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PROFESSIONAL LIABILITY BLOG

The "Tripartite" Relationship and an Insurer's Right to Sue Panel Counsel: Part 2, Illinois, Missouri, and Kansas

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Summary: Following a post on the case of Sentry Select Ins. Co. v. Maybank Law Firm, LLC, *---S.E2d---, 2018 WL 2423694 (S.C. 2018)* regarding tripartite relationships, this article provides a brief overview of how Illinois, Missouri, and Kansas address the "tripartite" relationship between an insurer, its insured, and panel.

Over the years, the tripartite relationship has taken on added significance with the prevalence of insured claims and the desire of insurers and insureds alike to safeguard their right to obtain the best possible legal services from their panel counsel. And as the tripartite relationship has become commonplace in litigating covered claims, so too have questions as to whether an insurer can sue its panel counsel for legal malpractice.

In the State of Illinois the ability of a primary insurer to sue its panel counsel is fairly straightforward. It has long been recognized in Illinois that an attorney retained by a primary insurer to represent its insured has a fiduciary duty to two clients, the insured and the primary insurer. *National Union Ins. Co. v. Dowd & Dowd, P.C.,* 2 F.Supp.2d 1013, 1017 (N.D. Ill. 1998). As a result of that fiduciary duty, an insured, and also the primary insurer, can sue panel counsel for legal malpractice. *Id*.

In Missouri and Kansas, the question is less straightforward. In the case of *St. Paul Surplus Lines Ins. Co. v. Remley*, 2009 WL 2070779 (July 13, 2009, E.D. Mo.), in a matter of first impression, the United States District Court for the Eastern District of Missouri evaluated whether an excess insurer could sue its insured's attorney for legal malpractice. Although the Court seemed skeptical of the excess insurer's ability to prevail on the merits, the Court denied the attorney's motion to dismiss for failure to state a claim upon which relief could be granted. In denying the motion to dismiss, the Court did not evaluate the merits of the claim but rather merely looked at whether the averments in the pleading supported the elements of a legal malpractice claim.

The Court noted a plaintiff could maintain a legal malpractice claim if it has a direct relationship with the defendant, or if the plaintiff was a third party beneficiary of the attorney-client relationship. *Id*. at *2. Although not specifically stating, the Court seemed to dismiss the idea that a direct attorney-client relationship existed between the excess insurer and the attorney. However, the door was left open as to whether an excess insurer could be a third-party beneficiary. In evaluating the ability of a third party to maintain an action against an attorney, the Court weighs: (1) the existence of a specific intent by the client that the purpose of the attorney's services were to benefit the plaintiff; (2) the foreseeability of the harm to the plaintiffs as a result of the attorney's negligence; (3) the degree of certainty that the plaintiffs will suffer injury from attorney misconduct; (4) the closeness of the connection between the attorney's conduct and the injury; (5) the policy of preventing future harm; and (6) the burden on the profession of recognizing liability under the circumstances. *Id*. at *2-3. Thus, if those factors weigh in favor the existence of an insurer's third-party beneficiary status, a legal malpractice claim by an insurer could be viable.

The Court did however go out of its way to state that going forward, the excess insurer had a very high bar to meet in order to succeed on its claim. *Id*. at *3. Not only did the Court have concerns about the insurers ability to produce evidence that it directly sought and received legal advice from the attorney and that the attorney intended to give the insurer legal advice, but also whether the excess insurer was more than a mere incidental or indirect beneficiary to the attorney-client relationship.[1] *Id*.

The question is also unanswered in Kansas. Pursuant to established insurance law principles, insurance companies often hire independent counsel to represent an insured while reserving the right to later contest coverage. See *Patrons Mut. Ins. Ass'n v. Harmon*, 240 Kan. 707, 712, 732 P.2d 741, 745 (1987). In such circumstances, retained counsel owe their duty of loyalty to the insured, not the insurance carrier. *United States v. Daniels*, 163 F. Supp. 2d 1288, 1290 (D. Kan. 2001). Therefore, it is unlikely a court would find an attorney-client relationship exists between the insurer and panel counsel.

However, Kansas courts do acknowledge there are circumstances where an attorney owes a duty to a third-party non-client affected by the attorney's work. A three-step analysis is required in determining the existence of an attorney's duty to a third-party nonclient affected by the attorney's work: first, if the client of the attorney and the third party are adversaries, no duty arises*;* second, if the attorney and client never intended for the attorney's work to benefit the third party, then no duty arises; and third, if it is possible to conclude that the attorney and client intended for the attorney's work to benefit the third party, then the reviewing court must determine whether a duty arose in the particular circumstances at hand. *Johnson v. Wiegers*, 30 Kan. App. 2d 672, 46 P.3d 563 (2002). Thus, like the State of Missouri, Kansas may allow a legal malpractice claim by a primary insurer against panel counsel.

As the law continues to evolve and define the tripartite relationship, these issues will undoubtedly be resolved by the courts of Missouri and Kansas in short order. Stay tuned.

[1] Notably, the Court dismissed the excess insurer's equitable subrogation claim due to the drastic nature of the remedy and the potential conflict of interest between the attorney and the insured.