

## Nevada Supreme Court Holds That Insurer's Liability for Breach of the Duty to Defend is Not Capped at Policy Limits

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In [Century Surety Company v. Dana Andrew](#) (Dec. 13, 2018), the Nevada Supreme Court issued an opinion regarding whether, under Nevada law, the liability of an insurer that has breached its duty to defend, but not acted in bad faith, is capped at the policy limit plus any costs incurred by the insured in mounting a defense, or whether the insurer is liable for all losses consequential to the insurer's breach.

Ryan Pretner ("Pretner") and Pretner's guardian (Respondents) initiated a personal injury action when a truck owned and driven by Michael Vasquez ("Vasquez") struck Pretner, causing brain injuries. Vasquez used the truck for personal use and also for his business, Blue Streak Auto Detailing, LLC ("Blue Streak"). At the time of the accident, Vasquez was insured under a personal auto liability insurance policy with a \$100,000 policy limit issued by Progressive Casualty Insurance Company, and Blue Streak was insured under a commercial liability policy with a \$1 million policy limit issued by Century Surety Company.

Century determined that the accident was not covered under its policy because Vasquez was not driving in the course and scope of his employment. Thereafter, the Respondents sued Vasquez and Blue Streak alleging that Vasquez was driving in the course and scope of his employment at the time of the accident. Century refused to defend Blue Streak in the action, and Vasquez and Blue Streak defaulted in the action. Vasquez and Blue Streak entered into a settlement agreement with the Respondents where the Respondents agreed not to execute any judgment against Vasquez and Blue Streak and in exchange, Blue Streak assigned its rights against Century to the Respondents. The court granted Respondents' application for entry of a default judgment that stated: "Vasquez was working in the course and scope of his employment with Blue Streak at the time, and that consequently, Blue Streak was also liable." Respondents then filed suit against Century in the state district court for breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair claims practices. Century removed the case to federal district court.

The federal court determined that Century did not act in bad faith but did breach its duty to defend, and the court ordered that "Blue Streak was entitled to recover consequential damages that exceeded the policy limit for [Century's] breach of the duty to defend, and that the default judgment was a reasonably foreseeable result of the breach of the duty to defend." The federal court stated that "bad faith was not required to impose liability on the insurer in excess of the policy limit."

Answering a certified question by the federal court, the Nevada Supreme Court agreed and stated that although it is the minority view, "[a] duty to defend limited to and coextensive with the duty to indemnify would be essentially meaningless; insureds pay a premium for what is partly litigation insurance designed to protect...the insured from the expense of defending suits brought against him." The court explained that the policy limits are related to amounts an insured may have to pay to a third party for personal injuries, not to the damages recoverable by the insured for a breach of the contract by the insurer. The court further explained that consistent with general contract principles, the insured may be entitled to consequential damages resulting from the insurer's breach of their contractual duty to defend. However, the Nevada Supreme Court noted that an "insured is tasked with showing that the breach caused the excess judgment and is obligated to take all reasonable



Article By [Carlton Fields](#)  
[Rachel J. Schwartz](#) [PropertyCasualtyFocus](#)

[Insurance Reinsurance & Surety](#)  
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means to protect himself and mitigate his damages.” For these reasons, the court concluded that an insured may recover any damages consequential to the insurer’s breach of the duty to defend and that an insurer’s liability for the breach of that duty is not capped at the policy limits, even absent bad faith.

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