IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

GREAT AMERICAN E&S INSURANCE COMPANY	**APPELLANTS**
VS.	**NO. 2009-CA-01063**
ROYAL INDEMNITY COMPANY, individually, and in its capacity as successor in interest to ROYAL INSURANCE COMPANY OF AMERICA, QUINTAIROS, PRIETO, WOOD & BOYER, P.A. and JOHN DOES 1-25	**APPELLEES**

BRIEF OF QUINTAIROS, PRIETO, WOOD & BOYER, P.A. APPELLEES

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

A. Great American E & S Insurance Company, Appellant;

B. Quintairos Prieto Wood & Boyer P.A., Appellee

C. Royal Indemnity Company, individually and in its capacity as successor in interest to Royal Insurance Company of America

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Respectfully submitted, this the 1st day of April, 2010.

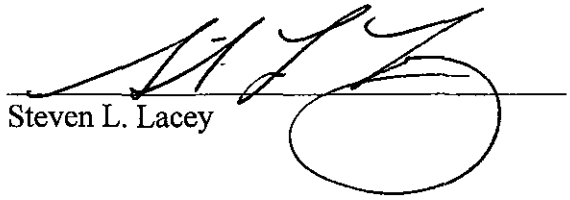

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES

RULES

SECONDARY SOURCES

STATEMENT REGARDING ORAL ARGUMENT

Appellee, Quintairos Prieto Wood & Boyer P.A., believes this case warrants oral argument. Crucial questions are presented involving an issue of first impression that will have a direct impact on the preservation of the attorney client relationship/privilege under Mississippi jurisprudence. Because the legal issues at stake are so important, oral argument should be granted.

STATEMENT OF THE ISSUE

Because no attorney-client relationship existed between Great American E&S Insurance Company ("Great American") and Quintairos Prieto Wood & Boyer P.A., ("Quintairos"), Great American's claim for legal malpractice was properly dismissed by the Circuit Court. Pursuant to Rule 28(b) Mississippi Rules of Appellate Procedure, Quintairos, is dissatisfied with the Statement of the Issues as set forth by Great American in its Brief, and would urge the Court to consider the following as a proper statement of the issue:

The issue is, can a lawyer or law firm, hired by a primary insurance carrier to defend an insured (the lawyer's client) be sued for legal malpractice by an excess insurance carrier who did not hire the lawyer. The issue before this Court is one of first impression and will require the Court to establish public policy of the State of Mississippi. The Court's decision will have a direct impact on the preservation of the attorney client relationship/privilege under Mississippi jurisprudence. At this stage of the proceeding, the issue before the Court is not whether Quintairos committed legal malpractice.

STATEMENT OF THE CASE

Great American has made claims against Quintairos and seeks to recover under several legal theories, including equitable subrogation, legal malpractice, and negligence. The factual basis for all of Great American's claims against Quintairos is, however, the same: the alleged failure of Quintairos to properly defend the underlying lawsuits. Thus, Great American is actually pursuing only a claim for legal malpractice against Quintairos, under several theories and based on separate aspects of events that occurred in the defense of the underlying cases.

In Count I of its Amended Complaint ("Equitable Subrogation"), Great American alleges that, as a result of the actions of Quintairos "in the handling of the defense of the referenced cases[1]," the insured suffered a loss[2] in excess of the Underlying Policy on each of the four cases. (R. p. 57 at ¶ 4.2). Great American further alleges that "the insured" has a cause of action against the Defendants which the insured could have asserted on its own behalf, "had the insured not been indemnified by Great American." (R. p. 58 at ¶ 4.4). Great American now seeks to recover "the indemnified damages sustained by the insureds" and other damages that it suffered as a result of Quintairos's actions in handling the underlying suits. (R. p. 58 at ¶¶ 4.4, 4.5).

In Count II, Great American alleges that Quintairos "failed to exercise the degree of care, skill, knowledge and ability ordinarily possessed by members of the legal profession in its

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[1] The referenced cases made a part of the Amended Complaint were all filed against various nursing homes, or assisted living facilities in the Circuit Court of Warren County, Mississippi and styled as follows: (1) *The Estate of Huldah Chase, et al. v. International Healthcare, et al.*, Civil Action Number 02-0133CI; (2) *Alma Taylor, et al. v. Vicksburg Convalescent Home, et al.*, Civil Action No. 02-0214 CI; (3) *The Estate of Nancy Jones and Brenda Jones, et al. v. International Health Care Properties 61, L.P..*, Civil Action No. 02-0197 CI; (4) *Hilliard Berry, Sr., et al. v. International Health Care Properties 61, L.P.*, Civil Action No. 02-0197 CI. (R. E. 4, Amended Complaint at pp. 52 & 56-7).

[2] Actually, there was no loss suffered by the insured, the underlying cases were all voluntarily settled by the primary and excess carriers.

performance of work in the *Chase, Norris, Berry* and *Jones* cases," and that its failure to do so was a proximate cause or proximate contributing cause of the damages suffered by Great American. (R. p. 58 at ¶¶ 4.7, 4.8). Similarly, in Count III ("Negligence"), Great American alleges that "Defendants" had a duty to maintain an adequate defense for the insureds and the Plaintiff in the underlying actions, that the "Defendants" breached that duty, and that their negligence was the sole proximate cause or proximate contributing cause of Great American's damages. (R. p. 59 at ¶¶ 4.10-4.12). Count III is clearly duplicative of Count II. Great American alleges that Quintairos "had a duty to maintain an adequate defense for the insureds and the Plaintiff in the underlying actions," and that Quintairos breached that duty by failing to exercise the degree of care, skill, knowledge and ability ordinarily possessed by attorneys . . . ." (R. p. 59 at ¶¶ 4.10, 4.11).

Further, Count IV ("Gross Negligence") merely adds that the Defendants' actions "constituted gross careless and reckless acts tantamount to intentional disregard for the rights of the insureds and Plaintiff." (¶R. p. 59 at 4.14). The alleged wrongful conduct by Quintairos could only have occurred in the course of its legal representation of the insured in the underlying cases, and, thus, Count IV is a further embellishment of Great American's claim for legal malpractice. Count V is only directed at Co-Defendants, not Quintairos.

