

Nevada Supreme Court Rules That Insurer Is Entitled To Defense Cost Reimbursement After No Duty To Defend Ruling

03.29.21



(Article from *Insurance Law Alert*, March 2021)

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Answering a question certified by the Ninth Circuit, the Nevada Supreme Court ruled that an insurer that defends under a reservation of rights is entitled to reimbursement of defense costs following a ruling that the insurer had no duty to defend. *Nautilus Ins. Co. v. Access Medical, LLC*, 2021 WL 936076 (Nev. Mar. 11, 2021).

Nautilus defended its insured under a reservation of rights that referenced its right to seek reimbursement of defense costs. While the underlying litigation was pending, Nautilus sought a declaration that it had no duty to defend. A Nevada federal district court ruled in Nautilus' favor and closed the case. Thereafter, Nautilus sought reimbursement of defense costs, which the court denied.

On appeal, the Ninth Circuit noted the lack of clarity under Nevada law regarding an insurer's right to reimbursement of defense costs following a no duty to defend ruling. See [July/August 2019 Alert](#). Therefore, the Ninth Circuit certified the following question of law to the Nevada Supreme Court:

Is an insurer entitled to reimbursement of costs already expended in defense of its insureds where a determination has been made that the insurer owed no duty to defend and the insurer expressly reserved its right to seek reimbursement in writing after defense has been tendered but where the insurance policy contains no reservation of rights?

This month, the Nevada Supreme Court answered the question in the affirmative. As a preliminary matter, the court rejected the policyholder's contention that recovery under an "unjust enrichment" theory is unavailable where there is an express, written contract. Further, the court concluded that it is equitable for an insurer to receive restitution for payments that the policyholder was not entitled to in the first place, so long as the insurer has expressly reserved its right to such reimbursement.

The court rejected the assertion that the reimbursement is tantamount to allowing the insurer to unilaterally amend the insurance contract, stating:

when a court holds that there never was a duty to defend, it is holding that the claims were never even potentially covered by the policy. Therefore, when the insurer reserved its right to seek reimbursement, it was not extracting an amendment to a contract . . .

. No contract governed its defense. In these circumstances, there is no reason it cannot reserve a right it has, not pursuant to the contract, but pursuant to the law of restitution.

As the court noted, this ruling accords with the law of California and the majority of other jurisdictions.

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