

Insurer Subrogation: The Changing Landscape of Legal Malpractice

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The landscape of legal malpractice has changed in recent years, with new opinions coming out of numerous high courts in states around the country. Notably, the relationship between insurers and attorneys for the insured, hired by the insurer, is seeing major changes around the United States. The most recent upheaval comes out of Florida, in the landmark decision by a unanimous Florida Supreme Court in *Arch Insurance Co. v. Kubicki Draper, LLP*, 318 So.3d 1249 (Fla. 2021).

In *Arch Insurance Co.*, the Court held that insurers have standing to sue attorneys hired to represent an insured, despite a lack of privity between the two parties, through contractual subrogation. Now, in Florida, insurers can sue attorneys hired to represent their insured for legal malpractice if they have included a provision in the policy agreement establishing a contractual right to any rights, remedies, and recovery of the creditor to whom the insurance company has paid a debt. Before this decision, privity of contract with the attorney was a pre-requisite for a cause of action for legal malpractice in Florida.

Florida is not the first state to adopt this new rule, and surely will not be the last, as states around the country begin to follow suit, either by way of contractual subrogation or some other method crafted by state supreme courts to permit actions by insurers against defense attorneys. This new era of legal malpractice could have serious repercussions on practitioners and their own insurance policies, specifically firms who mainly practice insurance defense, with potential increases in rates on Errors and Omissions insurance. This article will explore the recent decision in Florida, as well as similar shifts around the United States on this issue.

An Overview of Subrogation

Subrogation is an insurer's right to proceed against a third party responsible for a loss which the insurer has paid pursuant to its contractual obligation under a policy which depends, among other things, on the existence of the insured's right to proceed against that entity. 16 *Couch on Insurance* § 222:2 (3d ed. 2021). Subrogation is the substitution of one person in the place of another in reference to a lawful claim, demand, or right, so that he or she who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities. *Id.* Essentially, subrogation allows a party to step into the shoes of another and assert the rights of that party to recover any losses the subrogee (the insurer) incurred in paying the debts or losses of the subrogor (the insured). The insurer is recovering the funds it expended in covering the losses of the insured. Subrogation provides an equitable remedy for restitution to a person who, in the performance of some duty, has discharged a legal obligation that should have been met, either wholly or partially, by another. *Tank Tech, Inc. v. Valley Tank Testing, L.L.C.*, 244 So. 3d 383, 389 (Fla. 2d DCA 2018).

Classically, subrogation exists solely in the context of insurance, as a right that arises only with respect to rights of the insured against third parties to whom the insurer owes no duty. 16 *Couch on Insurance* § 222:1 (3d ed. 2021). There are three types of subrogation recognized: 1) Contractual (Conventional); 2) Equitable (Legal); and 3) Statutory. Conventional subrogation comes into existence by way of an express agreement or contract. Equitable subrogation is a

form of equitable relief in instances in which one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter. *Id.* at § 222:24. And finally, statutes affecting subrogation function in the form of a state legislature, or Congress, declaring the right of an insurer to subrogation by statute, and placing any requirements or limitations on the subrogation right. A prime example of statutory subrogation is ERISA, which places certain limitations on how workers' compensation insurance plans can seek reimbursement, or subrogation actions.

Subrogation and assignment are often used synonymously, but the two actually differ, and are distinctive legal concepts. CJS SUBROG § 2. The key difference between the two is: "(1) assignment transfers the entire value of the claim, whereas subrogation transfers the claim only to the extent necessary to reimburse the subrogee, (2) assignees are typically voluntary investors, whereas subrogees, usually insurers, are obligated to pay the insured's obligation to a third party, and (3) assignment is an outright transfer of the claim, whereas subrogation entails a substitution of the subrogee for the subrogor." *Id.*

In essence, the doctrine of subrogation gives insurers the means to pursue causes of action against wrongful tortfeasors for losses in payments to their insured, reimbursing them for their loss.

Contractual Subrogation

Contractual subrogation is certainly not new in the zeitgeist of American jurisprudence. The legal instrument has been employed for many years by contracting parties, particularly insurance companies seeking to recover their losses in covering the debts of their insured. Traditionally, contractual subrogation, also commonly referred to as conventional subrogation, is based on an agreement between two parties in which the party obligated to pay any debts of the other contracting party, commonly an insurance agreement, will be subrogated to the rights and remedies of the original creditor. 6 Fla. Prac. § 8:9.

In the context of torts, contractual subrogation arises when contracting parties agree that when, under certain circumstances, the first party pays some obligation owed to the second party by a third party whose tortious conduct injures the second party, the first party will be placed in the shoes of the second party and will be subrogated to his legal rights and remedies against the tortfeasor. *Id.* This form of agreement is often found in insurance policies, where after the insurer has made payment to the insured to cover any losses suffered from the acts of a third-party, the insurer will stand in the shoes of the insured as they relate to the rights of recovery against the liable third party, or the third party's insurance company.