In Count VI ("Negligent Misrepresentation"), Great American alleges that the Defendants, or their employees/agents, "made misrepresentations or material omissions to the Plaintiff regarding the referenced cases" and "failed to adequately and timely advise the Plaintiff of the status of the litigation in the referenced cases." (R. p. 60 at ¶¶ 4.21, 4.22). These allegations clearly demonstrate that the alleged wrongful conduct by Quintairos occurred in the course of its representation of the insureds in those cases. Thus, Count VI is a further description of Great American's claim for legal malpractice.

In Count VII ("Negligent Supervision"), Great American alleges that Quintairos has a duty to exercise due care in supervising its employees, and that it breached that duty by negligently supervising its employees. (R. p. 60 at ¶¶ 4.29, 4.30). The alleged negligent supervision could have occurred only in the course of Quintairos's representation of the insureds in the underlying cases. Thus, Count VII is merely a further description of Great American's claim for legal malpractice.

Great American has sued Quintairos to recover amounts that it paid as the excess insurance carrier to settle the four cases (which Great American describes as "compensatory damages"), and other damages, including cost of defense of the underlying suits, punitive damages, attorneys' fees and litigation costs for having to bring this suit, pre-judgment interest, post-judgment interest, and any other damages that it is entitled to recover. (R. p. 61 at ¶ 5.1).

STATEMENT OF THE FACTS

The Quintairos law firm was retained by Royal, the primary insurance carrier, to represent its insureds (certain residential care facilities) in the four cases named in the Amended Complaint (*Chase, Norris, Berry,* and *Jones*). (R. pp. 53, 56 at ¶¶ 3.3, 3.17). Great American was the excess insurance carrier for these residential care facilities. All four cases were ultimately settled. Royal paid the limit of its primary insurance coverage in each case, and Great American contributed to the settlements under its excess insurance coverage. (R. pp. 56, 57 at ¶¶ 3.16-3.18).

Great American does not even allege that it was the client of Quintairos in the underlying cases. Great American requested and was provided evaluations and assessments of the *Chase* claim by defense counsel (both the law firm that was originally retained to defend the insureds and Quintairos, which was retained in November 2003). (R. pp. 53-55 at ¶¶ 3.5, 3.6, 3.9, 3.14). In March 2004, upon learning that its excess policy might be implicated, Great American "immediately retained counsel to protect its interests in the [*Chase*] suit." (R. p. 55 at ¶ 3.14).

No claim has been made against Quintairos by the defendants that it represented in the underlying cases (its clients) and no claim has been made against Quintairos by Royal (the insurance carrier that hired Quintairos). The Amended Complaint includes no allegation that the insured defendants in the underlying cases have assigned any legal malpractice claims[3] against Quintairos to Great American or that Quintairos's clients have otherwise consented to or approved the filing and prosecution of such claims against their attorneys.

SUMMARY OF THE ARGUMENT

Great American's pursuit of legal malpractice claims under an equitable subrogation theory should be rejected. Mississippi has not yet considered whether an excess insurer can pursue legal malpractice claims against a lawyer who was hired by the primary carrier to represent the insured in the underlying case under an equitable subrogation theory. However, a majority of courts in other jurisdictions that have considered this question have refused to allow such claims, and Mississippi should do likewise.

The legal question presented by the present appeal is whether, under Mississippi law, an excess insurance carrier can pursue legal malpractice claims against attorneys retained by the primary insurance carrier to represent the insured. Mississippi decisions are very clear that a requisite element of a claim for legal malpractice is the existence of an attorney-client relationship. That element is not only not satisfied in this case, it is not even alleged to exist and Great American's claims for legal malpractice were therefore properly dismissed.

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[3] Even if there were an allegation of such assignment it would likely not be valid. Although Mississippi has not decided the issue, other states have and the majority prohibit assignment of legal malpractice actions. *Assignability of claim for legal malpractice*, 40 A.L.R.4th 684 (1985). (Reporting sixteen states do not allow such assignment and only three states do.)

ARGUMENT

A. A Lawyer-Client Relationship Is an Essential Element of a Legal Malpractice Claim

In order to prevail in an action for legal malpractice or any cause of action stemming from the attorney-client relationship, Plaintiff must show the existence of a duty owed to the Plaintiff by the Defendant. *Wilbourn v. Stennett, Wilkinson & Ward,* 687 So.2d 1205, 1215 (Miss. 1996). This duty arises from the attorney-client relationship. *Singleton v. Segall,* 580 So.2d 1242, 1244 (Miss. 1991). In the absence of an attorney-client relationship, however, there can be no duty that can give rise to an action for legal malpractice, breach of fiduciary duty or similar torts. *Id.* As this Court has aptly stated: "The first step is finding that a lawyer-client relationship has come into being." *Id.* Importantly, Great American does not even allege an attorney-client relationship with Quintairos in the underlying cases giving rise to a duty. Where there is no duty, there can be no breach of that duty.

Great American, however, relying upon Miss. Code Ann. § 11-7-20 and *Century 21 Deep South Properties, Ltd. v. Corson,* 612 So.2d 359 (Miss. 1992) asserts that a lawyer-client relationship is no longer one of the elements of a claim for legal malpractice. (Appellant's Brief at pp.10-14). This assertion is demonstrably incorrect. The effective date of § 11-7-20, which abolished the requirement of privity in negligence and other cases, was 1976. Century 21 was decided by this Court in 1992. However, post § 11-7-20 enactment and post - *Century 21* decisions of this Court and the Mississippi Court of Appeals have consistently held that one of the elements of a claim for legal malpractice is the existence of a lawyer-client relationship. *E.g., Byrd v. Bowie,* 933 So.2d 899, 904 (Miss. 2006); *Baker Donelson Bearman & Caldwell, P. C. v. Muirhead,* 920 So2d. 440, 449 (Miss. 2006); *Wilbourn v. Stennett, Wilkinson & Ward,* 687 So.2d 1205, 1215 (Miss. 1996); *Lancaster v. Stevens,* 961 So.2d 768, 771 (Miss. Ct. App. 2007); *Blanton v. Prins,* 938 So.2d 847,

851 (Miss. Ct. App. 2005). Great American does not even allege in its Amended Complaint that a lawyer-client relationship existed between it and Quintairos. Indeed, the detailed statement of facts set forth in the Amended Complaint (Section III) recites that "the Royal Defendants hired defense counsel to defend the insureds."(R. p. 53 ¶ 3.4).

