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Nautilus Ins. Co. v. Access Med., LLC, 137 Nev. Adv. Op. 10 (Mar. 11, 2021)

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CONTRACT LAW: INSURER'S DUTY TO DEFEND; RIGHT TO REIMBURSEMENT OF
LEGAL FEES AND COSTS; UNJUST ENRICHMENT

Summary

Most standard liability insurance policies impose a duty on the insurer to defend its policyholder against suits by third parties seeking damages covered by the policy. However, insurers and policyholders often disagree as to whether the insurer's duty to defend is triggered by a particular suit, and these disputes can rarely be resolved before the policyholder is required to defend the third party's suit. As a result, insurers often offer to pay for the defense, while reserving its right to seek restitution if a court later determines that it did not have the duty to do so.

In *Nautilus Ins. Co. v. Access Med., LLC*, the Ninth Circuit Court of Appeals, under Nevada Rule of Appellate Procedure 5, asked the Supreme Court of Nevada whether an insurer is entitled to reimbursement of costs already expended in defense of its insureds where it has been determined that the insurer owed no duty to defend and the insurer expressly reserved its right to seek reimbursement. The Supreme Court of Nevada concluded that the answer is yes: when a party to a contract performs a disputed obligation under protest and a court later determines that the contract did not require performance, the party may ordinarily recover in restitution. Further, the Court concluded that this rule not only applies to insurance policies, but to any other contract.

Background

Ted Switzer and respondents were former business partners who sold medical devices until their relationship soured. Switzer filed a cross-complaint against respondents alleging, among other things, that respondents interfered with his prospective economic advantage. During discovery, respondents uncovered an email showing that one of their representatives approached a hospital administrator to discuss the sale of certain medical devices. In this email, the representative stated that Switzer had been banned from selling those medical devices.

Respondents requested their insurer, Nautilus, to defend them in against Switzer's claim because under their insurance policy, Nautilus was required to defend respondents against suits seeking damages because of a personal and advertising injury arising out of any oral or written publication of material that defames a person or organization. Although Nautilus initially declined to defend, it eventually agreed, while expressly reserving its rights to disclaim coverage, withdraw from defense, and obtain a reimbursement of defense fees if a court determined that Nautilus never had a duty to defend respondents under their contract.

Nautilus began to defend respondents against Switzer's suit while simultaneously seeking a declaratory judgment in a Nevada federal district court, stating that it had no duty to defend respondents. The federal district court granted the declaratory judgment, concluding that the parties' insurance policy was never triggered because Switzer's cross-complaint did not allege, and the email found during discovery did not contain, a false statement that would support a claim for defamation. Accordingly, Nautilus moved for relief, seeking reimbursement of the expenses it had already incurred while defending respondents. However, the district court concluded that

¹ By Brendon N. Brandão.

Nautilus was not entitled to such relief because it did not establish that it was entitled to reimbursement under Nevada law.

On appeal, the Ninth Circuit Court of Appeals affirmed that Nautilus did not have a duty to defend respondents. However, it concluded it could not determine whether Nautilus was entitled to reimbursement because this question turned on an unresolved issue of Nevada state law. Noting a split of authority among other state courts, the Ninth Circuit certified the question to the Nevada Supreme Court, which accepted the invitation to provide an answer because the question presented an issue of first impression in Nevada.

Discussion

Standard of review

The Court only accepts certification of “questions of law” under NRAP 5. These questions of law are decided de novo in accordance with the purpose of a certified question, which is to clarify its state’s law when there is no controlling precedent.² The Court does not revisit the certifying court’s factual determinations.

No contract governs the right to reimbursement here

Nautilus invoked the theory of unjust enrichment to argue that it is entitled to reimbursement. Respondents argued that unjust enrichment is not available when there is an express, written contract covering the same subject matter. Therefore, respondents contended that only the insurance policy governed this dispute.

While noting that any other contract would ordinarily govern similar disputes, the Court concluded that the “duty to defend from defamation suits” clause was never triggered here. As the federal district court held, and the Ninth Circuit affirmed, the email did not contain a false statement that would support a claim for defamation.

