

# **Indiana Court of Appeals Finds Legal Malpractice Claims are Not Assignable and Voluntarily Providing a Defense Does Not Create a Duty When No Duty to Defend Existed**

AUTHOR: BEN WESSELSCHMIDT

CONTRIBUTOR: STEPHEN MURPHY

The named insured allowed his friend to drive a vehicle while both were intoxicated. The friend crashed the vehicle, causing the named insured severe injuries, and multiple lawsuits resulted. First, the named insured filed a lawsuit against the permissive driver for his injuries. The insurer provided a defense to the permissive driver under a reservation of rights, and the plaintiff/named insured ultimately obtained a \$21 million judgment, which had been reduced his own fault.

Following judgment, in exchange for an agreement not to pursue his personal assets, the permissive driver executed an assignment, assigning to the named insured all rights and claims he had against the insurer and defense counsel retained by the insurer. After the permissive driver executed the assignment, he filed a legal malpractice claim against defense counsel and the insurer. The trial court dismissed the insurer because claims for legal malpractice are not assignable under Indiana law, but allowed the claims against counsel to proceed.

While the claim against the permissive driver was pending, the insurer filed a declaratory judgment action. The insurer ultimately obtained a declaration it had no duty to defend the permissive driver because the policy excluded bodily injury to an insured.

Finally, the named insured filed a bad faith claim against the insurer based on the assignment from the permissive driver. The named insured alleged in relevant part (1) the insurer was liable for the actions and inactions of its retained counsel based on its oversight of the tort case and its policy manual; (2) the insurer was liable for the actions and inactions of its retained counsel because it admitted it had a duty to defend and the duty to defend was non-delegable; and (3) the acts and omissions of the insurer through retained counsel as its agent were negligent and/or performed in bad faith, ultimately causing tort judgment. The named insured asserted his claims were not based on attorney malpractice, but rather were claims for vicarious liability for its agent's acts and omissions, breach of the contractual duty to defend, and bad faith. The trial court dismissed all of the named insured's claims.

The Court of Appeals of Indiana affirmed the dismissal of the named insured's claims. First, the vicarious liability theory failed because it amounted to nothing more than a repackaging of a legal malpractice negligence claim against retained counsel, a claim which is not assignable under Indiana law. A non-client cannot maintain a claim against an attorney as a matter of policy, because the attorney never owed a legal duty to the non-client. However, the Court of Appeals reserved the question of whether the represented party subject to judgment, here the permissive driver who was owed a legal duty by retained counsel, could himself pursue a vicarious liability claim against the insurer arising from retained counsel's alleged malpractice.

Next, the duty to defend theory failed because the prior declaratory judgment determined the insurer did not owe a duty to defend or indemnify the permissive driver, therefore, the insurer could not breach a non-duty by gratuitously providing a defense. The Court refused to impose any liability under a theory of gratuitously assumed duty, as it would make for "unwise policy." Finally, the Court held the named insured failed to present any facts indicating the insurer failed to meet its good faith obligations and failed to designate any evidence showing the insurer acted with a dishonest purpose, ill will, or engaged in any conscious wrongdoing.

Case Citation: *Gregory Smith, As Assignee of Nolan Clayton v. Progressive Southeastern Insurance Company*, No. 19A-PL-1959, 2020 WL 3067807 (Ind. Ct. App. June 10, 2020)