Further, according to the Amended Complaint, the Royal Defendants reassigned the defense of the *Chase* case to Quintairos in November 2003. (R. p. 54 ¶ 3.6). Great American recites many facts about the procedural history of the *Chase* case, but again, it never alleges that it had a lawyer-client relationship with Quintairos at any relevant time. In fact, Great American alleges that, upon learning that its Excess Policy might be implicated, it "immediately retained counsel to protect its interests...." (R. p. 55 ¶ 3.14).

In *Blanton v. Prins*, 938 So.2d 847 (Miss. Ct. App. 2005), certain members of a limited liability company (LLC) initiated a legal malpractice suit against an attorney and law firm that represented the LLC. The members alleged that the attorney for the LLC had failed to advise them of the majority shareholder's alleged conflicts of interest and had withheld from them information regarding the LLC's settlement with a third party. The chancery court ruled that no attorney-client relationship existed between the lawyer and the members of the LLC, and the members appealed. *Id.* at 848-50. The Mississippi Court of Appeals agreed that no attorney-client relationship existed. The lawyer's duty was owed to the LLC, rather than to the LLC's individual members. *Id.* at 851-52.

A lawyer-client relationship is not even alleged to have existed between Quintairos and Great American in the underlying four cases at issue, and the allegations in the Amended Complaint that relate to communications between Quintairos and Great American are not sufficient to constitute such a relationship. *See Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves,* 929 F.2d 103, 107-08 (2d Cir. 1991) (excess insurer did not plead that it had retainer agreement with

attorneys; keeping insurer informed about progress of case not sufficient to support attorney-client relationship); *Querrey & Harrow, Ltd. v. Transcontinental Insurance Co.*, 861 N.E.2d 719, 724-25 (Ind. App. 2007), *aff'd*, 885 N.E.2d 1235 (Ind. 2008) (correspondence between primary insurer and excess insurer did not establish fact question as to whether primary insurer's attorneys consented to represent both their client and excess insurer). The *Blanton* case presented a much closer call than this case, and yet the facts in *Blanton* were not sufficient to establish an attorney-client relationship. Because the existence of such a relationship is an essential element of a claim for legal malpractice in Mississippi, and because that element is not present in this case, Great American's claims for legal malpractice were properly dismissed.

Thus, notwithstanding the *Century 21* decision and Section 11-7-20, Mississippi law is unmistakably clear that the existence of a lawyer-client relationship remains an essential element of a claim for legal malpractice. Further, *Century 21* is clearly distinguishable on its face. *Century 21* involved, among other things, several real estate transactions in which title examinations revealed certain liens on the property in question (a residence). The Corsons sued several defendants, including Donald J. Steighner, an attorney who had performed certain title work for the Meiers, from whom the Corsons purchased the residence. The Corsons did not claim that they had an attorney-client relationship with Steighner, and the Supreme Court ruled that the fact that Steighner corrected an easement problem discovered by another firm in the course of doing a title update for the Corsons did not create an attorney-client relationship between Steighner and the Corsons. The Mississippi Supreme Court held:

> Today we modify the requirements of legal malpractice actions based on an attorney's negligence *in performing title work* by abolishing the requirement of attorney-client relationship and extending liability to foreseeable third parties who detrimentally rely, as we have done in cases involving other professions. An attorney *performing title work* will be liable to reasonably foreseeable persons who, for a

> proper business purpose, detrimentally rely on the attorney's *title work*, suffering loss proximately caused by his negligence.

612 So.2d at 374 (emphasis added). The *Century 21* decision is clearly limited to an attorney's negligence in performing real estate title work, and this Court has never extended the holding of *Century 21* to any other type of legal malpractice action, including ones that arise from underlying personal injury or wrongful death litigation.

Moreover, it is undisputed that, while the underlying cases were pending, Quintairos was retained by Royal to represent the insureds, and that no lawyer-client relationship ever existed between Quintairos and Great American. Great American does not allege that it had any involvement in the selection of Quintairos, or that it was ever billed by Quintairos for any legal fees or expenses in the underlying cases. Great American merely requested and received copies of litigation status reports prepared by defense counsel (Quintairos and its predecessor). The averments of fact in the Amended Complaint demonstrate that no lawyer-client relationship between Quintairos and Great American ever existed. (R. 51-63). In the absence of such a relationship, Great American's claims for legal malpractice were properly dismissed by the Circuit Court.

Great American's Claims of Negligent Misrepresentation and Negligent Supervision Are Merely Additional Averments of Legal Malpractice

Great American asserts that its claims for negligent misrepresentation and negligent supervision are properly pleaded and viable. (Appellant's Brief at pp. 18-20). However, as set forth hereinabove, the allegations in these two counts (Count VI and Count VII) only further describe Great American's claims for legal malpractice. (R. pp. 60, 61). The alleged wrongful conduct by Quintairos set forth in these two counts occurred, and indeed could only have occurred, in the course of Quintairos's representation of the insureds in the underlying personal injury/wrongful death cases.

Thus, these counts are not distinct theories of liability and are instead merely additional descriptions of Great American's legal malpractice claims.