Thus, an insurer can bring a subrogation action against any alleged tortfeasor for damages, with the same rights and legal standing as the policy holder, although there is variance from state to state in terms of in whose name the Insurer can bring the suit. This legal instrument now provides the foundation for legal malpractice actions by insurers against panel defense attorneys hired to defend an insured in Florida.

Legal Malpractice Jurisprudence in Florida Pre *Arch Insurance Co. v. Kubicki Draper, LLP*

In Florida, prior to the decision by the Florida Supreme Court in *Arch Insurance Co.*, legal malpractice suits were limited to those in privity with the attorney, but with two distinct exceptions. Florida's 4th District Court of Appeal took

up the intermediate appeal on the issue to the Florida Supreme Court, in which they affirmed the trial court's denial of the insurer's right to sue, relying on two seminal cases in its decision, *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So.2d 1378 (Fla. 1993) and *Angel, Cohen & Rogovin v. Oberon Investment, N.V.*, 512 So.2d 192 (Fla. 1987).

In *Angel, Cohen & Rogovin*, the Florida Supreme Court addressed whether an incidental third-party beneficiary of the attorney-client relationship was entitled to bring a cause of action for legal malpractice. *Id.* at 193. A fiduciary agent of the plaintiff corporation retained the defendant firm to assist him in preparing documents and contracts for the sale of a subsidiary of the corporation, which were bought by said fiduciary. *Id.* The client then arranged concurrently for the subsidiary to be sold for a greater price. *Id.* The corporation brought an action against the fiduciary agent for breach of his duty to them, and against the firm for legal malpractice as a third-party beneficiary. *Id.* The Court held that the respondent, the corporation, lacked the requisite privity required to maintain an action sounding in negligence against an attorney. *Id.* at 194. The corporation did not fit within Florida's narrow third-party beneficiary exception, which only applied where it was the apparent intent of the client to benefit a third-party. Those cases were traditionally reserved for negligence in will drafting. *Id.* (citing *Lorraine v. Grover, Ciment, Weinstein, & Stauber, P.A.*, 467 So.2d 315 (Fla. 3d DCA 1985); *DeMaris v. Asti*, 426 So.2d 1153 (Fla. 3d DCA 1983); *McAbee v. Edwards*, 340 So.2d 1167 (Fla. 4th DCA 1976)).

In *Espinosa*, 612 So.2d 1378, the Florida Supreme Court once again reiterated the bounds of the third-party beneficiary exception for legal malpractice actions previously stated in *Angel*. In *Espinosa*, an attorney drafted a will for a man with multiple children. *Id.* at 1379. The will as drafted and signed by the testator made no provision for any after-born children. *Id.* A child was born to the testator after signing. *Id.* A new will was drafted to include the new child, but the testator never signed it, instead he signed a second codicil drafted by the attorney that only changed the identity of the co-trustee and co-personal representative, with no new provision for the after-born child. *Id.* The mother of the children brought a malpractice claim on behalf of the after-born child. *Id.* The trial court dismissed the entire action on summary judgment for lack of privity, which the 3d District Court of Appeal reversed in regard to the estate but affirmed the dismissal of the after-born child's claim. *Id.* The Court reiterated its position established in *Angel*, stating that an attorney's liability for negligence in the performance of his professional duties is limited to clients whom the attorney shares privity of contract. *Id.* at 1380. The Court also reiterated the exception for intended third-party beneficiaries to bring malpractice actions in will drafting cases, which did not include the after-born child. *Id.*

As demonstrated in these prior cases establishing the precedent and jurisprudence on legal malpractice actions in Florida, the privity requirement was construed quite narrowly and restrictively. Thus, the following case shakes up this traditional doctrine, but only within the province of insurance law.

Arch Insurance Co. v. Kubicki Draper, LLP

In *Arch Insurance Co. v. Kubicki Draper, LLP*, 318 So.3d 1249 (Fla. 2021), Arch Insurance Co. (Arch) hired Kubicki Draper, LLP (Kubicki) to defend their insured, Spear Safer CPAs, and Advisors (Spear), in a separate suit by a life insurance company for alleged accounting malpractice. *Id.* at 1251. The lawsuit against Spear triggered Arch's duty to defend Spear pursuant to the contract of insured. *Id.* The insurance policy also contained a subrogation provision allowing Arch to step into the shoes of Spear for any rights of recovery against tortfeasors for the extent of any payment under the policy. *Id.* Arch retained Kubicki to defend Spear, to wit, Kubicki settled the case for \$3.5 million just prior to trial. *Id.* Arch subsequently filed a legal malpractice suit against Kubicki for failure to raise the defense that the action against their

insured was barred by the applicable statute of limitations, causing the settlement cost to be significantly higher than it would have been. *Id.* at 1251-1252. Kubicki filed a motion for summary judgment based on Arch's lack of standing due to lack of privity, in keeping with the then existing precedent. *Id.* The trial court agreed and granted the motion. *Id.* Florida's 4th District Court of Appeal agreed with the trial court and affirmed. *Id.*

In a unanimous opinion the Court, without addressing any third-party beneficiary theory, held that insurers have standing to maintain a legal malpractice action against an attorney hired to represent their insured when the insurer is contractually subrogated to the insured's rights under the insurance policy. *Id.* at 1253. The Court focused on the policy's contractual subrogation provision, holding that it included claims for legal malpractice against counsel retained to defend an insured. The Court stated that "where an insurer has a duty to defend and counsel breaches the duty owed to the client insured, contractual subrogation permits the insurer, who—on behalf of the insured—pays the damage, to step into the shoes of its insured and pursue the same claim the insured could have pursued." *Id.* at 1254.

