumis Ins. Soc'y, Inc.*, 208 Cal. Rptr. at 506.