B. Great American Should not be allowed to Pursue Legal Malpractice Claims Against Quintairos Under an Equitable Subrogation Theory

"Equitable subrogation is a doctrine whereby a surety is permitted to stand in the shoes of the party that benefitted from its performance of the surety obligation in order to prevent unjust enrichment on the part of a wrongdoer who caused the surety's expense." *Lyndon Property Insurance Co. v. Duke Levy & Associates, LLC,* 475 F.3d 268, 270 (5th Cir. 2007). Stated differently, subrogation "is an equitable remedy, the purpose of which is to compel the ultimate discharge of a debt or obligation by one who in good conscience ought to pay it." *See Continental Casualty Co. v. Pullman, Comely, Brandley & Reeves,* 929 F.2d 103, 106 (2d Cir. 1991).

Our research indicates that Mississippi has not considered whether an excess insurer can pursue claims for legal malpractice against the attorney who represented the insured under an equitable subrogation theory. A survey of decisions from other courts indicates that a majority of the jurisdictions that have considered this question have declined to allow such claims for a variety of reasons.[4] Those decisions, and the reasons behind those decisions are summarized below. The public policy and rational included in those decisions is separately discussed after the following summary of the cases.

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[4]Some other courts have reached a contrary conclusion and have allowed such claims to go forward under an equitable subrogation theory. *See, e.g., National Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 F.Supp.2d 1013 (N.D. Ill. 1998); *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 787 N.Y.S.2d 15 (2004); *American Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480 (Tex. 1992); *Atlanta International Ins. Co. v. Bell,* 475 N.W.2d 294 (Mich 1991) These cases have been discussed by the Appellant. The public policy behind these decisions has been summarized by one court as follows: "The jurisdictions that allow equitable subrogation have chosen the shifting of responsibility for loss to the responsible attorney over the potential jeopardy to the sanctity of the attorney-client relationship. *State Farm Fire and Casualty Company v. Robert G. Weiss, Esq.*, 194 P.3d 1067 (Colo. App. 2008).

1. Courts in Other Jurisdictions Have Rejected Equitable Subrogation In Legal Malpractice Cases

a. Arkansas

In *Great American Insurance Co. v. Dover & Dixon, P.A.*, 402 F.Supp.2d 1012 (E. D. Ark. 2005), the United States District Court for the Eastern District of Arkansas considered a motion for summary judgment in a legal malpractice case filed by an excess insurance carrier against the attorneys who had represented the defendants in the underlying case. The legal malpractice case arose from a $78,000,000 verdict rendered in state court for the negligent care and wrongful death of a resident at the Rich Mountain nursing home. The Arkansas Supreme Court affirmed the judgment in that case, upon the condition of a remittitur of the verdict to $26,000,000.

The defendant's attorneys moved for summary judgment as to the excess insurer's claim, and the United States District Court, applying Arkansas law, concluded that the defendants were entitled to judgment as a matter of law. The Court stated that the issue presented was "whether excess insurers may pursue legal malpractice claims against the attorneys who represented their insured," and noted that most courts have denied such claims. *Id.* at 1019. The Court held that an Arkansas statute (§16-22-310) provides that no person licensed to practice law in Arkansas shall be liable to persons not in privity of contract with such person for civil damages resulting from acts, omissions, decisions or other conduct in connection with professional services performed by that person, subject to two limited exceptions. The Court determined that there was no direct privity between the defendants and the excess insurer, and that neither of the two statutory exceptions to the privity requirement were applicable. *Id.* at 1020-25.

The District Court also considered whether the excess insurer could rely upon equitable subrogation principles to avoid Arkansas's statutory privity requirement, and predicted that the

Arkansas Supreme Court, if presented with the issue, would answer the question in the negative. The effect of allowing such suits under a theory of equitable subrogation would be to severely undercut the Arkansas statute that limits legal malpractice claims and to severely undercut the Arkansas legislature's determination of when an attorney should face potential liability for professional negligence. *Id.* at 1025. In addition, allowing equitable subrogation claims in this context would, in essence, be founded on assignment of the insured's tort claim against its attorneys to the insurer that paid a portion of the insured's claim. The District Court noted that, arguably, Arkansas does not permit the assignment of tort claims, and predicted that the Arkansas Supreme Court, if confronted with the issue, would find that legal malpractice claims are personal to the client and non-assignable to third parties. *Id.*

The District Court's decision was subsequently affirmed by the United States Court of Appeals for the Eighth Circuit. *See Great American Insurance Co. v Dover, Dixon Horne, P.L.L.C.*, 456 F.3d 909 (8th Cir. 2006).

b. Colorado

In *Essex Insurance Co. v Tyler,* 309 F.Supp.2d 1270 (D. Colo. 2004), an excess insurer, claiming that it was equitably subrogated to the rights of its insureds, brought legal malpractice and breach of fiduciary duty claims against the attorney and law firm that represented the insureds in the underlying tort action. The underlying case involved a 1996 automobile accident, in which the driver hit a pedestrian. Following a trial in 2000, the jury returned a verdict of $300,000 in favor of the pedestrian. The pedestrian was found to be 33% negligent, and the plaintiff's insured was deemed 67% responsible. As the excess insurer, the plaintiff paid the pedestrian approximately $238,000.

In considering whether an excess insurer can pursue professional malpractice-based claims against insureds' attorney based on a theory of equitable subrogation, the United States District Court

first noted that Colorado case law is clear that, as a general rule, most legal malpractice claims must be predicated on the existence of an attorney-client relationship, absent allegations of fraud or maliciousness. *Id.* at 1272. The Court also noted that, under Colorado decisions, an attorney's liability to third parties is strictly limited. This rule rests upon three public policy bases: the protection of the attorney's duty of loyalty to and effective advocacy for his or her client; the nature of the potential for adversarial relationships between the attorney and third parties; and the attorney's potential for unlimited liability if his duty of care is extended to third parties. *Id.* at 1272, *citing Glover v. Southard*, 894 P.2d 21, 23 (Colo. App. 1994). Further, the District Court noted that the assignment of legal malpractice claims is prohibited under Colorado law, based on public policy considerations. Such an assignment involves matters of personal trust and personal service, and permitting the transfer of such claims would undermine the important relationship between an attorney and client. *Id.* at 1273, *citing Roberts v Holland & Hart,* 857 P.2d 492, 495 (Colo. App. 1993).

