

NEVADA LAW BULLETIN

Insurers defending under a reservation of rights should take note: “Cumis” is now the law in Nevada

Paul Bertone, Esq.

The Nevada Supreme Court has recently clarified a decades-old point of contention concerning whether an insurer may be required to secure independent “Cumis” counsel for its insureds.

In a concise, well-reasoned opinion, the Court in *State Farm Mutual Auto. Ins. Co. v. Hansen* adopted California’s “Cumis” standard (and approach) for determining if and when independent counsel need be appointed. In brief, Nevada law now requires an insurer to provide independent counsel when an actual conflict of interest arises between the insurer and the insured. Whether there is sufficient conflict to impose the independent counsel requirement is determined on a “case-by-case” basis. And critically, the mere issuance of a reservation of rights letter, standing alone, does not create a per se conflict of interest.

In arriving at its conclusions, the Court surveyed a variety of arguments outlining the various philosophies concerning the need for independent counsel in the insurance setting. But rejecting all other contenders, it found California’s “Cumis” model to be the best fit. The Court repeatedly emphasized the long established “dual” nature of assigned defense counsels’ representation in Nevada, the same model used in California, under which insurer-appointed counsel represents both the insurer and the insured. With an eye toward this dual representation, the Court reasoned that the “Cumis” rule was not based on insurance law at all, but on the ethical obligation of an attorney (also reflected in Rules of Professional Conduct) to avoid representing conflicting interests.

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Finally, recognizing the danger of insurer-provided counsel controlling an issue which ultimately could affect coverage, the Court surmised that “there is no conflict 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.” The need for independent counsel must therefore be determined on a “case-by-case” basis, and will be required only where the conflict is significant and actual.

In sum, insurers defending under a reservation of rights are advised that “Cumis” is now the law in Nevada.

Can an Insurer Circumvent Nevada’s Absolute Liability Statute?

Thomas P. Beko, Esq.

In *Torres v Nevada Direct Ins. Co.*, the Nevada Supreme Court considered whether an injured plaintiff, after obtaining judgment against a tortfeasor, could assert Nevada’s absolute liability statute, NRS 485.3091, in order to sue a tortfeasor’s insurer, and whether the injured party could also pursue a bad faith claim against the insurer.

Torres filed a complaint against Perez-Castellano as a result of a car accident. Perez-Castellano answered, but ultimately stopped participating in the action. Perez-Castellano’s insurance company, NDIC, filed a complaint for declaratory relief, maintaining that NDIC was not responsible for defense or indemnification of the matter because the insured failed to cooperate in the case. The district court entered a default judgment in the action and concluded that NDIC was not obligated to defend or indemnify Perez-Castellano. However, the court said that the default was not binding on Torres. Torres also acquired a default judgment in the liability action. Torres then sued NDIC, claiming that NDIC breached the implied covenant of good faith and fair dealing.

NDIC sought to dismiss for failure to state a claim, and the district court granted the motion. After a bench trial, the court concluded that Torres was not a contracting party or an intended beneficiary of the insurance contract and that Torres could not

recover under the absolute immunity statute. In Nevada, motor vehicles must be insured for at least \$15,000 bodily injury liability per accident. Under NRS 485.3091, every motor vehicle liability policy is subject to certain provisions, including one that states that the terms of an insurance policy include that liability “becomes absolute whenever injury or damage covered by the policy occurs.” The statute further provides that “no violation of policy defeats or voids the policy.”

The court held that post-injury conduct could not release the insurer under the absolute-liability provision. The statute requires the payment of these minimum benefits even if the insured breached the contract or made misrepresentations in the application. Accordingly, Perez-Castellano’s noncompliance with the cooperation clause of the policy did not void NDIC’s indemnity obligations, and the third-party claimant could sue the insurer to enforce compliance with NRS 485.3091.

The Court further reaffirmed that a third-party claimant could not pursue a bad faith claim against an insurer. The court reasoned that since third-party claimants do not have a contractual relationship with insurers, they cannot have standing to claim bad faith. Finally, the Court observed that NRS 485.3091 reflected no intent to allow third-party bad faith claims against insureds, and thus Torres had no standing to pursue such claim.



Erickson, Thorpe & Swainston, Ltd. would like to welcome **Brittany N. Cooper** as an associate of the Firm. Ms. Cooper was recently admitted to the State Bar of Nevada after graduating Magna Cum Laude from Gonzaga University School of Law, where she also was an Associate Editor of the Gonzaga Law Review and served as a Judicial Extern to Honorable Debra R. Hayes of Spokane County District Court. Before attending law school, Ms. Cooper attended the University of Nevada, Reno, earning a Bachelor of Arts Degree in Psychology, minoring in Addiction Counseling and Prevention Services (2006) and a Master's Degree in Justice Management (2011).

Everyone looks forward to working with Brittany. Please join us in welcoming her!

