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KD Alert: Appellate Division Rejects Claim Administrator's Legal Malpractice Claims Against Assigned Defense Counsel

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In Risk Control Associates Ins. Group v. Maloof Lebowitz Connahan & Oleske, P.C., 2014 WL 241741, 2014 N.Y. Slip Op. 00419 (1st Dep't 2014), New York's Appellate Division, First Department, continued to broaden the protections afforded by the long-standing requirement that only those parties in privity or in a relationship of "near privity" can assert a legal malpractice claim against an attorney. In doing so, the Court rejected a claim administrator's efforts to argue that its relationship with defense counsel was "near privity" or that it was entitled to equitable subrogation on a malpractice claim that the insured had against the attorney.

Risk Control, a claims administrator for an insurer, commenced an action alleging legal malpractice against defense counsel who was retained to represent an insured in a personal injury action. Risk Control acknowledged that it was not in direct privity with the defendant law firm. In New York, it is well settled that when an insurance company (or claim administrator) retains defense counsel to defend an insured, the paramount interest that defense counsel represents is that of the insured, not the insurer and that an attorney-client relationship only exists between the attorney and the insured. As such, an attorney only owes a duty to the insured, not the insurance carrier/claim administrator that pays the attorney. See Federal Ins. Co. v. North American Specialty Ins. Co., 47 A.D.3d 52, 847 N.Y.S.2d 7 (1st Dep't 2007).

In an effort to salvage its claim, Risk Control argued that its relationship with defense counsel was one of "near privity" and, therefore, its legal malpractice claim was viable. In doing so, the plaintiff appears to have relied upon Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 13 A.D.3d 172, 787 N.Y.S.2d 15 (1st Dep't 2004). In Allianz Underwriters Ins. Co., in the context of a pre-answer motion to dismiss, the First Department indicated that an excess insurer might be able to maintain a claim for breach of fiduciary duty against defense counsel retained by the primary insurer because the relationship between the excess carrier and defense counsel was "near privity."

Several years after deciding Allianz Underwriters Ins. Co., however, the First Department issued Federal Ins. Co., supra, which explained that the decision in Allianz Underwriters Ins. Co. was based upon a finding that an insurer may be entitled to equitable subrogation to whatever claims the insured had against the attorneys because the insurer had already paid to resolve claims on the insured's behalf. The First Department noted that its discussion of "near privity" in Allianz Underwriters Ins. Co. was merely dicta and that a non-client's claims against an attorney could only be maintained on a "near privity" basis when it is alleged that the attorney made negligent misrepresentations to the client, thereby diminishing the relevance of the "near privity" argument for routine malpractice claims.

In reaching its decision in Risk Control Associates Ins. Group, the Court engaged in little discussion of Federal Ins. Co. or Allianz Underwriters Ins. Co. Rather, the Court focused on the fact that there was no allegation that Risk Control had a contractual duty to pay on the insured's loss and that it had not sustained any actual damages as a result of such an obligation. As Risk Control was only a claims administrator it did not issue any policies of insurance and therefore, could not be responsible for any damages or defense costs. Further, since Risk Control was not responsible for making payments on the insured's behalf, it could not equitably subrogate to any of the rights of the insured.

Risk Control Associates Ins. Group confirms that while in certain situations an insurance carrier may be able to assert legal malpractice claims against the defense counsel they retain on their insured's behalf, a claims administrator, who bears no financial risk for an insured's potential losses, will not be able to do so.

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