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PROFESSIONAL LIABILITY BLOG

The “Tripartite” Relationship and an Insurers Right to Sue Panel Counsel

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Summary: This article provides a brief overview of the “tripartite” relationship between an insurer, its insured, and panel counsel and the theories under which a direct action can be brought by the insurer against panel counsel for legal malpractice.

The “tripartite” relationship refers to the relationship among an insurer, its insured and defense counsel retained by the insurer to defend the insured. Panel counsel are familiar with the “tripartite” relationship and the ethical and professional concerns that it entails. For instance, an attorney has an obligation to report fully and candidly with the insurer about the case. But the insured is the actual client to whom the attorney owes a fiduciary duty. Therefore, potential conflicts of interest can develop when an attorney acquires information from the insured that may be detrimental to the client’s insurance coverage. These conflicts can create dilemmas for an attorney and in some instances, subject him or her to ethical complaints and/or malpractice suits from the insured client.

But there are also circumstances when an attorney can be sued directly by the insurer. The recent South Carolina Supreme Court decision of *Sentry Select Ins. Co. v. Maybank Law Firm, LLC*, *---S.E2d---*, *2018 WL 2423694* (*S.C. 2018*) held that an insurer can bring a malpractice action against counsel retained to represent its insured even when the insured is not harmed by the alleged attorney’s negligence. In Sentry, the insurer hired an attorney to represent its insured in a trucking accident. Counsel initially represented the settlement value of the case was between $75,000 and $125,000. However, counsel later failed to answer requests to admit, which were deemed admitted under South Carolina law. As a result of this failure, Sentry settled the claim for $900,000. Thereafter, it filed suit against counsel for legal malpractice.

In reaching its conclusion, the Court affirmed the attorney's fiduciary duty is to the insured. But also reasoned an insurance company that hires an attorney is in a unique position with respect to the resulting attorney-client relationship which requires the insurer to defend the insured, investigate and settle claims in good faith, and pay attorneys' fees and costs of settlement. Therefore, this unique position affords the insurer the right to sue an attorney when it is damaged by the attorney's negligence. However, the right to bring such an action is limited to circumstances where the attorney breached a duty to his client (the insured), that is proven to be the proximate cause of damages to the insurer. The right to sue does not exist if there is any conflict between the insurer and insured created by the attorney's negligence.

In addition to the above duty-to-insured-damages-to-insurer theory, there are additional theories under which an insurer can sue panel counsel. In states like California, courts have ruled that the insurer is a co-client of the attorney to whom a fiduciary duty is owed. Other states such as Arizona provide recourse to an insurer for an attorney's negligence because the insurer is a third-party beneficiary of the attorney's services to the insured. On the other hand, Michigan and some states allow direct actions by an insurer against an attorney under the theory of equitable subrogation allowing the insurer to stand in the shoes of the insured.

As if the "tripartite" relationship were not already difficult to navigate, regardless of the theory employed by the courts, a majority of states now allow an insurer to bring a direct action against an attorney representing its insured. Attorneys who are panel counsel are well served to familiarize themselves with the above theories, determine which theory is applicable in their respective jurisdiction, and investigate whether a conflict of interest or any other defenses will defeat such a claim.