

February 9, 2011

## **Disappearing Defendants and Insurer Responsibility in New Mexico Auto Accident Cases**

A recent case from the New Mexico Court of Appeals shows the lengths to which some insurance companies will go to avoid their financial responsibility under their auto insurance policies.

In Gallegos v. Nevada General, the plaintiff was injured in an auto accident with a driver insured by Nevada General. There was no dispute as to the fault of Nevada General's insured. In fact, Nevada General did not dispute liability and paid for the property damage to the plaintiff's vehicle.

Nevada General refused to settle on the personal injury claims disputing medical damages. The plaintiff was forced to file suit. By the time of the suit, the insured driver had disappeared. Fortunately, The plaintiff had named both the insured driver and Nevada General as defendants.

The plaintiff legally served Nevada General. Unable to personally serve the defendant driver, the plaintiff was granted leave by the district court to serve by publication which was done. The defendant driver did not respond and was defaulted in the amount of \$20,564.55.

Naturally, Nevada General chose to fight the default electing to engage in lengthy and costly litigation rather than paying the rather meager judgment. In fact, they first initiated a declaratory judgment action in an effort to find that they had no legal obligation under the policy because their insured had disappeared and was not cooperating in the defense. They filed this action without naming the plaintiff who already had a judgment against their insured.

The plaintiff sought to intervene as an interested third party with a clear financial stake in the outcome of the Dec Action. Again, in an effort to evade financial responsibility and ironically at great legal expense, Nevada General fought the intervention of the plaintiff. Remarkably the district court judge agreed with Nevada General stating that the plaintiff had no right to intervene and releasing Nevada General from its contractual obligations under the policy.

Fortunately, the New Mexico Court of Appeals reversed the district court judge. Essentially, the Court stated that a financially interested third party is a necessary party to a dec action like the one initialed by Nevada General. The

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**Main Office:  
400 Gold Ave. SW  
Suite 500  
Albuquerque, NM 87102  
(505) 242-5958**

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Court recognized Declaratory Judgment Act and the case-law thereon forbidding adverse affects of a dec action on financially interested parties unnamed in the declaratory judgment action.

In an interesting section of the opinion, the Court stated:

"Insurers commonly use declaratory judgments against their insureds to determine the extent of coverage...Sometimes injured third parties are not even aware of the proceedings. Occasionally, insurers have even gone so far as to advise the insured not to appear in the declaratory actions."

Perhaps more importantly than laying out the rules governing declaratory judgment actions, the Court recognized the principles underlying New Mexico's Mandatory Financial Responsibility Act (MFRA). The MFRA recognizes that liability insurance is made compulsory for the protection of the public. Allowing an insurer to escape responsibility without even involving the injured plaintiff would defeat the purposes of the Act. The Court tacitly recognized the fact that insured drivers are going to disappear on occasion but stated that the injured third party must be allowed to proceed noting that "the insured may lose interest and the injured party has the primary motivation to pursue the claim."

In summary, the Court held that the insured plaintiff must be made a party to the declaratory action seeking to revoke coverage for lack of cooperation by the insured. This certainly provides some relief to injured plaintiffs but it really does not go far enough. The Court should have made clear that insurance carriers will not escape financial responsibility through a dec action whether or not the plaintiff is joined simply by virtue of having lost touch with their insured.

The fact that an insured driver is not available does not change the facts of the case nor should it affect the insurer's financial responsibility. The point is illustrated vividly in this case where Nevada General had already accepted liability for the accident when it paid for the property damage. What could the insured driver possibly contribute to the evaluation of injuries and medical care? The Court basically left open a clear path of relief for those insurers inclined to evade financial responsibility.

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