The District Court therefore concluded that, if presented with the issue, the Colorado Supreme Court would follow the policy concerns related to the limitation of non-client third-party claims of legal malpractice and the prohibition of the assignment of such claims under Colorado law, and would proscribe professional malpractice-based claims by excess insurers based on a theory of equitable subrogation. Accordingly, the Court dismissed the plaintiff's claims with prejudice. *Id.* at 1274-75.

c. Connecticut

Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves, 929 F.2d 103 (2nd Cir. 1991), involved a dispute between an excess insurer and the attorneys who had been retained to represent the insured in the underlying case. The underlying suit involved a tragic injury suffered by a newborn baby in a hospital delivery room. The primary insurance carrier provided coverage up to $500,000, and Continental provided the secondary or excess insurance and was contractually obligated to pay losses exceeding $500,000, up to the policy limit of $20,000,000.

In the underlying state court action for medical malpractice, the jury returned a multi-million dollar verdict against the insured hospital, and this verdict was upheld on appeal. Continental, as excess insurer, paid over $10,000,000 in satisfaction of that judgment.

Subsequently, Continental filed a civil complaint against the attorneys (and the primary carrier) in United States District Court. Count One, against the attorneys, alleged legal malpractice in failing to prepare an adequate defense. The attorneys thereafter moved for judgment on the pleadings, and the focal point of that motion was whether Continental, as an excess carrier, had standing to bring a legal malpractice claim against the attorneys, who had been retained by the primary insurer. The District Court dismissed Continental's claims against the attorneys, and Continental appealed.

The United States Court of Appeals for the Second Circuit noted that the Connecticut Supreme Court had never decided whether an excess carrier may have a claim founded in either contract or tort against a law firm hired by the primary insurer to represent the insured. Connecticut follows the general rule that attorneys are not liable to persons other than their clients for the negligent rendering of services, and Connecticut has been cautious in expanding attorney liability and has expressed a continuing concern over "the chilling effect of third party intrusion into an

attorney's primary duty of loyalty to the best interest of his or her client." *Id.* at 105-06, *quoting Mozzochi v. Beck*, 204 Conn. 490, 501, 529 A.2d 171, 176 (1987). The Second Circuit rejected Continental's attempt to equate an attorney's "dual representation" of the insurer and insured with that of a testator and beneficiary in the context of the drafting of a will. Further, the Second Circuit agreed with the District Court's observation that Continental was "hardly a neophyte in these matters". Continental, which had "multi-million dollar exposure," could monitor the litigation through its own attorneys and assure itself that Aetna was living up to its responsibilities as a primary insurer. The Court noted that it seemed clear that the Connecticut Supreme Court would not find the primary or direct purpose of the transaction (retention of the attorneys for the insured) was to benefit the third party excess insurer. *Id.* at 106.

Continental made an alternative argument that, upon satisfying the judgment, it was subrogated to the rights of its insured and can thereafter bring any legal malpractice claims against the attorneys that the insured could have brought. After reviewing equitable subrogation decisions from several jurisdictions, the Second Circuit stated that it was persuaded that the Connecticut Supreme Court would not permit a subrogee excess insurer to file legal malpractice claims against the insured's attorney. *Id.* at 107.

d. Florida

The Florida District Court of Appeals considered whether an insurance carrier could pursue a claim against attorneys for its insured under a subrogation theory in *National Union Fire Insurance Co. v. Salter,* 717 So.2d 141 (Fla. App. 1998). In 1994, "Golf Company" purchased a golf and country club. In 1995, the golf course flooded and had to be temporarily closed. Golf Company was insured by National Union, which paid it for its losses. In 1997, National Union filed suit against the attorneys who had represented Golf Company in the purchase of the golf course, claiming that

it was subrogated to its insured's right to recover. National Union alleged that the attorneys had failed to discover certain information about the property, such as the fact that it was located within a flood plain, and that Golf Company would not have purchased the golf course had it been properly advised. The trial court found that National Union was not in privity with the attorneys and dismissed its complaint with prejudice. *Id.* at 142.

The Florida appeals court agreed that National Union was not in privity with the attorneys and was not an intended third-party beneficiary. However, National Union argued that, as subrogee of the Golf Company, it has the same right to sue the attorneys as Golf Company. However, under Florida law, Golf Company could not assign its legal malpractice action to National Union, and the Court found that the same public policy reasons apply and prohibit the subrogation of a legal malpractice claim. Under Florida law, parties can assign causes of action derived from a contract or statute, but purely personal tort claims cannot be assigned. The Court states: "Florida law views legal malpractice as a personal tort which cannot be assigned because of the personal nature of the legal services which involve highly confidential relationships." *Id.*

The Court concluded that the policy reasons for prohibiting assignments are equally applicable to a subrogation action. The Court noted:

> To establish its claim, National Union would of necessity invade the confidential relationship between Golf Company and its attorneys. In addition, the attorneys may have to reveal work product or the confidences of Golf Company to defend themselves. Golf Company may not even be interested or believe that it has a legal malpractice action against its attorneys. As the California Court observed in [*Fireman's Fund Insurance Co. v McDonald, Hecht & Solberg*, 36 Cal. Rptr. 2d 424, 430 (Cal. App. 4th Dist. 1994)], perhaps "[d]ifferences between lawyer and client respecting malpractice should be limited to themselves."

717 So. 2d at 143.

e. Indiana

In *Querrey & Harrow, Ltd. v. Transcontinental Insurance Co.*, 861 N.E.2d 719 (Ind. App. 2007), Transcontinental, an excess insurance carrier ("CNA"), filed suit against two law firms and individual attorneys who were hired to represent the insured in the underlying product liability action. The underlying litigation was initiated by a child and his mother as a result of injuries the child suffered while using a trampoline manufactured by Jumpking. The parties subsequently reached a settlement that required Jumpking to pay $6,300,000. Jumpking was self-insured for the first $250,000 of liability. Its primary insurer was Liberty Mutual Insurance Company, which provided the first layer of coverage, in the amount of $5,000,000. Due to erosion in coverage, however, Liberty Mutual had less than $3,000,000 available for this claim. As the excess insurer, CNA provided excess coverage in the amount of $10,000,000, and it contributed $3,740,000 to the settlement. *Id.* at 720.

