# The New Mexico Trial Lawyer

The Journal of the New Mexico Trial Lawyers' Foundation

July / August 2014 Vol. XXXXV No. 4


## Rhodes v. Lucero: Time for a Second Look

### New Mexico Interpretation of the Declaratory Judgment Act Is out of Sync with Modern Jurisprudence

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The Declaratory Judgment Act, NMSA 1978, Sections 44-6-1 — 15, enacted in 1953, was a radical innovation in our legal system. In providing parties the ability to preemptively seek clarification of their legal rights, the DJA "relieve[s] litigants of the rule of the common law that no declaration of rights may be judicially adjudged unless a right has been violated."[1] In other words, the DJA expanded parties' access to the courts by recognizing new causes of action not justiciable prior to the passage of the Act. For example, prior to the passage the Act, a debtor could never sue his creditor for a declaration that he/she did not owe a debt; an inventor could not sue a patentee for a declaration that an arguably conflicting patent was invalid; and an insurance company could not have the court determine that its policy did not provide coverage for a particular risk.

By design, the right to sue under declaratory judgment acts has been evolving and expanding since the introduction of the Uniform Declaratory Judgment Act in 1922. Although many states were early adopters of the Uniform Act, a review of the initial applications of the Act shows that courts were reluctant to make declarations, especially regarding insurance companies' preemptive claims that they should be relieved of their obligations to defend or indemnify their insureds. Uniformly, these early courts held that an actual judgment against their insureds was a condition precedent of bringing a declaratory judgment action.[2]

This parsimonious view has been squarely overruled by modern interpretations of the law, and today, the DJA is commonly employed by insurers against their insureds to have the court determine the existence and extent of coverage under an insurance policy.[3] Similarly, an insured can also seek a declaration to determine the extent and availability of coverage where an insurer has improperly denied insurance coverage.[4] However, the law in New Mexico,

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as articulated in Rhodes v. Lucero, has not yet recognized the third-party beneficiary's (*i.e.,* the injured party's) right to a pre-judgment determination of insurance coverage under the Act.[5] The authors of this article believe Rhodes was wrongly decided and that a correct reading of the DJA, especially in light of the majority opinion within DJA-enacting states, would right Rhodes' wrong and expand the right to seek declaratory judgment to injured plaintiffs, even in the absence of a judgment against the tortfeasor.

Here is how the issue commonly presents itself: An injured party files suit against the tortfeasor only to learn that the tortfeasor's insurance carrier has denied coverage for what appears to be unfounded reasons. The tortfeasor has a right to file a declaratory judgment action against his/her insurance carrier to determine the coverage issue. In reality, however, the insured tortfeasor neither has the resources nor the interest in suing his/her insurance carrier to determine coverage that will benefit an injured third party. What is the injured party to do? Prosecute the action against the tortfeasor without any certainty as to his/her ability to recover after obtaining a judgment? Or wait to see if the insurance carrier will file a declaratory judgment action against the insured and name the injured party as a necessary party, which the New Mexico Court of Appeals has held to be required under Gallegos v. Nevada General Insurance Co.[6] Or should the injured party be permitted to bring a declaratory judgment action against the tortfeasor's insurer to determine coverage and whether or not the injured party's potential judgment will be "collectible and credible?"[7]

***The New Mexico Supreme Court in its 1968 opinion of Rhodes v. Lucero held that the an injured third-party beneficiary in a motor vehicle crash had no right to pursue a declaratory judgment action against the tortfeasor's insurance company to determine coverage.***

For a party to bring a declaratory judgment action, New Mexico requires an "actual controversy" between the parties.[8] The United States Supreme Court made it clear

that an actual controversy is not easily defined through a bright-line test:

> The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[9]

The New Mexico Supreme Court in its 1968 opinion of Rhodes v. Lucero held that the an injured third-party beneficiary in a motor vehicle crash had no right to pursue a declaratory judgment action against the tortfeasor's insurance company to determine coverage.[10] The Court held that there was no "justiciable controversy between the plaintiffs and the defendant insurer" because the plaintiff did not hold a judgment against the tortfeasor and the plaintiff's rights against the tortfeasor were contingent.[11] More recently, the Court of Appeals, in an unpublished opinion, held that while the Rhodes decision may "merit reconsideration," it had no authority to reconsider the Supreme Court's decision and affirmed that a third-party beneficiary to a legal malpractice insurance policy has no right bring a declaratory judgment action against the third-party insurance carrier.[12] The Supreme Court granted the petition for writ of certiorari, but later dismissed the writ of certiorari as a result of a stipulation of the parties.[13]

