

## Alerts

### Ohio Federal Court Allows Insurer to Sue Defense Counsel

March 22, 2012

*Lawyers for the Profession® Alert*

*Carolina Casualty Ins. Co. v. Sharp*, 2011 WL 4633869 (N.D. Ohio 2011)

#### Brief Summary

The U.S. District Court for the Northern District of Ohio denied a motion to dismiss filed by defendants, a law firm and lawyers, concluding that it was at least plausible that plaintiff insurer had standing to sue defense counsel for malpractice because the insurer and the insured appeared to be in privity based on a mutuality of interests. In addition, the court denied a motion to dismiss by the individual lawyer defendants, who had claimed that they were not bound as individuals by a confidential tolling agreement signed by the firm's managing partner.

#### Complete Summary

Prior to this litigation, a company sued its law firm (the "environmental law firm" or the "insured") for legal malpractice. The environmental law firm's insurer retained a professional liability law firm to defend the environmental law firm. During the course of that malpractice litigation, the insurer, the insured and the professional liability law firm entered into a confidential tolling agreement that preserved all time-related rights, liabilities and defenses related to that litigation.

Following resolution of that matter, the insurer then sued two of the professional liability law firm's lawyers for legal malpractice, and the professional liability firm itself for vicarious liability, based on that firm's representation in the first malpractice action. Defendant lawyers and law firm moved to dismiss, contending that the insurer did not have standing to sue. Defendant lawyers also contended that the tolling agreement was not enforceable against them as individual attorneys.

The U.S. District Court, Northern District of Ohio denied the motions to dismiss. The court held that the insurer plausibly had standing to sue based on privity between the insurer and the insured and that there also was a plausible, nonspeculative basis upon which to allow the claim against the individual lawyers to proceed despite their assertion that they were not bound by the tolling agreement.

With respect to the tolling agreement, the court relied on the agreement's language and the general rule that a partner acting within the scope of the partnership's business has the authority to bind the other partners to contracts

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and agreements. The court rejected, as “semantic gymnastics,” the individual lawyer defendants’ contention that the managing partner only had the authority to bind the law firm and not the individual partners to the tolling agreement.

The individual lawyers also argued that the claims against them should be dismissed as time-barred because the language of the tolling agreement itself did not apply to the individual attorneys. But the court held that it was plausible that the agreement did apply to them because the agreement stated that it was to be binding on the firm’s “partners” and “attorneys.”

The court also denied defendants’ motion to dismiss that was based on an alleged lack of standing. Although an attorney may be immune generally from professional liability to third parties, such immunity does not attach under Ohio law if the third party is in privity with the lawyer’s client by virtue of a mutuality of interest between them. The court found that the docket supported a plausible inference that the insurer and the insured here shared a mutuality of interest, and therefore that privity could exist between them, sufficient to defeat the motion to dismiss.

### **Significance of Opinion**

This opinion addresses one aspect of when partners may be bound by one another’s acts, under general partnership principles and Ohio law. It also weighs in on the issue of an insurer’s standing to sue insurance defense counsel for malpractice, and the circumstances under which such an action may proceed. Although the exception allowing suit when there is privity/mutuality of interest had already been addressed by at least one Ohio court and is reaffirmed and applied here, the issue remains open in some jurisdictions.

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