Decision Creates Potential for Legal Malpractice Actions Against Retained Defense Attorneys

The Supreme Court quashed the Fourth District's decision and held that an insurer has standing to maintain a legal malpractice action against counsel hired to represent the insured where the insurer is contractually subrogated to the insured's rights under the insurance policy.

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Two years ago, insurance defense lawyers around the state of Florida breathed a sigh of relief when the Fourth District Court of Appeal issued its decision in *Arch Insurance v. Kubicki Draper*, 266 So. 3d 1201 (Fla. 4th DCA 2019). In *Arch*, the Fourth District held that an insurer lacked standing to pursue a professional negligence claim against the law firm it retained to defend an insured in an underlying action.

However, the Florida Supreme Court has reversed course in *Arch Insurance v. Kubicki Draper*, SC19-673 (Fla. June 3, 2021). The Supreme Court quashed the Fourth District's decision and held that an insurer has standing to maintain a legal malpractice action against counsel hired to represent the insured where the insurer is contractually subrogated to the insured's rights under the insurance policy.

The case involved an insurer's legal malpractice action against a law firm it retained to represent its insured in a separate prior litigation. Based on the allegations against the insured, the insurer had a duty to defend. The policy also included a subrogation provision that provided: "to the extent of any payment under this policy, we shall be subrogated to all your rights of recovery therefor against any person, organization or entity … ."

The insurer retained a law firm to defend its insured, which failed to raise the statute of limitations defense timely. As a result, the lawsuit settled within the policy limits. Thereafter, the insurer sued the law firm for legal malpractice, breach of fiduciary duty, subrogation, assignment, third-party beneficiary, and breach of contract claims. The crux of the insurer's claim was that the failure to timely raise the statute of limitations defense significantly increased the cost of settlement.

The law firm moved for summary judgment, contending the insurer lacked standing to sue because there was no privity of contract or attorney-client relationship between the insurer and the law firm. The trial court ultimately agreed and granted the law firm's summary judgment motion.

The Fourth District adopted the trial court's order as its own. The Fourth District reasoned that the law firm was not in privity with the insurer, and there was nothing to indicate that the insurer was an intended third-party beneficiary of the relationship between the

law firm and the insured. The Fourth District also rejected the insurer's public policy argument and certified a question of great public importance to the Florida Supreme Court as to:

WHETHER AN INSURER HAS STANDING TO MAINTAIN A MALPRACTICE ACTION AGAINST COUNSEL HIRED TO REPRESENT THE INSURED WHERE THE INSURER HAS A DUTY TO DEFEND.

In *Arch*, SC19-673, the Supreme Court changed the focus of the discussion from a question of privity of contract to one of subrogation under the insurance policy. The Supreme Court agreed with the circuit court and the Fourth District that the law firm was in privity with the insured as the client rather than the insurer.

However, this time agreeing with the insurer, the Supreme Court rephrased the certified question as follows:

WHETHER THE INSURER HAS STANDING THROUGH ITS CONTRACTUAL SUBROGATION PROVISION TO MAINTAIN A MALPRACTICE ACTION AGAINST COUNSEL HIRED TO REPRESENT THE INSURED WHERE THE INSURER HAS A DUTY TO DEFEND.

The Supreme Court answered the rephrased certified question in the affirmative and quashed the Fourth District's decision.

Since the insurance policy expressly provided for the insurer's right to contractual subrogation, it was clear that the insurer was contractually subrogated to the rights of the insured, which include claims for legal malpractice against counsel retained to defend the insured. Likewise, "the subrogated claim originated by contract from the insured to the insurer, the same entity who hired the lawyer in the first instance."

Thus, the Supreme Court rejected the public policy concern that "the assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders and to whom the attorney has never owed a legal duty." Instead, the Supreme Court concluded that, "permitting the contractual subrogation claim alleging the law firm missed a statute of limitations defense to the detriment of the insured supports Florida public policy."

So, what does this mean for insurance defense attorneys in Florida? On the surface, the decision appears to apply narrowly to circumstances where the policy contains a subrogation provision. Thus, defense attorneys should review the applicable insurance policy when an insurer retains their firm to defend an insured.

Assuming the policy contains a right to subrogation, one can expect that certain actions and inactions may find insurance defense attorneys in the position where the insurer is suing them for legal malpractice. These may include but are not limited to:

- Failure to clear conflicts (representing more than one client without obtaining written consent);
- Failure to calendar key deadlines and appear at key events (depositions, hearings, mediations, etc.);
- Failure to understand the facts of the case (missing key evidence, inadequate investigation, failure to take critical depositions, etc.); and
- Failure to understand and apply the law (filing an answer instead of a

motion to dismiss, missing statute of limitations or other affirmative defenses, missing the deadline for a notice of appeal, etc.).

To avoid having the insurer exercise the right of subrogation against retained defense counsel, defense attorneys should turn the above failures into successes. Defense attorneys should also keep the insured and the insurer informed. They should provide prompt status updates. They should adhere to and comply with deadlines. They should put everything in writing. They should collaborate where possible on the best course of action.

The Supreme Court's decision may appear daunting. There are some concerns that the decision could lead to a slippery slope of legal malpractice actions. However, as the Supreme Court noted, "Florida public policy does not support shielding the law firm from account-ability for its professional malpractice." Thus, insurance defense attorneys should strive to be the best attorneys they can be every day, and this decision should not have a deleterious impact on their practice.

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