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Cases We're Watching: Certified Question to Nevada Supreme Court—Excess Carrier's Equitable Subrogation Claim

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Earlier this Fall, the Ninth Circuit certified the following question to the Nevada Supreme Court:

Under Nevada law, can an excess insurer state a claim for equitable subrogation against a primary insurer where the underlying lawsuit settled within the combined policy limits of the insurers?

The Nevada Supreme Court has since accepted the certified question and ordered briefing, which is currently underway.

The case at issue involves an equitable subrogation claim brought by an excess insurer against a primary insurer. The excess insurer filed suit against the primary insurer after the excess insurer paid $4 million of a $5 million settlement to resolve underlying litigation arising out of a murder at a Las Vegas apartment complex. The underlying litigation—alleging negligence and wrongful death against the insured owner of the apartment complex—was filed in 2019.

According to the facts as presented in the certification order, the primary carrier actively defended the underlying litigation. Between March 2019 and November 2021, the primary insurer apparently rejected a number of settlement demands from the plaintiff-estate in the underlying litigation, "all at or below the $1 million policy limit." In August 2022, according to certification order, however, the excess carrier learned of another lawsuit against the insured owner of the apartment complex "involving a more recent murder" at the apartment complex. That lawsuit settled for $11 million after the deposition of the owner of the apartment complex. That same month, the plaintiff-estate increased its demand to $5 million. The primary insurer subsequently decided to settle, and in November 2022, the case settled for $5 million. The primary insurer contributed its full policy limit of $1 million, and the excess carrier contributed the remaining $4 million.

Because the primary insurer had opportunities to settle "at or below" its policy limit, the excess insurer filed suit against the primary insurer. Through its equitable subrogation claim, the excess carrier argued that had it not stepped in to cover the costs of the settlement, the insured would have possessed a cause of action for breach of the implied covenant against the primary insurer. The excess carrier argued, under these circumstances, it had the right to step into the insured's shoes as subrogee to that cause of action.

The federal district court dismissed the case. After performing a choice of law analysis, it held that while California permits claims such as the excess carrier's in this case, Nevada law did not allow an excess insurer to maintain a claim for equitable subrogation against a primary insurer when the underlying litigation settled within the insurers' combined policy limits.

The Ninth Circuit recognized that the district court relied on two unpublished decisions from the Nevada Supreme Court. Those cases are not "mandatory precedent" in other actions, under Nevada rue of Appellate Procedure 36(c), but in one of them the Nevada Supreme Court rejected an equitable subrogation claim brought by an excess carrier against a primary carrier because the excess carrier had "no damages" where the underlying settlement did not "exceed[] the collective policy limits[.]" *Aspen Specialty Ins. Co. v. Eighth Jud. Dist. Ct.*, 528 P.3d 287 (Nev. 2023).

But, in its certification order, the Ninth Circuit highlighted a potential conflict to be resolved by the Nevada Supreme Court. The Ninth Circuit noted that "Nevada generally recognizes the doctrine of equitable subrogation." *See In re Fontainebleau Las Vegas Holdings*, 128 Nev. 556, 572 n.8 (2012) ("This court has recognized the doctrine of equitable subrogation in a variety of situations."). "And, where Nevada law is less developed on an issue, such as equitable subrogation, Nevada courts have looked to the law of other states, including California." *See, e.g.*, *Mort v. United States*, 86 F.3d 890, 893 (9th Cir. 1996) ("Where Nevada law is lacking, its courts have looked to the law of other jurisdictions, particularly California, for guidance. In accordance with this practice, we have looked to the law of other states when necessary to supplement Nevada's law on equitable subrogation.") (internal citations omitted); *Zurich Am Ins. Co. v. Aspen Specialty Ins. Co.*, 2021 WL 3489713 at *3 (D. Nev. Aug. 6, 2021) ("[The court] look[s] to California law for guidance because the Supreme Court of Nevada often does that when deciding an issue of first impression.").

The Ninth Circuit explained that because the prior, unpublished cases were merely persuasive and because California law recognizes an equitable subrogation action in circumstances such as the case at issue, it "believe[s] that the Nevada Supreme Court should be the first to determine whether equitable subrogation is permitted between two insurers in this context." The Nevada Supreme Court apparently agreed because it accepted the certified question, and ordered briefing.

The case pending at the Nevada Supreme Court is *North River Ins. Co. v. James River Ins. Co.*, Case No. 89228.

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