The Rhodes opinion warrants reconsideration to permit New Mexico to "effectuate [the] general purpose" of the Act by making a uniform body of law that is in sync with the rest of the country. As the law currently stands, an insurer is permitted to file a declaratory judgment action against its insured and name the injured party as necessary party to determine coverage, but the injured party is not permitted to do the same against the insurance carrier.[14] In other words, for all practicable purposes, it is the least motived party, the insurer—not the most motivated party, the potential third-party beneficiary to the insurance contract—who determines when and if the court can determine whether insurance coverage exists when there is not yet a judgment against the insured.[15] The current interpretation of the Act is unfair, impracticable, and not in accord with other jurisdictions implementing the same Act.

In interpreting the nearly identical federal declaratory judgment act, Judge Posner of the Seventh Circuit presented the following example to demonstrate the importance of permitting injured parties to bring a declaratory judgment action against a third-party insurer:

> [S]uppose that the day after the accident in which the victim was injured, and therefore long before he could feasibly bring a tort suit, let alone obtain a judgment, the insurer declared the liability insurance policy void; and suppose the insured had no other assets. Then a tort suit would be worthless unless the insured's victim could obtain a declaration that the policy was valid after all. Must the victim go to the expense of prosecuting to judgment a tort suit that will be completely worthless unless the policy is declared valid? Or does not the victim have sufficient interest in the policy to proceed simultaneously, on both fronts, against insured and insurer, or even against the latter first if less preparation is necessary for that suit?[16]

***As the law currently stands, an insurer is permitted to file a declaratory judgment action against its insured and name the injured party as necessary party to determine coverage, but the injured party is not permitted to do the same against the insurance carrier.***

Judge Posner's pragmatic approach to the determination of whether an individual plaintiff presents an "actual controversy" for purposes of the Declaratory Judgment Act, as opposed to the bright-line test expressed in Rhodes v. Lucero, is in direct accord with the United States Supreme Court's decision in Maryland Casualty Co. and provides persuasive evidence that the blanket prohibition set forth in Rhodes v. Lucero should not be maintained.[17] Many other jurisdictions have followed the Seventh Circuit's approach.[18] Uniformity of interpretation is an explicitly stated goal of the Declaratory Judgment Act.[19] While Rhodes does not stand entirely alone, it is in a distinct minority of jurisdictions that fail to afford declaratory relief to injured plaintiffs regarding the existence and extent of the tort defendant's insurance coverage.[20] Because of the substantial public interest in creating uniform laws, and the United State

Supreme Court's caution against creating bright-line tests as to what constitutes a justiciable controversy, Rhodes should be revisited.

Because interpretation of a legislative act is involved, the principles of *stare decisis* should be balanced against the uniformity provision of NMSA 1978, Section 44-6-15, which requires that the Declaratory Judgment Act "be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees." Moreover, Section 44-6-14 requires courts to "liberally construe[]" the Act in order to fulfil its purpose "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations[.]"

The factors counseling the departure from the Rhodes precedent weigh heavily in favor of abandoning Rhodes. First, as set forth above, the hallmark of the Declaratory Judgment Act, as enacted throughout this country, is its evolutionary recognition of the new causes of action created by the statute. Thus, to the great benefit of our legal system, courts over the last century have provided declaratory relief to an ever growing pool of worthy litigants who heretofore have been denied such relief. In light of this fact, it is fair to say that the principles of declaratory judgment law have developed to such an extent as to leave the old rule articulated in Rhodes in 1968 "no more than a remnant of abandoned doctrine."[21]

***While Rhodes does not stand entirely alone, it is in a distinct minority of jurisdictions that fail to afford declaratory relief to injured plaintiffs regarding the existence and extent of the tort defendant's insurance coverage.***

This is especially true given the fact that insurers and their insureds can bring similar declaratory judgment actions, Schultz, 1969-NMSC-113, and must join the injured plaintiff when they do, Gallegos, 2011-NMCA-004, at ¶ 6. However, if this same action is barred if brought by the injured party. Rhodes, 1968-NMSC-137, ¶ 4. This unfair limitation on an injured party's access to the courts is at odds with the purpose of the Declaratory Judgment Act, which allows "any person" with a legally cognizable interest in a contract to seek declaratory relief. NMSA 1978, § 44-6-4. Thus, Rhodes "poses a direct obstacle to the realization of important objectives embodied in other laws" and should be – and would properly be – overturned.[22]

