UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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PATRICK McCLAIN, an individual d/b/a A. ADMIRAL PREMIER POOLS & SPAS, AA PREMIER POOLS & SPA and PARADISE POOLS, and AA PREMIER POOLS & SPAS, INC., a Nevada corporation, Plaintiffs, v. NATIONAL FIRE & MARINE INSURANCE COMPANY, a Nebraska corporation, Defendant.	2:05-cv-00706-LRH-RJJ ORDER

Before the court are four motions: Defendant National Fire and Marine Insurance Company's ("National Fire") motion for reconsideration (#90), two motions in limine (#84 & #85), and National Fire's Motion to Name Scottsdale Insurance Company as a Real Party in Interest (#96).

I. Facts and Procedural History

On June 23, 2008, this court issued an order granting in part and denying in part National Fire's and Patrick McClain's cross-motions for summary judgment. In its order, the court concluded that National Fire, an insurer, had a duty to defend McClain, its insured, in a construction defect suit referred to as the Big Horn litigation. The court also found that National Fire had not shown as a matter of law that its policy excluded coverage for the Big Horn litigation's settlement. In its present motion for reconsideration, National Fire argues this court erred on both counts.

II. Legal Standard

While the Federal Rules of Civil Procedure do not explicitly recognize a motion to reconsider, this court has the inherent power to revise, correct, and alter interlocutory orders at any time prior to entry of a final judgment. *See Sch. Dist. No. 5 v. Lundgren*, 259 F.2d 101, 105 (9th Cir. 1958); *Santamarina v. Sera, Roebuck & Co.*, 466 F.3d 570, 571-72 (7th Cir. 2006). This authority is governed by the law of the case doctrine under which a court will generally not reexamine an issue previously decided by the same or higher court in the same case. *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 766 (9th Cir. 2001); *United States v. Cuddy*, 147 F.3d 1111, 1114 (9th Cir. 1998). However, a court may have discretion to depart from the law of case when (1) the first decision was clearly erroneous, (2) there has been an intervening change of law, (3) the evidence on remand is substantially different, (4) other changed circumstances exist, or (5) a manifest injustice would otherwise result. *Cuddy*, 147 F.3d at 1114.

III. Discussion

A. Motion for Reconsideration

This court's June 23, 2008, order concluded National Fire breached its duty to defend McClain because its policy arguably or possibly extended coverage to McClain. Moreover, the court concluded that the policy's M-5077 endorsement, which purports to eliminate National Fire's duty to defend when McClain requests a defense from another insurer, did not operate to defeat a duty to defend. The court rested its conclusion upon two bases. First, because the claims against McClain in the Big Horn litigation made no mention of McClain requesting a defense from another insurer, Nevada law required National Fire to defend. Second, enforcing National Fire's M-5077 endorsement would defeat the strong public policy favoring an insurer's duty to defend.

National Fire argues this court applied the wrong legal standard in determining whether National Fire had a duty to defend. Specifically, National Fire asserts that this court should have allowed National Fire to present external evidence showing that McClain was already being

defended by another insurer.

The court has reviewed the case law supporting an exception to the rule against considering external evidence when determining if there is a duty to defend. *See Pompa v. Am. Family Mut. Ins. Co.*, 520 F.3d 1139, 1146-49 (10th Cir. 2008). While the court finds this authority persuasive, the court need not rule on the issue because the court reaffirms its holding that National Fire's M-5077 endorsement violates public policy.

National Fire argues at length that this court erred by relying on public policy rather than enforcing the policy's terms as written. In particular, National Fire contends the M-5077 endorsement should be enforced because another insurer "was already defending [McClain], and continued to provide him a complete defense until the case was resolved." (Mot. for Recons. (#90) at 4:7-8.) National Fire's argument, however, fails to appreciate the breadth of its endorsement. Endorsement M-5077 states, "We have the option, but not the duty, to defend any 'suit' if an insured has requested another insurance company or companies to defend the 'suit' in whole or in part, regardless of whether such request has been accepted or accepted under a reservation of rights." (Commercial Policy – Endorsement M-5077 (#80) Ex. S.) In its June 23, 2008, order, the court concluded that the endorsement is unenforceable because it has the extremely harsh effect of abrogating National Fire's duty to defend upon an insured's mere request of a defense by another insurer. The court stands by its conclusion that this endorsement violates the strong public policy favoring an insurer's duty to defend its insured.

National Fire also argues this court erred by refusing to find as a matter of law that National Fire's policy excluded coverage for the Big Horn litigation's settlement. In its June 23, 2008, order, the court found that National Fire's evidence on this issue was inadmissible. The court also refused to enforce the M-5076 endorsement, which National Fire relied upon for noncoverage, because it denied coverage upon an insured's mere request for a defense by another insurer.

The court reaffirms its order deeming unenforceable the portion of M-5076 that defeats

coverage upon an insured's request for a defense by another insurer. Despite National Fire's contention that the M-5076 endorsement is "primarily based on facts, specifically when damage first started, not the actions of the insured[,]" the endorsement makes clear that it excludes coverage upon an insured's mere request for a defense:

> *If any insured requests an insurance company*, including us, *to defend*, pay or indemnify any amount or otherwise respond to any claim or "suit" under any insurance policy incepting prior to the first day of the policy period of this Policy, this Policy shall not apply to damages sought in that claim or "suit".

(Commercial Policy – Endorsement M-5076 (#80) Ex. S) (emphasis added). The court's June 23, 2008, order, however, did not deem unenforceable the portion of M-5076 that excludes coverage for property damage that commences prior to the first day of the policy period. Therefore, that ground for exclusion is still available to National Fire.

Furthermore, because it appears there may not be issues of fact concerning National Fire's coverage for the Big Horn litigation's settlement, the court will grant the parties another opportunity to move for summary judgment. As such, the court grants the parties 30 days to conduct further discovery and 45 days to file a motion for summary judgment. In light of this ruling, the court will deny the pending motions in limine without prejudice.

Finally, the court will deny National Fire's request for an interlocutory appeal. Because a renewed motion for summary judgment may greatly assist in moving this case toward its final disposition, an appeal at this time would not materially advance the ultimate termination of this litigation. *See* 28 U.S.C. § 1292(b).

B. Motion to Name Real Party in Interest

National Fire has also moved to name Scottsdale Insurance Company as a real party in interest. The court will deny this motion. National Fire was put on notice of McClain's relationship with Scottsdale Insurance Company when McClain moved to file a cross-complaint against National Fire in December 2005. National Fire then delayed almost three years in bringing the present

motion. Given this delay, National Fire's has waived its real party in interest objection. *See* Charles Alan Wright et al., *Federal Practice and Procedure* § 1554, at 407 (2d ed. 1990) ("Regardless of what vehicle is used for presenting the [real party in interest] objection, it should be done with reasonable promptness.").

IT IS THEREFORE ORDERED that National Fire's motions in limine (#84 & #85) are DENIED without prejudice.

IT IS FURTHER ORDERED that National Fire's motion for reconsideration (#90) is GRANTED in part and DENIED in part. The parties are granted 30 days to conduct further discovery and 45 days to file a renewed motion for summary judgment.

IT IS FURTHER ORDERED that National Fire's Motion to Name Scottsdale Insurance Company as a Real Party in Interest (#96) is DENIED.

IT IS SO ORDERED.

DATED this 24th day of February 2009.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE