



## Alerts

### Florida Supreme Court Holds Insurer May Pursue Malpractice Claims Against Defense Counsel Retained to Defend Its Insured

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*Arch Insurance Co. v. Kubicki Draper, 2021 Fla. LEXIS 898*

#### Brief Summary

The Supreme Court of Florida held that an insurer has standing, through its contractual subrogation provision, to maintain a malpractice action against defense counsel retained to represent its insured where the insurer had a duty to defend.

#### Complete Summary

Spear Safer CPAs and Advisors (Spear Safer), an accounting firm, performed audits of the financial statements of Mutual Benefits Corporation (MBC). MBC later became subject to an action by the Securities and Exchange Commission (SEC) for federal securities regulations violation and subsequently reached a settlement with the SEC. MBC subsequently sued Spear Safer for accounting malpractice.

Arch Insurance Company (Arch) had a duty to defend Spear Safer in the accounting malpractice suit under a professional liability insurance policy's terms. The policy gave the insured the right to appoint legal counsel with Arch's approval. It also included a subrogation provision, which stated that Arch shall be subrogated to all Spear Safer rights of recovery against any person, organization, or entity, and Spear Safer shall do whatever necessary to secure such rights.

Arch retained defendant to defend Spear Safer in the accounting malpractice action. Just before trial, the litigation settled within Spear Safer's policy limits for \$3.5 million. Arch subsequently filed this malpractice lawsuit against defendant. Arch alleged that in the underlying litigation, defendant failed to timely raise a statute of limitations defense, which significantly increased the cost of settlement.

Defendant filed a motion for summary judgment arguing that Arch lacked standing due to a lack of privity of contract or attorney-client relationship between Arch and defendant. Arch argued there was privity or, alternatively,

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that Arch was an intended third-party beneficiary and that the policy provided Arch with subrogation rights. The trial court granted defendant's motion, reasoning that there was no privity and that therefore defendant did not owe Arch a duty of care. The Florida Fourth District Court of Appeal affirmed and adopted the trial court's order as its reasoning.

The Florida Supreme Court agreed with the circuit court and Fourth District that defendant was in privity with Spear Safer, rather than Arch. It held, however, that Arch had standing to maintain a legal malpractice action against defense counsel retained to defend its insured where Arch was contractually subrogated to the insured's rights under the insurance policy.

Arch's right to contractual subrogation was expressly provided for in the insurance policy, and this included claims for legal malpractice against counsel retained to defend the insured. The court stated that where an insurer has a duty to defend and counsel breaches the duty owed to the insured, contractual subrogation permits the insurer to pursue the same claim the insured could have pursued. Because the insured was in privity with defendant, Arch could step into the insured's shoes and pursue the malpractice claim.

The court stated that the public policy concerns that generally cause courts to prohibit the assignment of legal malpractice claims did not exist in these circumstances. The insurer is not a stranger to the attorney. Rather, the insurer is trying to recover money it paid from defense counsel it retained to defend its insured. Further, subrogation holds premium rates down by allowing insurers to recover indemnification payments from the tortfeasor who caused the injury. The Florida Supreme Court thus quashed the Fourth District's decision and remanded the case.

## Significance of Decision

This case demonstrates that in some jurisdictions, an action can be brought against an attorney not only by the former client, but also by the former client's insurer if there is a duty to defend and subrogation rights provided in the policy.