Accordingly, the Court gave no weight to respondents’ arguments concerning the scope of the insurer’s duty to defend, since the federal courts had already done that: they determined that Nautilus never owed a duty to defend. Finally, because the contract between the parties did not apply to this dispute, the Court held that the existence of the contract did not foreclose an unjust enrichment claim.

A party that performs a disputed obligation under protest, and does not in fact have a duty to perform, is entitled to reimbursement

The Court then turned to the merits of Nautilus’s unjust enrichment claim. The Court determined that Nautilus conferred a benefit onto the respondents by defending them against the defamation suit, and that respondents accepted Nautilus’s defense. The central issue then became whether equity requires respondents to reimburse Nautilus for a benefit it provided when it did not have a duty to do so.

Insurance companies tend to defend policyholders even when they do not believe they have a duty to do so, because if they were to refuse to defend and a court later determined that they *did* have a duty to defend, insurers may be subject to significant liability. Further, because insurers

² See NEV. R. APP. P. 5(a).

don't have the time to obtain a declaratory judgment from a court stating whether it has a duty to defend before defense action must be taken in a claim, it makes sense to decide quickly what to do, and to litigate later who must pay. The Court found this to be reasonable.

The Court concluded that when a court determines that the insurer never had contractual a duty to defend, and the insurer clearly and expressly reserved its right to seek reimbursement, it is equitable to require the policyholder to reimburse the insurer for defense expenses already paid. The Court held that, because the law has encouraged insurers to offer to defend doubtful claims, it is only fair to allow insurers to recover costs that they never agreed to bear in the first place.

Restitution does not modify the contract

Some courts have held that reimbursement is “tantamount to allowing the insurer to extract a unilateral amendment to the insurance contract.”³ Similarly, respondents argued that the policy's express language required Nautilus to bear “all expenses it incurs” for any claim it chooses to defend, whether or not the policy required it to defend that claim in the first place.

Because the majority's opinion inspired a dissent that agreed with this argument, the Court took another opportunity to reiterate its disagreement with the respondents' argument. It restated its reasoning that when a court holds that there never was a duty to defend, it is holding that the claims were never even potentially covered by the policy. Therefore, when an insurer reserved its right to seek reimbursement, it is not extracting an amendment to a contract that would otherwise govern its defense because, after all, *no* contract governed its defense.

Restitution does not erode the duty to defend

The Court strongly disagreed with the view that permitting reimbursement would amount to a retroactive erosion of the broad duty to defend and narrow the long-standing view that the duty to defend is broader than the duty to indemnify. The Court recognized that it is true that, in Nevada, the duty to defend is broader than the duty to indemnify because an insurer must defend even claims that the third party does not ultimately prove. But the duty to defend is not absolute. And when a court holds that a claim was never covered, then the court should hold that the duty to defend never arose. Accordingly, a consequence of such holding is that the insurer may be entitled to reimbursement if it reserved its rights.

Here, the parties contracted for Nautilus to defend against certain kinds of allegations, and the federal courts have determined that the allegation against the respondents were not of that kind. Accordingly, the Court reasoned that is not eroding the duty to defend by acknowledging its *existing* limits.

Conclusion

In providing an answer to the Ninth Circuit's certified question, the Supreme Court clarified that, in Nevada, (1) when a court determines that an insurer never owed a duty to defend, (2) the insurer expressly reserved its right to seek reimbursement in writing after defense was tendered, and (3) the policyholder accepted the defense from the insurer, then the insurer is entitled to that reimbursement. This holding stems from generally applicable principles of unjust

³ Gen. Agents Ins. Co. of Am. v. Midwest Sporting Goods Co., 828 N.E.2d 1092, 1102 (Ill. 2005) (internal quotation marks omitted).

enrichment and restitution, wherein the insurer confers a benefit to the policyholder, who appreciates the benefit, and because it is reasonable for the insurer to accede to the policyholder's demand, it is equitable to require the policyholder to pay.