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Insurer Can Sue Hired Atty For Malpractice, SC Justices Say

By **Jeff Sistrunk**

Law360 (May 30, 2018, 9:18 PM EDT) -- An insurance company may directly pursue a legal malpractice claim against counsel it hired to defend its policyholder, a divided South Carolina Supreme Court ruled Wednesday, allowing Sentry Select Insurance Co. to proceed with a malpractice suit over a law firm's alleged mishandling of litigation regarding a car crash involving Sentry's insureds.

Answering certified questions from a federal judge, the South Carolina high court held 3-2 that the state's law permits an insurance company whose policy includes a defense duty to maintain a direct malpractice action against counsel retained on an insured's behalf.

The decision paves the way for Sentry to continue its suit against Charleston, South Carolina-based Maybank Law Firm LLC, which the insurance company hired to defend its insureds, a trucking company and driver, in the underlying action. Sentry has alleged the firm's negligence caused the case to ultimately settle for several times the sum that was initially on the table.

Wednesday's opinion contained an important limitation: the three-judge majority said an insurance carrier may recover damages for an attorney's breach of his or her duty to an insured client only if the carrier can prove that its damages were proximately caused by that breach.

The majority cast aside Maybank's concerns that the ruling would improperly divide an attorney's loyalty between the insurance company and its insured, saying courts can assess on a case-by-case basis whether the insurer's interests diverge from the insured's.

"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 we will not permit the attorney's duty to the client to be affected by the interests of the insurance company," Associate Justice John Cannon Few wrote for the majority.

The underlying action stemmed from a September 2010 accident in which a vehicle driven by Wanda Rivers rear-ended a stationary tractor-trailer rig operated by Herman Shaw, a driver for Wall Street Systems Inc. and its Madison Intermodal LLC subsidiary. Rivers, who suffered serious injuries in the collision, proceeded to sue Shaw, Wall Street and Madison, claiming Shaw had been improperly stopped in the roadway.

Sentry hired Maybank to defend Shaw and the companies. But problems arose when the law firm failed to respond in time to Rivers' requests for admissions, which asked the defendants to admit to a series of statements acknowledging responsibility for the crash and Rivers' damages, according to court documents.

Due to the lack of a response, the court overseeing the case deemed Rivers' requests admitted, thereby establishing that Shaw and his co-defendants were liable for the accident and resulting damages, court papers indicate. When Maybank made a belated request for an extension of time to reply to the requests for admissions, the court declined pending the completion of mediation, according to court documents.

Faced with the prospect of a verdict exceeding Sentry's $1 million policy limit if the case were to go to trial, the insurance company agreed to pay $900,000 to settle Rivers' claims — far more than the $75,000 to $125,000 settlement range that Maybank had once estimated, court papers say.

Shaw, Wall Street and Madison assigned their legal malpractice claims against Maybank to Sentry, and the insurance company proceeded to sue the law firm in South Carolina federal court in December 2015, wielding both the assigned claims and its own direct claims.

Maybank moved to dismiss the case, arguing that South Carolina law neither permits Sentry to bring a direct malpractice claim nor authorizes an attorney's client to assign a malpractice claim to a third party responsible for the payment of its legal fees. In June 2016, U.S. District Judge J. Michelle Childs sought the South Carolina Supreme Court's guidance, noting the lack of controlling precedent on either issue.

In Wednesday's opinion, the South Carolina high court majority found that an insurer in Sentry's position may indeed bring a direct malpractice action against the counsel it hired to represent its insured, pointing out that 24 other states already permit such an action. The majority also said its holding is consistent with the rationale of the state high court's 2014 decision in Fabian v. Lindsay, which held that an attorney may be held liable for a breach of his or her professional duty that results in damages to a third party.

However, the majority emphasized that its decision in Sentry's favor should not be interpreted to allow the "slightest intrusion into the sanctity of the attorney-client relationship, nor to diminish to any degree the fiduciary responsibilities the attorney owes his client." Here, it said, the facts in Sentry's case did not raise the specter of Maybank's loyalties being divided.

"The attorney's duty to his client includes the obligation to timely respond to requests to admit," Associate Justice Few wrote. "The fact that an insurance company may suffer financial loss from an attorney's negligence in failing to timely respond to the requests, and our recognition that the insurer may sue the attorney to recover this loss after settling the underlying case to protect the interests of the insured, do not in any way affect the attorney's duty to his client."

Based on its holding on the direct claim issue, the majority declined to decide whether malpractice claims can be assigned to a third party.

Chief Justice Donald W. Beatty wrote a sharply worded dissent, saying he would have ruled in Maybank's favor on both the direct claim and assignment questions.

"In deciding otherwise, the majority provides the insurer a windfall at the cost of preserving the attorney-client relationship, which is a decision I cannot support," Chief Justice Beatty wrote.

Sentry's counsel, Daryl G. Hawkins, told Law360 that he and his client are very happy with the state high court's decision, saying it "changes roughly 200 years of common law that a non-client cannot sue a lawyer."

"We were very careful in our arguments to preserve the attorney-client privilege," Hawkins added.

An attorney for Maybank did not immediately respond to a request for comment.

Sentry is represented by Daryl G. Hawkins of the Law Office of Daryl G. Hawkins LLC.

Maybank is represented by David W. Overstreet, Michael B. McCall, and Steven R. Kropski of Earhart Overstreet LLC.

Sentry Select Insurance Co. v. Maybank Law Firm LLC et al., case number 2016-001351, in the South Carolina Supreme Court.

--Editing by John Campbell.