SETTLING WRONGFUL DEATH CLAIMS IN NEVADA

BY MIKE MILLS, ESQ.

Nevada's Wrongful Death statute allows both the decedent's estate and the intestate heirs to bring wrongful death claims. Often, the insurance proceeds are inadequate to compensate for such a devastating loss. Dividing the limited funds might produce a global settlement. If not, an insurer must involve and inform its insured of settlement opportunities and seek the insured's input before attempting to settle with less than all claimants. Otherwise, the insurance company may be acting in bad faith.

Nevada Courts Strictly Construe Nevada's Wrongful Death Statute

Since its earliest days, Nevada has recognized English common law as the starting point for any legal analysis. NRS 1.030. However, English common law provided no remedy where an individual tortiously caused the death of another.

The Nevada Legislature saw fit to change the common law and provide a remedy for wrongful death. NRS 41.085. However, Nevada also recognizes the rule that statutes in derogation of the common law must be strictly construed.[1] This strict construction rule applies to Nevada's wrongful death scheme. The Nevada Supreme Court has said that "[w]hatever standing plaintiffs have [in a wrongful death action] must be found in the statutes of Nevada. The remedy, being wholly statutory, is exclusive. The statute provides the only measure of damages, and designates the only person who can maintain such an action."[2]

Nevada's Wrongful Death Statute Recognizes Two Classes of Claimants

Knowing these foundational principles, let's look at Nevada's wrongful death statute and identify those who are entitled to recover.

The Decedent's Estate

Nevada's wrongful death law recognizes two classes of claimants. First is a claim in favor of the estate. The estate's claim is brought by the personal representative of the decedent. NRS 41.085(5). The estate may recover "[a]ny special damages, such as medical expenses, which the decedent incurred or sustained before his death, and funeral expenses." The estate may also pursue "[a]ny penalties, including, but not limited to, exemplary or punitive damages, that the decedent would have recovered if he had lived."

The Decedent's Intestate Heirs

The second class of claimants is made up of those individuals who qualify as the decedent's heirs under Nevada's laws of intestate succession. NRS 134.030 et seq. Each heir can recover for his or her own "grief or sorrow, loss of probable support, companionship, society, comfort and consortium." Each heir can also recover for damages for the "pain, suffering or disfigurement of the decedent." NRS 41.085(4). Fiancées, unmarried partners, un-adopted stepchildren, foster children or anyone else who does not qualify as an "intestate heir" under NRS 134.030 may not recover for wrongful death, even if they are beneficiaries under the decedent's will or were wholly dependent on the decedent for support.

Multiple Claimants and Inadequate Limits Can Impede Settlement in Wrongful Death Claims

Often a lack of adequate bodily injury liability insurance coverage may impede wrongful death settlements.

Under Nevada's Wrongful Death Statute, Where There Is Only One Decedent, There is Only One "Each Person" Limit Available

In *Nationwide Mut. Ins. v. Moya*, 108 Nev. 578, 837 P.2d 426 (1992), the Nevada Supreme Court held that while the claim of the estate and the claim of each heir was independent, all claimants of the same decedent must share as a group the one "per person" limit of the tortfeasor's bodily injury liability coverage. This often forces liability insurers to face the classic problem of multiple claimants making claim to the same inadequate policy limit. The Nevada Supreme Court has not said whether an insurance company can lawfully pay the full insurance proceeds to one of many claimants without breaching its contractual or good faith obligations to the insured, even though other claimants remain unpaid.[3]

Counsel for Each Claimant Will Compete for the Same Limit and Will Try to Force the Insurance Company to Pay the Excess

Counsel for each of the wrongful death claimants will almost universally demand payment to their claimant for the same limited policy limit sought by the others. Those attorneys know the principle taught by Justice Robert Rose in his dissent in the case of *DeJesus v. Flick*, 116 Nev. 812, 824, 7 P.3d 459, 467, fn.1 (2000). There, Rose said that where a policy limit demand is made and the insurance company fails to pay the limit, the insurance company will be obliged to pay the excess judgment.[4] These competing demands should not be unanticipated.

