

# Injured Party Cannot Pursue Direct Action Against Insurer Before Obtaining Judgment Against the Insured

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The New Mexico Court of Appeals has held that an injured third-party claimant cannot pursue a direct action against an insurer prior to obtaining a judgment against an insured, absent a contractual or statutory provision authorizing such an action. *Cohen v. Cont'l Cas. Co.*, No. 32,391 (N.M. Ct. App. Sept. 23, 2013). Wiley Rein represented one of the insurers in the litigation.

The claimants filed a malpractice lawsuit against their former attorneys. After the attorneys' professional liability insurers denied coverage, the claimants amended their complaint to add the two insurers as defendants, seeking a declaratory judgment as to the rights and liabilities of the parties under the professional liability policies. The insurer represented by Wiley Rein moved to dismiss the complaint for, *inter alia*, failure to state a claim. The trial court granted the motion, holding that the claimants had no "present rights" under the policy because they had yet to obtain "a judicial determination of liability" against the insured attorneys. Pursuant to stipulation, the claimants then dismissed the second insurer from the action.

On appeal, the New Mexico Court of Appeals affirmed, concluding that the New Mexico Supreme Court's decision in *Rhodes v. Lucero*, 444 P.2d 588 (N.M. 1968), controlled the issue. First, the court rejected the claimants' reliance on extra-jurisdictional authority holding that a declaratory judgment action does not constitute a "direct action." The court observed that, even if there is a difference between "direct" and "declaratory" actions, "the latter is still prohibited" under *Rhodes*. Second, the court declined to extend the narrow rule of New Mexico law that requires an automobile insurer to join both its insureds and the injured parties in the same coverage action. The court reasoned that a claimant's "contingent" interest in a policy does not present a justiciable controversy and therefore does not permit the initiation of a declaratory judgment action against an insurer. Third, the court refused to credit the claimants' policy-based arguments regarding judicial waste and efficiency, observing that it is up to the New Mexico Supreme Court to announce new policy. Fourth, the court rejected the claimants' contention that the common law prohibition on the joinder of an insurer by injured parties is "obsolete." The court distinguished each of the cases relied on by the claimants as involving statutory provisions that specifically authorized suits against insurers, and held that New Mexico's declaratory judgment statute does not itself provide such a right. Finally, the court concluded that the public policy exception that allows injured parties to join an insurer to an underlying suit "where the

insurance coverage [at issue] is mandated by law for the benefit of the public” did not apply because professional liability insurance for attorneys is “not strictly mandatory.” Because each of the claimants' arguments proved unavailing, the appellate court concluded that the lower court did not err in following the binding precedent set forth in the *Rhodes* decision.