Unfortunately, the New Mexico Supreme Court lost its opportunity to address the merits of the Cohen appeal due to a stipulation of the parties. The authors encourage other attorneys to challenge the soundness of the Rhodes decision in appropriate cases to provide our Supreme Court with an opportunity harmonize the Act with the reminder of the country and provide injured parties with litigation outcomes that are more "dispositive, collectible, and credible."[23]

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## Endnotes

1 De Charette v. St. Matthews Bank & Trust Co., 28.3 S.W. 410, 413 (Ky. 1926).

2. E.g., Merchants Mut. Cas. Co. v. Leone, 9 N.E.2d 552, 554 (Mass. 1937) (dismissing a suit brought by an insurance company against its insured and injured third parties, holding that "[t]here is no present dispute between [the insurance company] and [the injured parties], but only a contingent future possibility of dispute.").

3 See, e.g., Home Fire & Marine Ins. Co. v. Schultz, 1969-NMSC-113, 80 N.M. 517.

4 See, e.g., Valley Improvement Ass'n v. Hartford Accident & Indem. Co., 1993-NMSC-061, 116 N.M. 426.

5 1968-NMSC-137, 79 N.M. 403.

6 2011-NMCA-004, 149 N.M. 364.

7 Wilson v. Cont. Cas. Co., 778 N.E.2d 849, 852 (Ind. Ct. App. 2002).

8 NMSA 1978, § 44-6-2.

9 Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941).

10 1968-NMSC-137, 79 N.M. 403.

11 Id. at 404.

12 Cohen v. Cont'l Cas. Co., 2013 N.M. App. Unpub. LEXIS 283 (N.M. Ct. App. Sept. 23, 2013) *cert' granted* Cohen v. Cont'l Cas. Co., 314 P.3d 963 (N.M. 2013) (unpublished), *cert' dismissed* 2014 N.M. LEXIS 194 (N.M. June 6, 2014) (stipulated dismissal by the parties).

13 Id.

14 Id.; Gallegos, 2011-NMCA-004; but see Raskob v. Sanchez, 1998 - NMSC - 045, 126 N.M. 394 (Raskob does appear to permit a declaratory judgment action against a third-party insurer in the motor vehicle insurance context).

15 After a judgment, an injured party may file a declaratory action against an insurer to determine coverage issues. See, e.g., Guar. Nat'l Ins. Co. v. C de Baca, 1995-NMCA-130, 120 N.M. 806 (obtaining a judgment and assignment of the tortfeasor's rights that may exist under an insurance policy to pursue a declaratory action against the insurer).

16 Bankers Trust Co. v. Old Republic Ins. Co., 959 F.2d 677, 682 (7th Cir. 1992).

17 Although the Court of Appeals in Cohen read Lucero as an absolute prohibition, the Supreme Court has not been so strict. In Baca v. New Mexico State Highway Dep't., 1971-NMCA-087, ¶22, 922, 82 N.M. 689, this Court allowed injured plaintiffs to seek a declaration that the State was indemnified for certain risks associated with the negligent maintenance of roadways. In so ruling, this Court found that because the existence of coverage was a statutory condition precedent to plaintiffs' ability to bring suit, plaintiffs sufficiently pled a justiciable dispute.Id.

