

Insurer Can Sue Retained Defense Counsel for Failure to Accept Settlement Demand, Says U.S. District Court in Florida

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In a case of first impression, *Hartford Ins. Co. of the Midwest v. Steven G. Koeppel, et al*, 2009 WL 1229250 (M.D. Fla. May 5th, 2009),¹ a Federal District Court Judge denied the defendants' motion to dismiss and permitted Hartford Insurance Company of the Midwest ("Hartford") to proceed with legal malpractice claims against its insureds' defense counsel. Hartford's claims stemmed from defense counsel's work on a catastrophic personal injury claim asserted against Hartford's insureds.

Prior to suit being brought, Hartford retained defense counsel to 1) represent its insureds and *also* 2) specifically to accept a time-limited policy limits settlement demand issued by the underlying claimant's attorney. In attempting to accept the time-limited demand, defense counsel failed to precisely comply with the terms of the demand. As a consequence, the tender of policy limits was rejected and suit was filed against Hartford's insureds resulting in considerable excess exposure to Hartford's insureds and to Hartford itself.

Following Hartford's subsequent settlement of the underlying matter for an amount substantially in excess of the policy limits, Hartford brought a legal malpractice and breach of contract action against defense counsel on the basis of the failure to accept the time-limited settlement demand. The underlying defense counsel, now the defendant, moved to dismiss on the ground that Hartford lacked standing. Defense counsel contended that he was hired to represent only the insureds and that under Florida law he could not represent both the insureds and Hartford. The United States District Court for the Middle District of Florida, disagreed and held that, based upon the face of the Complaint, Hartford had standing as a matter of fact because it appeared that Hartford was in privity of contract with defense counsel.

In so ruling, the Court noted that shortly after receiving the claim, Hartford had successfully encouraged its insureds to secure personal counsel because it was clear that the available policy limits were unlikely to cover the plaintiff's very serious injury claims. The Court further noted that, a few months later, the claimant tendered a time-limited settlement demand to Hartford. Hartford then in turn hired defense counsel to accept the demand and, thus, at least in part, to represent Hartford. Based on the factual allegations of the Complaint, the Court found privity of contract between Hartford and defense counsel, and therefore held that Hartford had standing to pursue legal malpractice and breach of contract claims.

The Court went on, however, to consider whether Hartford would also have had standing to bring the action *even if* defense counsel had specifically been retained *only* to represent the insureds. The Court noted that the majority of jurisdictions recognize an insurer's right to pursue a legal malpractice action against counsel that it retained to represent its insured. Because no Florida court had rendered an opinion on the subject, the Court's assessment in this regard required an analysis of how the Florida Supreme Court would decide this issue. The Court pointed out that those jurisdictions that represent the majority rule have confirmed an insurer's standing in such a case in at least two ways: 1) a finding of privity of contract between the insurer and defense counsel, or 2) a finding that the insurer was an intended third-party beneficiary of the relationship between defense counsel and the insured.

Although the Court found no Florida appellate court decision directly on point, the District Court noted persuasive state court authority in three specific areas. First, the Rules Regulating the Florida Bar, as interpreted by Florida's Second District Court of Appeals, provide that an attorney may ethically represent both an insured and an insurer absent conflicting interests. Second, Florida courts have recognized exceptions to the strict privity requirement for legal malpractice claims in other areas of law, such as will drafting. Finally, the Court found that the Florida Supreme Court implicitly approved an insurer's standing to sue defense counsel for malpractice via a question certified from the Eleventh Circuit regarding the

statute of limitations for an insurer's malpractice case against its insured's defense counsel. The Florida Supreme Court issued its ruling without raising any objections to the insurer's standing to sue insured's defense counsel for malpractice.

Based upon these decisions, the District Court concluded that the Florida Supreme Court would likely follow the majority rule and find either that the insureds' defense counsel had an attorney-client relationship with Hartford or that Hartford was an intended third-party beneficiary of the attorney-client relationship between the insureds and defense counsel.

¹ Edward Angell Palmer & Dodge LLP, by Craig E. Stewart and John David Dickenson, represents Hartford in the Action.