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Florida Court Holds Insurer Lacks Standing to Sue Defense Counsel for Legal Malpractice

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Arch Ins. Co. v. Kubicki Draper, LLP, 2019 Fla. App. LEXIS 886 (Fla. Dist. Ct. App. Jan. 23, 2019)

Brief Summary

The Florida Fourth District Court of Appeal held that an insurer does not have standing to sue defense counsel for legal malpractice in connection with representation of an insured in an underlying matter, because defense counsel and the insurer are not in privity. Specifically, the Court concluded that the insurer is not an intended third-party beneficiary of the contract between defense counsel and the insured.

Complete Summary

The plaintiff, Arch Insurance Company (the "insurer"), engaged the defendant ("defense counsel") to defend the insurer's insured in an underlying lawsuit. After the underlying suit settled within the insured's policy limits, the insurer sued defense counsel for legal malpractice. The insurer alleged that defense counsel's delay in asserting a statute of limitations defense resulted in a settlement with the insurer's funds, which would have been avoided—in whole or in part—if defense counsel had raised the defense at an earlier time. Defense counsel moved for summary judgment on the basis that the insurer lacked standing because defense counsel and the insurer were not in privity with each other, and the insurer was not an intended third-party beneficiary. The trial court granted the motion concluding that "there is no privity between [the insurer] and [defense counsel], and none of the recognized exceptions to the strict privity requirement apply in the instant action."

The insurer appealed, but the Florida Fourth District Court of Appeal affirmed. The Court held that the insurer and defense counsel were not in privity, and the insurer was not an intended third-party beneficiary of the relationship between defense counsel and the insured. Although the Court acknowledged the insurer's policy arguments in favor of allowing it to sue defense counsel, the Court concluded that it was bound by the Florida Supreme Court's existing precedent. The insurer alleged that it paid the law firm's fees, was an intended third-party beneficiary of the relationship between defense counsel and the insured, and that privity of contract was unnecessary, but the Court rejected that argument and held that none of the recognized exceptions to the strict

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privity requirement in Florida applied. In short, because the Florida Supreme Court has not specifically held that an insurer is an intended third-party beneficiary, the appellate court here declined "to expand the field of privity exceptions" to apply to this case.

Significance of Decision

It appears that until the Florida Supreme Court holds otherwise, an insurer has no recourse against retained defense counsel if the insurer suffers a loss as a result of defense counsel's negligence. One should note, however, that other federal and state courts across the country have relaxed the strict privity requirement and allowed insurers to sue defense counsel. *See, e.g., Hartford Insurance Co. of Midwest v. Koeppel*, 629 F. Supp. 2d 1293 (M.D. Fla. 2009); *Nova Casualty Co. v. Santa Lucia*, No. 8:09-cv-1351-T-30AEP, 2010 U.S. Dist. LEXIS 106321, 2010 WL 3942875 (M.D. Fla. Oct. 5, 2010).

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