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Nevada Adopts Cumis Independent Counsel Rule; Holds Reservation of Rights Is Not a Per Se Conflict

By Andrew B. Downs

Yesterday, the Nevada Supreme Court adopted the "Cumis" independent counsel doctrine first adopted in California more than 30 years ago. In *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Op. 74 (9/24/2015), the court held policyholders are entitled to independent defense counsel at the insurer's expense when the insurer's reservation of rights creates an actual conflict of interest for defense counsel. The court also agreed with California that not every reservation of rights creates a conflict of interest requiring independent counsel, thus requiring case by case analysis rather than adopting a per se conflict of interest rule.

Nevada is a tripartite relationship state, where insurer-appointed defense counsel has two clients, the policyholder defendant and the liability insurer. Under Nevada law, the appointed defense attorney represents both the policyholder and the insurer. *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Ct.*, 123 Nev. 44, 152 P.3d 737 (2007). That dual representation was the key factor in the Nevada Supreme Court's decision. The court held, "Because Nevada is a dual-representation state, counsel may not represent both the insurer and the insured when their interests conflict and no special exception applies."

The Nevada court then proceeded to examine what would create a conflict of interest entitling the policyholder to independent defense counsel. It concluded the insurer's issuance of a reservation of rights did not per se create a conflict requiring independent counsel. Instead, it held a case by case analysis was necessary because the purpose of the rule is to enforce attorney conflict of interest rules. It thus tied the entitlement to independent counsel to whether defense counsel has an actual conflict of interest under Nevada's Rule of Professional Conduct 1.7. It explained, "This means that there is no conflict of interest if the reservation of rights is based on coverage issues that are only extrinsic or ancillary to the issues actually litigated in the underlying action."

By declining to adopt a bright line rule regarding when a conflict necessitating independent counsel exists, and by using the Rules of Professional Conduct for attorneys as the standard, the Nevada Supreme Court has established a standard that may be difficult for both claims professionals and appointed defense attorneys to apply, thus leading to more litigation and additional disputes. In addition, because the rule is a common law one, much as *Cumis* was before it was modified and clarified by statute, there is no standard for what reasonable fees are for independent defense counsel, which is likely also to create more litigation.