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Court of Appeals Addresses Insurance Defense Conflicts in Reservation of Rights Context

By Mark J. Fucile
Fucile & Reising LLP

Division II of the Court of Appeals recently addressed conflicts when an insurance defense counsel is representing an insured in a reservation of rights case. The plaintiffs in *Arden v. Forsberg & Umlauf, P.S.*, ___ Wn. App. ___, ___ P.3d ___, 2016 WL 2647685 (May 3, 2016), asserted that the defendant law firm had a conflict when representing them in an earlier tort case and were pursuing breach of fiduciary duty and related claims against the firm. On summary judgment, the firm argued that it had no conflict. The trial court agreed and dismissed the case. The Court of Appeals affirmed.

In taking on the tort case, the law firm was careful to emphasize in its engagement agreement that it was representing the insureds only in the defense of the that case and not on any associated coverage issues. The insureds, in turn, had their own lawyer on coverage issues in light of the carrier's reservation of rights. A dispute arose during settlement negotiations in the tort case between the insureds and the carrier over the amount to be offered. The insureds later sued the carrier on a bad faith claim and then amended their complaint to add the law firm. A mediation resolved all of the litigation except for the insureds' claims against the law firm. On the latter, the insureds argued that the law firm had a conflict because it handled work for other insureds assigned by the carrier

and did some coverage work for the carrier directly. The insureds contended that in the reservation of rights context, both constituted conflicts. As noted, the trial court and the Court of Appeals rejected both theories.

The Court of Appeals began by noting that in Washington under *Tank v. State Farm Fire & Casualty Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986), an insurance defense counsel generally has only one client—the insured. In this instance, the law firm had made that plain in its engagement agreement. The Court of Appeals, therefore, concluded that there was no multiple client conflict under RPC 1.7(a)(1) and the underlying fiduciary duty of loyalty. The Court of Appeals next found that the fact that the law firm also did some unrelated coverage work for the carrier did not—in and of itself—constitute a “material limitation” conflict under RPC 1.7(a)(2) against the backdrop of the coverage dispute again because the firm was simply handling the direct defense of the tort case.

Although *Tank* has been the touchstone for analyzing insurance defense conflicts for a generation, *Arden* is a useful addition for lawyers in the occasionally uncomfortable position of defending an insured when the insured and the carrier are at the same time engaged in their own separate coverage dispute.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB *Ethical Oregon Lawyer*, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.