Interpleader May Not be the Best Solution

In situations like this, some may recommend interpleading the policy proceeds and naming the estate and the heirs as defendants. However, the results may not produce the hoped for results. By interpleading the policy proceeds, the funds are no longer available to the insurance company to try and settle any of the claims.[5] The court into which the funds are interplead may not have the authority to compel the estate or the heirs to accept their *pro rata* shares and deliver a release based on such a distribution We know for certain that after interpleading the funds, an insurance company is not relieved of its duty to defend the insured even if the policy relieves the company of that duty.[6]

An Insurance Company Acting Unilaterally to Settle with One Claimant to the Detriment of Others May Expose the Insurance Company to Paying an Excess Verdict

The case of *Allstate Ins. Co. v. Miller,* 125 Nev. 300, 212 P.3d 318 (2009) is a prime example of how an insurance company went wrong by acting without involving the insured. Allstate had the opportunity to settle a case within the policy limit. But fear of a hospital lien prevented it from making payment consistent with the conditions set by the plaintiff's attorney. The claimant's attorney agreed to provide a release if Allstate would interplead the funds and name the claimant, the attorney and the hospital as defendants. Allstate initially refused and only came around after the time limit demand had expired. The court said that Allstate had acted in bad faith, because it failed to inform the insured of the options related to the settlement.

There is no reason to expect a different result under a scenario involving multiple claimants each vying for the same limited wrongful death proceeds in Nevada.

The First Best Choice is to Reach a Global Settlement

If there are no demands pending, the defendant should complete its investigation and try to muster all the wrongful death claimants, hopefully reaching a global settlement. Courts look favorably on this potential solution.[7]

The Insured Must Be Informed of All Claims and the Insured's Input Must Be Sought

In a wrongful death scenario, there are many reasons why a global settlement cannot be achieved. Perhaps it is not worth the trouble to the family to set up an estate. It is possible that an heir will not agree on the split of the proceeds. While the insurance company will likely have retained the authority to settle and can settle with any one of the claimants, the insured's input can and must be obtained. If there are multiple insureds, they must all be consulted. If an agreement can be reached by the insurance company and the insured(s), the agreement is best put in writing and signed. If the insured's settlement solution is not the one the insurance company implements, the insurance company will have to have a good explanation as to why it deviated from the insured's desired plan.

Families are devastated when one of theirs is the victim of a wrongful death. Where possible, obtaining a global settlement with the estate and the heirs that protects the tortfeasor(s) is the best solution. Insurance companies must always inform and involve their insureds of settlement opportunities in order to perform their duty of good faith. **NL**

1. See *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 431, 132 P.3d 1022, 1036 (2006); *West Indies v. First Nat. Bank*, 67 Nev. 13, 33, 214 P.2d 144, 154 (1950); *Orr Ditch Co. v. Dist. Ct.*, 64 Nev. 138, 164, 178 P.2d 558, 570 (1947).
2. *Wells, Inc. v. Shoemake,* 64 Nev. 57, 66, 177 P.2d 451, 456 (Nev. 1947). See also, *Pitman v. Thorndike*, 762 F. Supp. 870, 871 (D. Nev. 1991); *Moyer v. United States*, 593 F. Supp. 145, 146 (D. Nev. 1984).
3. *Miller v. Georgia Interlocal Risk Management Agency,* 501 S.E.2d 589 (Ga. App. 1998); *Texas Farmers Ins. Co. v. Soriano*, 881 S.W.3d 312 (Tex.. 1994).
4. *See, Green v. J.C. Penney Auto Ins. Co.*, 806 F.2d 759, 763-64 (7th Cir. 1986); 46A C.J.S. Insurance § 1584 (1993).
5. *Allstate Ins. Co. v. Evans*, 200 Ga. App. 713, 409 S.E.2d 273 (1991).
6. *Benchmark Ins. Co. v. Sparks*, 127 Nev. 407, 254 P.3d 617 (2011).
7. *Kinder v. W. Pioneer Ins. Co.*, 231 Cal. App. 2d 894 (1965); *Bartlett v. Travelers' Ins. Co.*, 117 Conn. 147, 167 A. 180 (1933).

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