CNA subsequently filed a complaint and claimed that, had the attorneys from the two firms timely raised a non-party defense, the underlying litigation would have been settled for or a verdict would have been reached that was significantly less than $6,300,000. CNA further claimed that, absent the law firms' malpractice, it would not have had to pay the excess coverage. The law firms filed motions for summary judgment that asserted that the excess insurer could not bring a claim for legal malpractice. Those motions were denied by the lower court. *Id.* at 720-21.

The Court of Appeals of Indiana reversed. The excess insurer had asserted that it may recover under the doctrine of equitable subrogation. The Court of Appeals considered the decisions of a number of federal and state courts and held: "We agree with those jurisdictions that hold that subrogation amounts to an assignment, as each operates to transfer from one person to another a cause of action against a third, and the reasons of policy which make certain causes of action non-

assignable would seem to operate as forcefully against transfer of such causes of action by subrogation." *Id.* at 723 (citation omitted). The Court noted that Indiana does not allow assignments of legal malpractice actions. "The potential for conflict is ever present, and we do not deem it appropriate that the attorney's loyalty should be divided." *Id.* at 724.

This decision of the Court of Appeals of Indiana was subsequently adopted by the Supreme Court of Indiana. *See Querrey & Harrow, Ltd. v. Transcontinental Insurance Co.*, 885 N.E.2d 1235 (Ind. 2008).

f. Kentucky

In *American Continental Insurance Co. v. Weber & Rose, P.S.C.*, 997 S.W.2d 12 (Ky. App. 1998), the Court of Appeals of Kentucky ruled that allowing an excess insurer to maintain legal malpractice actions against insureds' attorneys based upon theories of equitable subrogation would undermine Kentucky's adherence to a view promoting the preservation of traditional attorney-client relationship. In so ruling, the Court noted "our clearly-defined duty to protect, encourage, and preserve the traditional attorney-client relationship." *Id.* at 14.

The Court also held that the excess insurer was not an intended and foreseeable beneficiary of the legal services rendered to the insured. The excess insurer had no contractual relationship with the attorneys. Moreover, the attorneys were retained by the insured to represent it, rather than to represent the excess insurer. Nothing in the record suggested that the insured was obligated to provide an attorney to represent the excess insurer's interests in the pending litigation. To the contrary, the sole duty of Weber & Rose was to represent the insured's interest. The employment of Weber & Rose was intended only to benefit the insured, and there was no basis to conclude that the primary or direct purpose of the firm's employment was to benefit the excess insurer. Accordingly, Weber & Rose did not owe a legal duty to the excess insurer that afforded the excess

insurer a basis for a malpractice action. *Id.* at 14. *See also National Surety Corp. v. Hartford Casualty Insurance Co.*, 493 F.3d 752, 758-59 (6th Cir. 2007).

g. Ohio

The Court of Appeals of Ohio considered whether to allow an action by an excess insurer against an attorney retained to represent its insured in *Swiss Reinsurance America Corporation, Inc. v. Roetzel & Andress*, 163 Ohio App.3d 336, 837 N.E.2d 1215 (Ohio App. 2005). The underlying action was a medical malpractice action that was settled after two days of trial for $2,200,000. Subsequent to the settlement, the primary carrier (Frontier) sought recovery of $1,000,000 from the reinsurance company (SwissRe). SwissRe asserted that Frontier had a contractual duty to mitigate its damages by suing the attorney for malpractice, and Frontier ultimately filed suit against the attorney. The trial court granted the attorney's motion for summary judgment and found that the insurers lacked standing to file their legal malpractice claim. *Id.* at 1217-19.

The insurers, asserted that, even if the primary insurer was found not to be the attorney's client, equitable subrogation provided them the right to file suit. The Court of Appeals noted that its review of decisions of other courts on this point indicate that states have taken divergent views on the ability of an insurance company to step into the shoes of its insured and file suit for legal malpractice. After reviewing a number of decisions from other jurisdictions, the Ohio Court of Appeals stated: "This court is persuaded that Ohio's zealous guarding of the attorney-client relationship compels a holding that equitable subrogation is not available to appellants." *Id.* at 1224.

The Court observed that the insurers alleged that the attorney failed to properly prepare a defense for the insured. However, during his deposition, the insured testified that he was satisfied with the attorney's preparation for trial. The Court noted that equity compelled a holding that, when the interest of an insured conflicts with the interest of the insurer, equitable subrogation will not exist

to permit a claim of legal malpractice when the record reflects that the attorney has complied with the interests of his client to the detriment of the insurer. *Id.*

Further, the Ohio Court of Appeals stated that permitting equitable subrogation in this context would drive a wedge between counsel and the insured to the inexorable detriment of the attorney-client relationship. *Id., quoting Continental Insurance Co. v. Pullman, Comely, Bradley & Reeves*, 929 F2d. 103, 107 (2nd Cir. 1991). The Court stated: "Indeed, the attorney would be placed in an even more precarious position than is inherent in a tripartite relationship." *Id.* Accordingly, the Court held that both the primary and excess carriers lacked standing to pursue legal malpractice claims against the attorneys.

2. The Public Policy Supporting the Decisions Refusing to Allow Excess Carriers the use of Equitable Subrogation As a Tool to Sue the Insured's Attorney for Malpractice Should Be Adopted by this Court

One of the recurring policy considerations in these decisions is the effect that allowing such claims to go forward may have on the attorney-client relationship. Quintairos respectfully submits that allowing such claims to be prosecuted here by a non-client third party will have a detrimental effect on the attorney-client relationship and could ultimately place that relationship in jeopardy.