18 Eureka Fed. Savings & Loan Ass'n v. American Casualty Co., 873 F.2d 229, 232 (9th Cir. 1989) (declaratory relief appropriate in cases where the existence of coverage is dependent upon the outcome of the underlying action); Nat'l Sec. Fire & Cas. Co. v. Poskey, 828 S.W.2d 836 (Ark. 1992) (Arkansas's direct action statute does not prohibit an injured third-party from bringing a declaratory judgment action against an alleged tortfeasor's insurer seeking relief as to insurance coverage); Weber v. St. Paul Fire & Marine Ins. Co., 622 N.E.2d 66 (Ill. App. 1993) (declaratory judgment actions brought by an injured third-party against the alleged tortfeasor's insurance carrier are not ripe as to the question of indemnification but are ripe as to the question of the insurance company's duty to defend its insured); Community Action of Greater Indianapolis, Inc. v. Indiana Farmers Mut. Ins. Co., 708 N.E.2d 882, 886 (Ind. App. 1999) (allowing injured plaintiffs to bring declaratory action against insurer is "not . . . contrary to this state's policy of prohibiting direct actions against an insurer where the injured party had no relationship with the insurer [because] such suit is not a direct action suit against an insurer." (internal citations omitted)); Dorchester Mut. Ins. Co. v. Legeyt, No. CV-2006-02077 (Mass. Dist. Ct. 2006) (unpublished disposition) (denying insurance company's motion to dismiss tort plaintiff's declaratory judgment action); Richmond v. Hartford Underwriters Ins. Co., 727 A.2d 968 (Md. App. 1999) ("Maryland law instructs that an individual may seek a declaratory judgment against an insurer before the insured tort-feasor's underlying liability has been determined when the two issues are independent and separable."); Hartford Mut. Ins. Co. v. Woodfin Equities Corp., 687 A.2d 652 (Md. 1997); GM Sign, Inc. v. Auto-Owners Ins. Co., No. 301742 (Mich. App. 2013) (unpublished disposition) (dismissing injured plaintiff's declaratory judgment action against injurer on the merits); GM Sign, Inc. v. Auto-Owners Ins. Co., No. 301742 (Mich. App. 2013) (unpublished disposition) (Gleicher, J. concurring) (discussing plaintiff's standing to maintain declaratory judgment action); Ridley v. Guaranty Nat'l Ins. Co., 951 P.2d 987 (Mont. 1997) (trial court abused its discretion in dismissing declaratory judgment action brought by injured third party against tortfeasor's insurance company); White v. Nationwide Mut. Ins. Co., 228 A.D.2d 940, 941 (N.Y. App. 1996) ("Recognizing that the person most interested in this dispute is the injured person, a declaratory judgment action may be brought by the injured person against both the insured and the insurer." (internal grammatical marks omitted) (quoting David Siegel, NY Prac. 2d ed., § 437, at 665)); (DeMent v. Nationwide Mut. Ins. Co., 544 S.E.2d 797, 801 (N.C. App. 2001) (injured plaintiffs may seek declaratory relief from another's insurer if such plaintiffs are in the class of intended beneficiaries to the insurance policy); Berrios v. JEVIC Transport Inc., C.A. No. PC 04-2390 (R.I. App. 2011) ("Plaintiff's declaratory judgment action is permitted by law because it is not a 'direct action' against National Union." (citing Mendez v. Brites, 849 A.2d 329 (R.I. 2004)); Craig v. Dye, 526 S.E.2d 9, 10 (Va. 2000) (allowing without discussion declaratory judgment action).

19 Section 44-6-15 provides that "The Declaratory Judgment Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees." Therefore, it is incumbent that the Act's interpretation is not in conflict with other jurisdictions, as far as such goal is possible. See Gallegos v. Nev. Gen. Ins. Co., 2011-NMCA-004, ¶ 17, 149 N.M. 364, 248 P.3d 912 ("we interpret our DJA to make it harmonious with those of other states."); Town of Manchester v. Town of Townshend, 192 A. 22 (Ver. 1937) (under the uniformity provision, decisions of the highest courts of other states under a like act are precedents by which the court is more or less imperatively bound); Am. Jur. 2d. Declaratory Judgments, § 8 (same).

20 Farmers Ins. Exch. v. Dist. Ct. for the Fourth Judicial Dist., 862 P.2d 944, 945 (Colo. 1993) (injured plaintiff had no standing to bring declaratory judgment under direct action rule); Brooksby v. GEICO Gen. Ins. Co, 286 P.3d 182, 184 (Idaho 2012) (same); Anderson v. St. Paul Fire & Marine Ins. Co., 414 N.W.2d 575, 577 (Minn. App. 1987) (same).

21 State v. Pieri, 2009-NMSC-019, ¶ 21, 146 N.M. 155 (quoting Padilla v. State Farm Mut. Auto. Ins., 2003-NMSC-011, ¶ 7, 133 N.M. 661).

22 Padilla v. State Farm Mut. Auto. Ins. Co., 2003-NMSC-011, ¶ 14, 133 N.M. 661.

23 Wilson v. Cont'l Cas. Co., 778 N.E.2d 849, 851 (Ind. Ct. App. 2002).