

NEVADA SUPREME COURT: INSURERS MUST PROVIDE INDEPENDENT COUNSEL FOR THEIR INSURED

BY SARAH J. ODIA, ESQ.



The Nevada Supreme Court recently held that Nevada law requires liability insurers to provide independent defense counsel for their insureds when there is a conflict of interest between the insurer and its insured. This issue of first impression was finally decided by the Nevada Supreme Court in *State Farm Mutual Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Op. 74 (Sept. 24, 2015).

The *Hansen* decision derives from the Rules of Professional Conduct. Nevada is a dual-representation state, whereby insurer-appointed counsel represents both the insurer and the insured.¹ Nevada's Rules of Professional Conduct (RPC) prevent a lawyer from representing clients with competing interests.² Therefore an attorney may not represent both an insurer and its insured when there is a conflict. Accordingly, in order to satisfy its contractual duty to defend, an insurer must allow its insured to select its own counsel and pay the reasonable costs of the independent counsel's representation of the insured.

Insurer-appointed defense counsel, in particular, should be aware of the *Hansen* decision and its potential implications on counsel's ability to concurrently represent both of its clients (the insurer and the insured).

When is an Insured Entitled to Independent Counsel?

Under *Hansen*, an insured is entitled to independent counsel when the insured has a conflict of interest with his or her insurance company such that counsel's representation of both clients would violate RPC 1.7(a).

One of the questions certified to the *Hansen* court was whether a reservation



of rights letter from the insurer creates a per se conflict of interest that entitles the insured to independent counsel. The *Hansen* court decided that a reservation of rights letter does not create a per se conflict; instead, because the right to independent counsel is rooted in the Rules of Professional Conduct, the *Hansen* court decided that there must be a conflict of interest that would prevent counsel's dual representation under RPC 1.7(a). Thus, counsel must look to the Rules of Professional Conduct to determine whether a conflict exists.

RPC 1.7(a) states, in part, a concurrent conflict of interest exists if:

1. The representation of one client will be directly adverse to another client; or



SHUTTERSTOCK

2. 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.

To determine if the insurer and insured's interests are directly adverse or if counsel's representation of both clients will be materially limited, counsel may look to both:

1. The reservation of rights letter from the insurer; and
2. Whether or not counsel has control over an issue in the underlying case that will also decide a coverage issue.

Reservation of Rights Letter

Counsel should obtain a copy of the insurer's reservation of rights letter to the insured. Although it is not clear from *Hansen* whether an insurer must expressly reserve its right to deny coverage to the insured before the insured is entitled to independent counsel, the reservation of rights letter is a good place to start. If the insurer has not reserved its right to deny coverage of the insured's liability in the underlying litigation, then there is potentially no conflict of interest. Under such circumstance, the insured may not face any exposure to personal

liability in the underlying litigation because the insurance carrier has agreed to cover the entire liability.

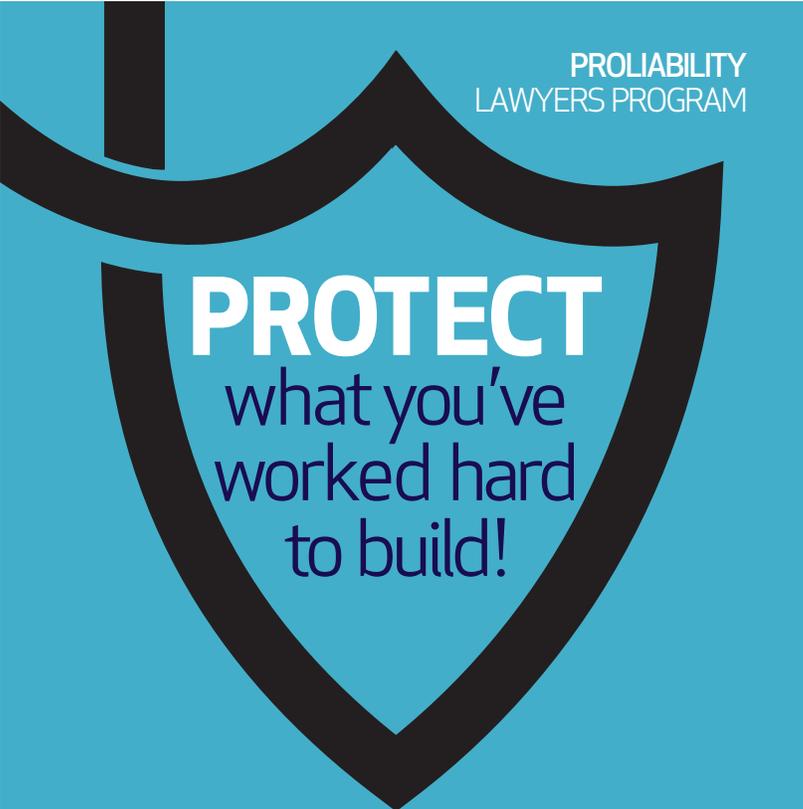
However, it is likely that there will be a reservation of rights letter from the insurer. An insurer will at least reserve its right to deny coverage for any liability that exceeds the insured's policy limits. The reservation of rights letter will often be lengthy and include every possible coverage exclusion and limitation. Counsel should evaluate every reservation and determine whether any reservation creates a conflict of interest under the Rules of Professional Conduct.

