Arch Ins. Co. v. Kubicki Draper, LLP, 266 So. 3d 1210 (Fla. 4th DCA 2019), *review granted,* SC19-673, 2019 WL 2386336 (Fla. June 6, 2019)

The Fourth District shields lawyers appointed to represent insureds from malpractice claims by insurers

Rejecting federal precedent, ignoring numerous recent cases which relax the privity rule and Florida Bar Rules, the Fourth District Court of Appeal held that an insurer cannot sue a law firm retained to represent its insured.

Three federal court decisions held that the insurer is in privity of contract with the attorney hired to represent insureds or is a third-party beneficiary of the relationship between the attorney and the insured. *See Hartford Ins. Co. of the Midwest v. Koeppel*, 629 F. Supp. 2d 1293 (M.D. Fla. 2009); *Nova Cas. Co. v. Santa Lucia*, 2010 WL 3942875 (M.D. Fla. 2010) and *U.S. Specialty Ins. Co. v. Burd*, 833 F. Supp. 2d 1348 (M.D. Fla. 2011). The *Arch Creek* court correctly pointed out that these federal cases were merely persuasive authority and went on to state that they were "distinguishable".

The Court found *Hartford* and *Nova* distinguishable because the attorneys were hired to defend the carrier's interest in obtaining a settlement. Overlooked is the fact that in *Hartford* the conduct also benefitted the insured since the settlement would have been within policy limits thereby avoiding excess exposure and in *Burd* the court concluded the attorney owed a duty to both the insured and the insurer.

The *Nova* court addressed the issue head on holding that an insurance carrier has standing to bring a legal malpractice action against an attorney hired to defend its insured for three reasons. First, as a direct cause of action due to privity of contract. Second, as a third party beneficiary of the representation of the insured. Third, after paying the claim the carrier steps into the shoes of the insured through equitable subrogation. Notwithstanding these three separate paths for recovery, the *Arch Creek* court held there was no privity and none of the exceptions to strict privity applied.

Without detail, the Fourth District found nothing in the record to indicate the law firm was in privity with the insured's lawyer or that the insurer was an intended third party beneficiary. This statement is difficult to evaluate without knowledge of the record. However, if the engagement letter was included, and the letter followed Florida Bar rules, it is hard to justify the Court's decision.

R. Regulating Fla. Bar 4–1.7(e) provides:

> **(e) Representation of Insureds.** Upon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation. All other Rules Regulating the Florida Bar related to conflicts of interest apply to the representation as they would in any other situation.

If the writing required by this Rule disclosed the law firm represented both the insured and the insurer, contractual privity would be satisfied. Prophetically, a note to the Rule exclaims "The unique tripartite relationship of insured, insurer, and lawyer can lead to ambiguity as to whom a lawyer represents."

R. Regulating Fla. B. 4-1.8(j) sub-titled "Representation of Insureds" refers to a required Statement of Insured Client's Rights that also establishes privity. Paragraph 3 of the Statement, for example, provides: "Directing the Lawyer. If your policy, like most insurance policies, provides for the insurance company to control the defense of the lawsuit, the lawyer will be taking instructions from the insurance company." Similar recognition appears in paragraphs 4 ("Litigation Guidelines"), 5 ("Confidentiality"), 6 ("Conflicts of Interest"), and 7 ("Settlement").

The Court relied upon its understanding of the "law as it exists" and found only two situations in which a third party could pursue a claim against counsel with whom they were not in privity – a will drafting situation and a private placement situation. There is a plethora of cases that were overlooked. *See Rushing v. Bosse*, 652 So. 2d 869 (Fla. 4th DCA. 1995)(adoption); *E.P. v. Hogreve*, 259 So. 3d 1007 (Fla. 5th DCA.2018). (adoption); *Saadeh v. Connors*, 166 So. 3d 959 (Fla. 4th DCA 2015). (adult ward could sue lawyer hired by emergency guardian); *Dingle v. Dellinger*, 134 So. 3d 484 (Fla. 5th DCA.), *review denied*, 153 So. 3d 903 (Fla.), and *review denied sub nom. Millhorn v. Dingle*, 153 So. 3d 907 (Fla. 2014) (grantee of a quit claim deed suing lawyer for grantor).

Arising from *Arch Creek* is the certified question of WHETHER AN INSURER HAS STANDING TO MAINTAIN A MALPRACTICE ACTION AGAINST COUNSEL HIRED TO REPRESENT THE INSURED WHERE THE INSURER HAS A DUTY TO DEFEND. The Florida Supreme Court has not yet answered the question.

TAKEAWAY *Arch Creek* allows insurance carrier appointed lawyers to malpractice with impunity. Aside from the deductible, the only damaged participant is the insurance carrier who won't be able to sue. Appointed counsel could make it clear in the Statement of Client's Rights they only represent the insured to avoid liability. A knowledgeable insurance carrier will insist upon a tripartite relationship to establish both contractual privity and third party beneficiary status so that it can sue if the appointed counsel commits malpractice.