Quintairos does not dispute that, in other contexts, the courts of Mississippi have utilized the theory of equitable subrogation. However, Mississippi has not yet considered whether an excess insurer can pursue claims for legal malpractice under an equitable subrogation theory against an attorney retained by the primary insurer to represent the insured. Quintairos believes that the cases which do not allow equitable subrogation in such a situation are better reasoned, offer greater protection to the lawyer-client relationship, and should be followed by this Court.

Generally, under Mississippi law, attorneys owe to their clients duties that fall into three broad categories: (1) a duty of care consistent with the level of expertise that he holds himself out

as possessing; (2) a duty of loyalty and fidelity, which includes duties of confidentiality, candor, and disclosure; and (3) any duties created by his contract with his client. *Baker Donelson Bearman & Caldwell, P.C. v. Muirhead*, 920 So.2d 440, 449 (Miss. 2006). As noted above, Quintairos was retained by Royal to represent the insureds in the underlying cases. Neither Royal nor the insureds have asserted legal malpractice claims against Quintairos, and none of them have assigned any legal malpractice claims arising from the underlying cases to Great American. Thus, Great American is a stranger to the attorney-client relationship, and its claims based upon equitable subrogation could adversely affect that relationship and, in particular, could impact Quintairos's duty of loyalty and fidelity to its clients in the underlying cases.

Several of the decisions summarized above note that allowing equitable subrogation claims would in essence be founded on an assignment of the insured's tort claims against its attorneys to an insurer who paid a portion of the insured's claim.[5] Many of the public policy reasons advanced in opposition to permitting the assignment of legal malpractice claims likewise support the refusal to allow pursuit of legal malpractice claims under the equitable subrogation theory.

The Mississippi Supreme Court has held that certain assignments violate public policy, even though Sections 11-7-3 and 11-7-7 of the Mississippi Code overrule common law and generally authorize assignments of causes of action. *See, e. g., Ladner v. Logan*, 857 So.2d 764, 772 (Miss. 2003) (no assignment of child support benefits); *Fry v. Layton*, 191 Miss. 17, 2 So.2d 561, 565 (Miss. 1941) (no assignment of usury claims). A purported assignment of a claim for legal malpractice should likewise be held to violate public policy, both because of the personal nature of

[5]In *Baker Donelson, supra*, the appellant law firm asked this Court to decide whether public policy prohibited a client assigning to an adversary a claim for legal malpractice against his attorney(s). This Court declined to address that issue, in view of its holding that neither the law firm nor any of its attorneys committed malpractice. 920 So.2d at 448.

the lawyer-client relationship and because of the potential damage that such an assignment might cause to the lawyer-client relationship. The possibility of an assignment of a legal malpractice claim might tempt a lawyer to ingratiate himself with an adversary, and a client who contemplates making such an assignment might not share confidences with his lawyer for fear that those confidences might later be exposed in the legal malpractice suit.

The Mississippi Supreme Court has in recent years given significant attention to the tripartite relationship of lawyer, client, and insurer. Great American asserts that the *Moeller* decision (707 So.2d 1062) authorizes application of equitable subrogation here. (Appellant's Brief at p. 22). *Moeller* stands for the proposition that, when an attorney is offered employment by an insurance carrier, he should first ascertain if there is any reason that a conflict might exist in representing the carrier and the insured. If so, the attorney should undertake to represent only the carrier for the part covered, and the carrier should give the insured ample opportunity to select his own independent counsel to look after his interest. *Moeller v. American Guar. and Liability Ins. Co.*, 707 So.2d 1062, 1070 (Miss. 1996). Defense counsel should withdraw from representation of either "if there is any possibility that representing one and not the other may be injurious to the client the attorney ceases to represent." *Id.* *Moeller* does not, as Great American claims (Appellant's Brief at p. 22), hold that "an attorney hired by an insurance company must altogether withdraw from representation if a conflict arises between the interests of the insurer and the insured." Nor does *Moeller* authorize application of equitable subrogation here.

Royal, not Great American, retained Quintairos to represent the insureds in the underlying cases. Neither Royal nor the insureds have asserted legal malpractice claims against Quintairos. Neither Royal nor the insureds have assigned or attempted to assign any legal malpractice claims arising from the underlying cases to Great American, and Great American does not allege that either

Royal or the insureds have consented to the assertion of legal malpractice claims against Quintairos. Thus, Great American, a stranger to the lawyer-client relationship, seeks to use equitable subrogation to force a legal malpractice action upon Quintairos, Royal, and the insureds, and it apparently has little, if any, concern for the potential adverse effects that its actions may likely have on the lawyer-client relationship.

3. Attorney-Client Confidentiality Concerns

Allowing a stranger to the attorney-client relationship to pursue a legal malpractice claim will present serious confidentiality issues. One of the ways of defending a legal malpractice claim is to prove that the client would not have prevailed, even in the absence of any alleged legal malpractice. An attorney who takes this position may need to disclose confidential information that he learned in the course of the attorney-client relationship in order to properly defend himself against the stranger's legal malpractice claim. *See, e.g., National Union Fire Insurance Co. v. Salter*, 717 So.2d 141, 143 (Fla. App. 1998) (attorneys may have to reveal work product or client confidences to defend themselves). However, it is the statutory duty of all attorneys in Mississippi "[t]o maintain inviolate the confidence and, at every peril to themselves, to preserve the secrets of their clients". *Miss. Code Ann.* § 73-3-37(4). Thus, if the client (who is not a party to the legal malpractice suit) objects to the disclosure of such confidential, privileged information, the attorney may not disclose it, or, if he does, he may violate statutory duties and applicable rules of professional conduct. If the real client, the insured, instructs the lawyer not to reveal its privileged communication, will the lawyer be prohibited from properly defending the malpractice action filed by the stranger to the attorney-client relationship? Will the stranger to the attorney/client relationship, through the doctrine of equitable subrogation totally supplant itself for the real client and be authorized to waive the real client's attorney-client privilege so the lawyer may defend himself? Certainly, the attorney is caught

between the requirement of maintaining the confidentiality of client information and the necessity of using such information to defend himself properly against a legal malpractice claim.