Counsel's Control Over Coverage Issue

Next, counsel should determine whether the underlying litigation may involve issues that will decide coverage. If the litigation involves coverage-determinative issues, then there is likely a conflict of interest between the insurer and the insured. Some common examples of such coverage-determinative issues include whether an insured acted intentionally, the timing and causation of property damage or bodily injury, and agency issues.

The litigation of coverage-determinative issues creates a conflict of interest between the insurer and the insured because defense counsel will likely have some control over the

continued on page 10

PROLIABILITY
LAWYERS PROGRAM


PROTECT
what you've
worked hard
to build!

PROGRAM HIGHLIGHTS:

50 State Solutions

Exceptional Customer Service

Dedicated Account Managers and Agents

Easy to purchase — Apply and obtain coverage online at www.proliability.com/lawyers

PROLIABILITY LAWYERS PROGRAM

Administered by Mercer Consumer, a service of Mercer Health & Benefits Administration LLC, with more than 40 years' experience in providing law firms with the protection they need and deserve.

GET YOUR QUOTE TODAY!

To obtain your Professional Liability Insurance quote:

VISIT  www.proliability.com/lawyersCALL  (303) 376-5860

AR Ins. Lic. #303439 | CA Ins. Lic. #0G39709

In CA d/b/a Mercer Health & Benefits Insurance Services LLC

69366, 69702, 69703, 70002 (2015) Copyright 2015 Mercer LLC. All rights reserved.

INDEPENDENT COUNSEL FOR INSUREDS

outcome of such issues. Defense counsel could take certain discovery, perform certain expert testing, and advocate certain views in court that could either help or hurt coverage. Thus, defense counsel could be left to choose between advocating for the insurer or the insured. Defense counsel cannot represent both clients (the insurer and the insured) in such a circumstance without violating RPC 1.7(a).

Counsel's Personal Interests

Insurer-appointed defense counsel should also be mindful of his or her own personal interests that could create a conflict of interest under RPC 1.7. For example, if defense counsel feels pressure to follow the instruction of the insurer (even at the expense of his or her other client, the insured), in order to secure future business from the insurer, then a concurrent conflict of interest may exist under RPC 1.7.

In addition, counsel should be mindful of RPC 1.8(f), which is also discussed in *Hansen*. RPC 1.8(f) provides that “[a] lawyer shall not accept compensation for representing a client from one other than the client unless ... [t]here is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship.” Counsel should ensure that his or her compensation from the insurer for representation of the insured does not interfere with counsel’s ability to adequately represent the insured.

Even though the *Hansen* decision borrows heavily from California’s *Cumis* rule,³ it is unclear whether Nevada attorneys can look to California case law for guidance. California’s *Cumis* rule has been codified (California Civil Code § 2860(b)) and appears to have diverged from its original roots in the Rules of Professional Conduct. Given the potential ethical violations at stake, Nevada defense insurer-appointed defense counsel should be cautious and cognizant of *Hansen*. **NL**

1. *Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 123 Nev. 44, 52, 152 P.3d 737, 742 (2007).
2. RPC 1.7(a).
3. *San Diego Navy Federal Credit Union v. Cumis Ins. Society, Inc.*, 208 Cal. Rptr. 494, 506 (Cal. Ct. App. 1984) superseded by statute as stated in *United Enters., Inc. v. Superior Court*, 108 Cal. Rptr. 3d 25 (Cal. Ct. App. 2010).

SARAH J. ODIS is an attorney at Payne & Fears, LLP. She handles matters involving construction defects, insurance coverage and employment law.

