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ALERT

Excess Carrier May Sue Attorneys Retained by Primary Carrier for Equitable Subrogation, But Not Legal Malpractice

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Great American E&S Insurance Company v. Quintairos, Prieto, Wood & Boyer, P.A., 100 So. 3d 420 (Miss.2012)

Brief Summary

The Supreme Court of Mississippi held that an excess carrier could maintain a cause of action for equitable subrogation against attorneys retained by the primary carrier for the insured, to the extent of its losses. However, it reversed a ruling that also allowed a claim for legal malpractice, determining that the excess carrier failed to allege a sufficient factual basis to maintain a direct claim of professional negligence against the law firm.

Complete Summary

After the estate of a former nursing home resident sued the nursing home for negligent care, the nursing home's primary insurance carrier retained lawyers to defend the suit. During the course of the litigation, defense counsel provided the excess carrier with copies of status reports sent to the primary carrier, in which it evaluated settlement value to be between $150,000 and $400,000. The reports indicated that defense counsel would need to designate experts, including a physician. Sometime thereafter, the primary carrier reassigned the lawsuit to defendant law firm.

Although plaintiff timely designated two expert witnesses, defense counsel failed to designate experts before the deadline. Defendant law firm provided the primary carrier with a status report, which noted that experts had not yet been retained and that the case had a value of $250,000 in compensatory damages, and a trial value of $500,000. A courtesy copy of the report was forwarded to the excess carrier. When defendant law firm attempted to designate experts, the trial court granted plaintiff's motion to strike. Defense counsel then provided an updated suit evaluation increasing the settlement value to between $3 million and $4 million. This suit evaluation was the first notice the excess carrier had that its coverage was implicated. To exacerbate matters, the excess carrier learned that defense counsel had no attorneys licensed in Mississippi who could represent the insureds at trial. It consequently retained counsel on behalf of itself and the insured. The case ultimately settled.

The excess carrier sued defendant law firm for legal malpractice, negligence and equitable subrogation. Defendant law firm moved to dismiss, contending that it had no attorney-client relationship with the excess carrier. The trial court granted the motion, dismissing all claims.

The appellate court reversed, holding that the excess carrier had sufficiently alleged an attorney-client relationship based on the courtesy copies of suit reports it received from the law firm providing an evaluation of the case. The appellate court viewed the suit reports as confidential communications made in furtherance of the rendition of professional services, which could establish an attorney-client relationship.

The Mississippi Supreme Court granted *certiorari* to review an issue of first impression—whether the excess carrier could bring a claim against a primary insurer's attorney under a theory of equitable subrogation and whether an attorney-client relationship was necessary for a claim of legal malpractice by the excess carrier. The Court held that when lawyers breach the duty they owe to their clients, excess insurance carriers who must pay the damages on behalf of the clients, may pursue, to the extent of their losses, the same claim the client could have pursued.

The Court disagreed, however, with the appellate court that the excess carrier could pursue direct claims of legal malpractice against defendant lawyers. Instead, the Court specifically agreed with the appellate dissent that defendant lawyers did not provide legal advice or legal services to the excess carrier by simply communicating their opinion of the outcome and value of the case. *Great American E&S Insurance Company v. Quintairos, Prieto, Wood & Boyer, P.A.,* 100 So. 3d 453, 468 (Miss. Ct. App. 2012) (Carlton, J., *dissenting*). Case status reports providing an estimated settlement value, without more, are insufficient to establish an attorney-client relationship. The Court rejected the argument that its decision in *Century 21 Deep South Properties, Ltd. v. Corson,* 612 So. 2d 359 (Miss. 1992), abolished the attorney-client relationship requirement in legal malpractice suits in favor of a finding that the attorney is liable to all reasonably foreseeable third parties who rely on the attorney's work.

The Court distinguished *Corson* because it dealt with attorneys performing title-work, and held that liability may be extended to "foreseeable third parties who detrimentally rely" on the attorney's negligent conduct. *Corson* was inapplicable in the liability-insurance carrier context where attorneys often provide information and strategies to others with common interests without creating an attorney-client relationship. An attorney-client relationship is an essential element in a legal malpractice claim, and the excess carrier failed to plead sufficient facts to establish an attorney-client relationship. The Court thus reversed the appellate court and dismissed the cause of action for legal malpractice. The court stated "[A] plaintiff's negligence claim cannot survive unless the defendant had a duty to the plaintiff. A lawyer's duty to the client must be absolute and uncompromised; and the lawyer must be free to provide advice to the client—even where that advice might bring harm to others."

Significance of Opinion

This decision is significant for two reasons. First, the Court's reversal of the appellate court on the issue of legal malpractice reinforces that a direct attorney-client relationship must exist to sustain a cause of action for legal malpractice. Second, the issue of equitable subrogation to the rights of the client in favor of the excess carrier was one of first impression for the Court. An excess carrier may pursue equitable subrogation against the attorneys retained by the primary carrier, to the extent of its losses.

For further information, please contact Terrence P. McAvoy, Patricia Lynch Franklin or your regular Hinshaw attorney.

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