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Nevada Supreme Court Allows Insurer to Recoup Defense Costs, Rejecting the Approach of the Restatement of the Law, Liability Insurance

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On March 11, 2021, the Nevada Supreme Court held an insurer that advances defense costs under a reservation of the right to recover them if a court later finds there was no duty to defend, is entitled to recoup those costs from its policyholder, and rejected the counter-position taken by the Restatement of the Law, Liability Insurance. *Nautilus Ins. Co. v. Access Med., LLC*, No. 79130, 2021 WL 936076 (Nev. Mar. 11, 2021).

This case arose from an underlying suit filed by Ted Switzer against his former business partners, Access Medical, LLC, Flournoy Management LLC, and Robert Clark Wood, II (the "policyholders"). Switzer asserted various claims against the policyholders, including interference with a prospective economic advantage, which he alleged caused injury to his personal and business reputation.

The policyholders tendered the defense of the underlying suit to their liability insurer, Nautilus Insurance Company. The policy required the insurer to defend the policyholders against "any suit seeking damages" because of a "personal and advertising injury," "arising out of … [o]ral or written publication, in any manner, of material that *slanders or libels* a person or organization or disparages a person's or organization's goods, products or services." (emphasis added). The insurer accepted the defense under an express, written reservation of rights, including the right to disclaim coverage, withdraw from the defense, and obtain reimbursement of defense fees it incurred in the event the court determined that there was no coverage for the claims asserted by Switzer against the policyholders.

Nautilus then brought a declaratory judgment action in Nevada federal district court seeking a declaration that it did not owe a duty to defend or indemnify the policyholders. The district court "found that the duty to defend was never triggered" because there was no allegation of "a false statement that would support a claim for defamation, libel, or slander." The insurer then moved for declaratory relief, seeking reimbursement of defense costs. The district court denied the motion, reasoning that Nautilus did not establish it was entitled to reimbursement under Nevada law.

On appeal, the Ninth Circuit found that whether the insurer was entitled to reimbursement was an unsettled question of Nevada law, recognized the split among jurisdictions on the issue, and certified the following question to the Nevada Supreme Court:

> Is an insurer entitled to reimbursement of costs already expended in defense of its insureds where a determination has been made that the insurer owed no duty to defend and the insurer expressly reserved its right to seek reimbursement in writing after defense has been tendered but where the insurance policy contains no reservation of rights?

The Nevada Supreme Court answered "yes." It held in a 4-3 decision that "when a court determines that the insurer never had a duty to defend, and the insurer clearly and expressly reserved its right to seek reimbursement, it is equitable to require the policyholder" to repay the defense costs previously incurred by the insurer under a theory of unjust enrichment.

The Court noted that, under Nevada law, "unjust enrichment is not available when there is an express, written contract." *LeasePartners Corp. v. Robert L. Brooks Tr.*, 942 P.2d 182, 187 (Nev. 1997). Here, however, the Court reasoned that the existence of the insurance contract did not bar an unjust enrichment claim because the federal courts had determined that the duty to defend was *never triggered*, and thus the insurance contract did not apply to the dispute.

The Court held that Nautilus had satisfied the elements of an unjust enrichment claim under Nevada law, because "[w]hen the insurer furnishes a defense, … the insurer has conferred a benefit on the policyholder, and … the policyholder appreciates it," and "it is only fair to permit … insurers to recover costs they never agreed to bear." Because the insurance contract was never triggered due to the lack of coverage, the absence of an express policy provision that would contractually entitle the insurer to recoupment was irrelevant. The insurer's right to recover was grounded on existing Nevada law governing unjust enrichment. The Court was persuaded by the Restatement (Third) of Restitution & Unjust Enrichment, which reasons that a reservation of rights preserves "a claim in restitution to recover the value of the benefit conferred in excess of the recipient's contractual entitlement." Restatement (Third) § 34 (2011). The Court noted that allowing insurer recoupment in this situation is the majority approach across the country.

Three justices dissented. They argued that the existence of the insurance contract precluded any equitable claim based on unjust enrichment. In addition, the dissenting justices argued that the policy's "silence on recoupment" should be construed against the insurer. On that basis, they concluded that the absence of an express policy provision indicated that the parties did not intend the insurer to recoup defense costs in these circumstances.

Crowell & Moring participated as counsel for the Complex Insurance Claims Litigation Association (CICLA) and American Property Casualty Insurance Association (APCIA), who were *amici curiae* in support of the insurer. On behalf of the *amici*, Laura Foggan participated in oral argument before the Nevada Supreme Court. The majority decision adopted key arguments articulated in the *amicus* brief, including that the Restatement of the Law, Liability Insurance adopts reasoning which "is inconsistent with [Nevada] precedent that 'legal principles applicable to contracts generally are applicable to insurance policies.'" *Century Sur. Co. v. Andrew*, 432 P.3d 180, 183 (Nev. 2018).

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