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Washington Supreme Court Tells Lawyers Representing Both Insurers and Insureds to Proceed—Carefully

By R. Daniel Lindahl, Daniel R. Bentson

According to the Washington Supreme Court, lawyers who represent insurance companies in coverage litigation may also defend insureds of those same companies in civil litigation. In its decision, however, the court cautioned that lawyers who represent both insurers and their insureds may at times have a conflict of interest that potentially exposes the lawyers to civil liability.

On September 14, 2017, the Washington Supreme Court issued its decision in *Arden v. Forsberg & Umlauf, P.S.* Case No. 93207-7. The facts of *Arden* were not unusual. Property and Insurance Company of Hartford retained Forsberg & Umlauf to defend Hartford's insureds in a civil action. Forsberg & Umlauf and Hartford had a long-standing relationship, which included representing Hartford in coverage litigation. The law firm did not disclose its relationship with Hartford to the insureds or obtain the insureds' consent to waive any potential conflict.

The civil action against the insureds eventually settled, with Hartford paying the settlement. But that did not deter the insureds from suing the law firm for breach of fiduciary duty and legal malpractice. The legal malpractice claims included a theory that the law firm had breached its duties to the insureds by failing to disclose the law firm's past representation of Hartford.

The trial court ordered summary judgment against the claims, and the Washington Court of Appeals affirmed. The Washington Supreme Court also affirmed the dismissal of the insureds' claims. In doing so, however, the court indicated that such claims could be legally viable.

The court flatly rejected the insureds' argument that a lawyer who represents an insurance company is automatically disqualified from representing that company's insureds. But the court cautioned that a lawyer who represents both an insurance company and its insureds potentially has a conflict of interest under Rule of Professional Responsibility 1.7(a)(2). The rule says that a lawyer has a conflict of interest if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer."

A lawyer who has a conflict of interest under Rule 1.7(a)(2) may proceed with representing a client only if, among other things, there is disclosure of the conflict and each affected client gives informed consent in writing.

The Washington Supreme Court ultimately affirmed summary judgment dismissing the claims on the grounds the insureds failed to prove the alleged breach had caused damages. And the important lesson of *Arden* is that, in Washington, lawyers may continue to represent both insurers and their insureds. But lawyers who represent both insurance companies and their insureds should recognize that they may have a potential conflict of interest and, therefore, they should take appropriate steps before proceeding to ensure compliance with Rule 1.7(a)(2) and safeguard themselves from potential liability down the road.