



**Andrew B. Downs**

San Francisco,  
Shareholder

Direct Dial: 415.352.2716

Fax: 415.352.2701

Email Attorney

## **In Nevada, Liability Insurer Cannot Exhaust Policy Before Judgment by Interpleading Funds**

By Andrew B. Downs

Last week, the Nevada Supreme Court joined California and some other states in holding that a liability insurer may not interplead its policy limits before a final judgment is entered against the policyholder for the purpose of exhausting its policy and terminating its duty to defend.

*Benchmark Insurance Co. v. Sparks*, 127 Nev. Adv. Op. 33 (2011) involved an attempt by an automobile insurer to interplead its policy limits so as to terminate its duty to defend the policyholder in the underlying action. The Nevada Supreme Court held that the insurer could not use the interpleader procedure to exhaust its policy limits before judgment was entered in the underlying action against the policyholder.

The Nevada Supreme Court's decision turned on its interpretation of the following policy language:

We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted.

In rejecting Benchmark's attempt to exhaust, the Nevada Supreme Court found the policy's exhaustion provision did not unambiguously alert the policyholder that Benchmark could terminate its duty to defend while a potential for indemnification still existed under the policy. Instead, it found the exhaustion provision to be ambiguous if it allowed exhaustion by means other than settlement or satisfaction of a judgment.

The *Benchmark* decision does not prevent liability insurers from interpleading their policy limits in Nevada, but it does restrict the insurer's ability to exhaust those limits before the underlying action settles or proceeds to judgment.

Andy Downs is a coverage attorney in the San Francisco and Las Vegas offices of Bullivant Houser Bailey PC. For more information about this eAlert, please contact the author or the Insurance Group of Bullivant Houser Bailey PC.