

January 11, 2019

Nevada Supreme Court Holds Insurer Can Be Liable In Excess of Policy Limits for Breaching Defense

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In its recent decision in *Century Surety Co. v. Andrew*, 2018 WL 6609591 (Nev. Dec. 13, 2018), the Nevada Supreme Court had occasion to consider the damages available to an insured resulting from an insurer's breach of its defense obligation.

Century insured Blue Streak under a commercial auto policy and was determined to have breached a duty to defend its insured in an underlying personal injury lawsuit arising out of an auto accident. The lower court concluded that Century improperly relied on extrinsic facts in determining its defense obligation, and that as such, the disclaimer was improper. The Nevada federal district court nevertheless concluded that while Century breached its defense obligation, its conduct was not in bad faith and that as such, Century's payment obligation in connection with the resulting judgment was limited to its policy's limit of liability.

On appeal, however, the question was raised as to whether Century could be liable for consequential damages in excess of its policy's limit of liability as a "reasonably foreseeable result" of its breach of the duty to defend. This question ultimately was certified to the Nevada Supreme Court. In considering this question, the Court observed that the majority rule, by far, is that an insurer's damages for breaching the duty to defend are limited to reimbursement of defense costs and for payment of a resulting judgment or settlement up to policy limits, and only for covered damages, absent some finding of bad faith misconduct.

The Nevada Supreme Court, however, found the majority rule to lack sufficient protections for insureds. Citing to commentary in the ALI's Restatement of Liability Insurance, the Court observed that the minority rule is fairer to insureds since it offers an insured the better opportunity for being made whole as a consequence of the breach of the duty to defend rather than placing "an artificial limit to the insurer's liability within the policy limits for a breach of its duty to defend."

Thus, the Court adopted the rule that when an insurer breaches the duty to defend, it can be held liable for a resulting judgment in excess of its policy limits, irrespective of whether the insurer acted in bad faith. The Court did, however, place a limit on this outcome by stating that the insured still has the burden of showing that the excess judgment was a consequence of the insurer's breach and that the insured took all reasonable measures "to protect himself and mitigate his damages."