The Court distinguished the 4th District's opinion below, which addressed only the lack privity between Kubicki and Arch, with the established principles of subrogation, holding that because the insured is in privity with the law firm, contractual subrogation permits the insurer to step into the shoes of the insured, giving the insurer standing to pursue a legal malpractice claim against Kubicki. *Id.*

The Court went on to address how subrogation exists to hold premium rates down by allowing insurers to recover indemnification payments from tortfeasors who cause their insured injury, and how Florida public policy does not support shielding the law firm from accountability for professional malpractice. *Id.* at 1255.

Ultimately, insurers in Florida now have legal standing to sue attorneys for malpractice in their insured's cases, recovering money which ought not to have been paid but for an attorney's negligent mishandling of a case resulting in a higher settlement or judgment.

Legal Malpractice Actions by Insurers in Other States

Florida is not the first state to allow insurance carriers to bring legal malpractice actions against attorneys retained for their insured and is likely not the last. Other states have already recognized the right of insurance companies, which retain counsel for an insured's defense, to bring an action for legal malpractice against said counsel through contractual subrogation. *See Risk Control Associates Ins. Group v. Lebowitz*, 151 A.D.3d 527 (N.Y. App. Div. 1st Dep. 2017). Granted, not every state has used the same legal instrument to arrive at the same result.

Some states do not require a subrogation agreement for insurers to bring a malpractice action. For example, the South Carolina Supreme Court in *Sentry Select Insurance Co. v. Maybank Law Firm, LLC, and Roy P. Maybank*, 826 S.E.2d 270, 272 (S.C. 2019), held that an insurer can bring a direct action against counsel hired to represent its insured. The Court's rationale focused on the unique position of insurers in relation to the attorney-client relationship of their insured, noting the insurer's duty to defend its insured and compensate their attorney for their time in defense of the client. *Id.* The Court held that the insurer could recover only for the attorney's breach of his duty to his client when the insurer proves the breach is the proximate cause of damages to the insurer. *Id.* Further, if the interests of the client are the slightest bit inconsistent with the insurer's interests, there can be no liability of the attorney to the insurer, for the Court would not permit the attorney's duty to the client to be affected by the interests of the insurance company. *Id.* The Supreme Court of Arizona in an *en banc* opinion in *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 24 P.3d 593, 602 (Az. 2001) adopted a similar approach to South Carolina, recognizing a duty on the part of attorneys to the insurer, and liability for negligent breach of that duty so long as the interests of the insurer and client align.

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Both of these holdings appear to mirror the language of the *3d Restatement of the Law Governing Lawyers* § 51(g.), which states that a “lawyer designated by an insurer to defend an insured owes a duty of care to the insurer with respect to matters as to which the interests of the insurer and insured are not in conflict, whether or not the insurer is held to be a co-client of the lawyer.”

Many states rely on the doctrine of equitable subrogation to support actions for legal malpractice, largely in the cases of excess insurers. The Supreme Court of Mississippi in *Great American E&S Ins. Co. v. Quintairos, Prieto, Wood & Boyer, P.A.*, 100 So.3d 420 (Miss. 2012), permitted an excess insurer to bring a malpractice claim against a law firm retained by the primary insurer to defend its insured by way of equitable subrogation. The Supreme Court of Texas permitted the same style of action based on equitable subrogation in *American Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480 (Tex. 1992).

Ultimately, the historically strict privity requirements are slowly disappearing in modern American jurisprudence regarding insurers’ rights to bring legal malpractice actions against defense attorneys. Twenty-six (26) states now recognize an insurer’s cause of action against an attorney hired for an insured.

Fallout: Impact on the Practice of Law and a Word of Caution

In this rapidly changing landscape in insurance law, insurance defense attorneys are now potentially on the hook not only to the insured, but also the insurer, for malpractice. Prior to *Arch*, malpractice claims in insurance defense cases could not be assigned as a financial commodity and insureds could not subrogate their claims to insurers. Ordinarily, if the client is covered fully by the policy, the malpractice of an attorney would not result in any damages to the client, resulting in minimal risk for malpractice insurers with insurance defense policy holders. Now that insurers can bring these claims directly in Florida, insurance defense firms in the state, and their respective insurance carriers, are at greater risk. This could potentially result in higher premiums on policies in respect to insurance defense practitioners. Thus, insurance defense practitioners in Florida, and perhaps eventually in other states as a growing majority rule allowing these actions develops, should be prepared for the enhanced risks that follow these changes in traditional insurance defense and professional liability practice.

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