Court clarifies respondent superior liability for intentional, criminal acts of employees

Brittany N. Cooper, Esq.

After a ruling by the Nevada Supreme Court in *Anderson v. Mandalay Corp.*, a hotel guest who was raped by a housekeeper employee will be able to take her civil lawsuit against the hotel to trial.

The victim's attacker pled guilty to sexual assault in the underlying criminal matter. The hotel argued that it could not be responsible for the worker's actions, as they were unforeseeable and outside the scope of his employment. The trial court agreed and granted summary judgment for the defense.

According to plaintiff, she came to Las Vegas in the fall of 2008 on a business trip. She checked in, performed work-related business, and went out for dinner and drinks with co-workers. She became intoxicated and returned to the hotel at 2:00 a.m. Surveillance showed that she shared an elevator with the employee. She exited the elevator, entered her room, shut the door, and went to sleep. She later woke up vomiting and felt someone wipe her face with a washcloth and realized a man was in her room. She alleged that he raped her.

Plaintiff presented evidence showing that the employee was not closely supervised. Evidence revealed that there were five sexual assaults perpetrated by hotel workers on the hotel premises. Three of those incidents involved guests and two involved other employees. Further, evidence showed that the hotel received about one complaint per month of unauthorized employee entry into

occupied guest rooms. Online travel sites also reported this being a problem. Plaintiff further presented expert witness testimony indicating that the security provided by the hotel was insufficient, and that ongoing security defects created a dangerous condition.

The District Court granted the defense's motion for summary judgment, finding that the hotel could not be held vicariously liable because the worker's actions were independent, not committed in the course of a task assigned, and not foreseeable.

Disagreeing, the Nevada Supreme Court reversed and remanded the case for trial. The court noted that this particular employee had been the subject of a sexual harassment complaint and that there had been numerous reports of sexual assault by employees on the property in recent years. The hotel had notice that employees entrusted with keypad access to guest rooms sometimes abused that privilege by entering those rooms to commit property crimes, that employees were capable of sexual assault on guests and each other, and that this particular employee had been suspended for a month for harassing and threatening a female supervisor. Critically, despite all of this knowledge, the hotel restored the worker's key card access and assigned him to a job with little supervision.

Based on all of the evidence, the court concluded that a jury could find that the sexual assault was foreseeable. The case was thus remanded for trial.

Class Action Waivers in Employment Contracts are Valid and Enforceable

by Brett Dieffenbach, Esq.

On September 15, 2015, the Nevada Supreme Court issued an important decision in *Tallman v. Eighth Jud. Dist. Ct.*, with far-reaching implications for both employers and employees in Nevada. In *Tallman*, the Court analyzed the recent United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, and ultimately held that class action waivers in employment contracts are valid and enforceable.

The Plaintiff-employee sought to overturn a district court order compelling arbitration on his wage and hour claims against his former employer, both in his individual and purported class-action representative capacity. Tallman, through his employment agreement, signed both short- and long-form arbitration agreements which not only required arbitration of any dispute between employer and employee, but also included a waiver of his right to initiate or participate in collective or class actions.

The Court acknowledged that the typical individual wage-and-hour suit would revolve around relatively small-dollar claims and the inability to bring class-action suits on such claims may have a chilling effect. The Court had also previously held that class arbitration waivers in the context of consumer contracts of adhesion are

unconscionable and unenforceable when the amounts involved are too small to be challenged individually, such that they allowed the stronger party to escape liability. Ultimately, however, the Court felt bound by the holding of *Conception* and its broad language interpreting the Federal Arbitration Act.

In denying Plaintiff's request, the Court held the FAA is the supreme law of the land in any matter involving commerce. It was also inescapable that the FAA protected employers' ability to include class action waivers in their employment agreements even when requiring such individual arbitration hampers effective vindication of statutory claims.

Moving forward from *Conception*, many employers, through the use of carefully worded employment agreements, now have the ability to limit their employees' ability to bring suit outside of arbitration. This has the benefit of discouraging frivolous suits while also limiting legal expenses that would be incurred in full litigation. Likewise, employees must be careful to fully understand the terms of their labor agreements. They may sign away their access to the court and ability to join together to vindicate perceived injustices in the conditions of their employment.



Erickson, Thorpe & Swainston was founded in 1969. Since that time, the Firm has efficiently and successfully represented its clients in state and federal courts in Nevada and Northern California. As experienced trial and appellate attorneys, we vigorously advocate our clients' interests while remaining committed to the principles of the highest legal ethics.

Erickson, Thorpe & Swainston offers committed support in all phases of commercial and civil litigation, including labor and employment law and associated preventative employment services. We provide the experience necessary to meet our clients' expectations for an effective, efficient and timely resolution of their conflicts and issues. Our continued success in this highly competitive market demonstrates our widely recognized ability to deliver satisfaction and positive outcome to those who give us their trust – our clients.