



## Alerts

### South Carolina Supreme Court Holds that Insurer can sue Defense Attorney Retained to Represent its Insured

June 6, 2018

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*Sentry Select Insurance Company v. Maybank Law Firm, LLC, et al.*, (May 30, 2018)

#### Brief Summary

The South Carolina Supreme Court, in response to questions from the District Court, ruled that an insurance company may directly pursue a legal malpractice claim against counsel it hired to defend its insured, allowing the insurer (Sentry Select) to proceed with a malpractice suit over a law firm's alleged mishandling of litigation regarding a car crash involving Sentry's insureds.

#### Complete Summary

Sentry Select Insurance Company brought a legal malpractice lawsuit alleging negligence against the lawyer it hired to defend its insured in an automobile accident case. The attorney failed to timely answer requests to admit served by the plaintiff. Seven months later, the attorney filed a motion seeking additional time to answer the requests, which the circuit court held under advisement until the parties completed mediation. Sentry Select claims that because of the attorney's failure to timely answer the requests, and the likelihood the circuit court would deem them admitted, it settled the case for \$900,000, when the attorney had previously represented to Sentry Select it could settle in a range of \$75,000 to \$125,000.

Sentry Select then filed this lawsuit in federal district court against the attorney and his law firm alleging a variety of theories, essentially claiming that the lawyer's negligence caused it to settle the case for an amount significantly more than it would otherwise have settled.

The District Court requested that the South Carolina Supreme Court answer two questions of law: 1) whether an insurance company may directly pursue a legal malpractice claim against counsel it hired to defend its policyholder, and 2) whether a legal malpractice claim may be assigned to a third party.

The South Carolina Supreme Court answered the first question in the affirmative—stating that an insurer may directly pursue a legal malpractice claim against counsel it hired to defend its insured. The majority opinion explained that it made this holding because of the insurer's unique position

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resulting from the fact that if the insured settles or has judgment imposed against him, the insurance contract ordinarily requires the insurer to pay the settlement or judgment.

The court cautioned, however, that it would not place an attorney in a conflict between his client's interests and the interests of the insurer, and that if the interests of the client are the slightest bit inconsistent with the insurer's interests, there can be no liability of the attorney to the insurer. Because of this, the insurer may recover only for the attorney's breach of his duty to his client, when the insurer proves the breach is the proximate cause of damages to the insurer, and proves its case by clear and convincing evidence.

The court emphasized that it was not recognizing any separate duty owed by the insured's attorney to the insurer, and that it was not recognizing a "dual attorney-client relationship."

The court also held that the insurer may not intrude upon the privilege between the attorney it hires and the attorney's client, the insured, leaving it to the trial courts to protect the attorney-client privilege if any dispute over it arises.

The court noted that its opinion does nothing to change the principle embodied in Rule 1.8(f), that a lawyer shall not accept compensation for representing a client from one other than the client unless there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship, and in Rule 5.4(c), that a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

The court also held that there may be no double recovery and noted that it made a deliberate decision not to specifically identify a theory of recovery—such as third party beneficiary theory or equitable subrogation. This decision was designed to preserve the attorney's fiduciary allegiance to his client with no interference from the insurer.

The dissenting opinion objected that "the majority creates another exception to the attorney-client relationship requirement to allow an insurer to pursue a cause of action against counsel hired to represent the insured." It criticized the majority's assertion that its decision is "consistent with the rule adopted by the majority of states that have considered the issue" because most of those jurisdictions appear to have done so on the belief that a dual attorney-client relationship exists between the insurer, insured, and counsel, which was not a relationship recognized by the majority.

The dissent also noted that by limiting the insurer's recovery to the extent hired counsel breached its duty to the insured and prohibiting double recovery, any cause of action against the defense counsel would be more akin to equitable subrogation or an assignment of an insured's legal malpractice claim, which the dissent believed to be contrary to the public policy of South Carolina.

The dissent stated that it was unable to identify any harm suffered by an insurer when the case settles within the agreed-upon policy limits because the insurer would merely be fulfilling a contractual promise between it and the insured. The insurer established a price to cover the risk and the insured paid it. Although the insurer might be unhappy that it paid more than it wanted to, that is the risk that it took and the nature of the insurance business.

The dissent acknowledged that denying the insurer the ability to sue the defense attorney directly may result in a negligent attorney avoiding liability, when the claim is resolved within the policy limits because it is unlikely the insured will bring a legal malpractice action, but the dissent found that risk outweighed by the other factors it discussed.

The Court declined to answer the second question, which was whether a legal malpractice claim may be assigned to a third party. The dissenting opinion would answer that a legal malpractice claim may not be assigned to a third party.

### **Significance of the Case**

This case represents the recognition by another state, conforming to the majority view, that an insurer may directly sue defense counsel it retained to represent an insured.

For more information, please contact Terry McAvoy.