Great American describes these concerns as "conjectural dilemmas which *may* arise" (Appellant's Brief a p. 25), and states that these potentially negative impacts simply do not exist under the circumstances presented by this case. (Appellant's Brief at p. 225). To the contrary, the concerns raised by Quintairos are very real and likely to arise in this and other litigation. For instance, Quintairos's ability to defend against Great American's legal malpractice claims will be greatly impaired if the insured, which is not a party to this legal malpractice suit, objects to the disclosure of confidential, privileged information that Quintairos learned in the course of the attorney-client relationship. If the client objects, is Quintairos barred both statutorily and ethically from disclosing such information or using it in defending against Great American's claims. That scenario is not a mere abstraction or a "conjectural dilemma"; it is a very real problem that directly involves the lawyer-client relationship and that could impair Quintairos's ability to defend against Great American's claims. Remember, the insured has not assigned or consented to Great American's pursuit of the legal malpractice claim.

When a client conveys privileged information to his attorney he should be forever confident that the information will remain privileged. *United States v. Zolin,* 491 U.S. 554, 562, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989). ("Its purpose is to encourage full and frank communication between attorneys and their clients and thereby to promote broader public interests in the observance of law and administration of justice." *Id.* at 1249. "That purpose, of course, requires that clients be free to make full disclosure to their attorneys."). If the doctrine of equitable subrogation is allowed to be used as suggested by Great American, then this third-party stranger to the attorney-client relationship can waive the client's privilege. The client who wanted the case settled, who does not believe he has

a claim for malpractice and who does not wish to pursue such a claim suddenly finds his privilege waived and that the merits of the suit he desired not to be tried will be tried in a public forum. Clients settle cases for many reasons and sometimes avoiding adverse publicity and public testimony about their alleged actions is a motivating factor. If the court adopts Great American's approach, not only will the client lose his attorney-client privilege so the lawyer can defend himself at trial, he loses a major benefit of the settlement which is not to have the allegations tried in a public forum.

Will attorneys now have to warn their clients that their privileged communications will remain privileged, ***unless***, an excess carrier claims the attorney committed malpractice and files a suit for same at which time the lawyer will have to reveal the privileged information to defend the malpractice case filed by the excess carrier? What a chilling effect that will be on the attorney-client relationship which requires the utmost personal trust and candor between lawyer and client.

Will an attorney now have to advise his client that the settlement he reached means his case will not have to be tried in a public forum and the negative information will not be made public and that he has avoided adverse publicity, which may be harmful to his business by entering into a settlement, ***unless,*** the excess insurance carrier files a malpractice action against the attorney at which time the client will lose all of the benefits of his settlement? What chilling effect might this have on the public policy of Mississippi to encourage settlements?

Mississippi's public policy favors settlement for many reasons, not the least of which is the expeditious closure of claims. *McBride v. Chevron U.S.A.*, 673 So. 2d 372, 379 (Miss. 1996). The public policy of Mississippi has always been in favor of settlement rather than litigation of cases. The reason behind this public policy is that it results in the amicable resolution of doubts and uncertainties while at the same time reducing the amount of litigation in Mississippi courts *Hastings v. Guillott*, 825 So.2d 20 (Miss. 2002), *Parmley v. 84 Lumber Co.*, 2005WL1021631 (Miss.App.

2005). Should the Court accept Great American's position, then the client's settlement and all of the benefits received thereby may be of no value.

This Court has always made protection of the attorney-client relationship of paramount concern. *Flowers v. State*, 601 So.2d 828 (Miss. 1992)(This confidentiality is too important a principle for this Court to allow it to be ignored. "The public is better protected if full and open communication by the client is encouraged than if it is inhibited." Rule 1.6, Comment). Those relationships involve matters of personal trust, candor and personal service, and permitting the pursuit of legal malpractice claims under an equitable subrogation theory by an excess insurer that is a stranger to such a relationship will undoubtedly undermine attorney-client relationships.

4. The Excess Insurance Carrier has the Means & Resources to Protect its Interest

Appellant's Brief claims that although they had in interest in the litigation, they had no duty to defend and/or ability to control the underlying litigation. (Appellant's Brief at p. 5 ¶ 2.10). However, during oral argument in the trial court below, counsel for both parties advised the Court that they have been hired by excess carriers to consult with a primary carrier's lawyer on strategy, sit in depositions and monitor cases. (Record Transcript pp. 40, 41). In fact, Plaintiff's counsel admitted that he was eventually hired by Great American in these cases and that it happens all the time. *Id.* Thus, contrary to Appellant's argument, nothing prohibited Great American from protecting its interests in the underlying cases. Rather than actively protect their interest in the underlying litigation, Great American (a stranger to the lawyer-client relationship), now seeks to use the doctrine of equitable subrogation to recover their losses by forcing a legal malpractice action upon Quintairos. Allowing equitable subrogation claims, in this context, will severely undermine the personal nature of legal services and an attorney's confidential relationship with his client by

subjecting the attorney to potentially unlimited liability if his duty of care is extended to non-client third parties.

5. The Tripartite Relationship Is, at Times, Difficult to Manage. Defense Counsel Does Not Need a Third Master

This Court has paid considerable attention to the tripartite relationship that exists between the primary carrier, the insured and defense counsel hired to represent the insured. Navigating this relationship can at times be tricky. Depending upon facts and circumstances defense counsel may have to withdraw from representing the insured with respect to some aspects of the case and/or may have to withdraw completely from representing the insured. Adding a new master to whom the defense counsel is responsible in the mix will only further complicate defense counsel's relationship with the real client, the insured.

An excess carrier's primary concern is to try to get the underlying case resolved within the primary carrier's policy limits. Sometimes this can be done and sometimes it cannot. Sometimes, cases are taken to trial which results in consequences adverse to the defendant, the primary and the excess carrier. If this Court were to allow equitable subrogation as a theory for excess carriers to pursue a legal malpractice action against the attorney, will the attorneys of this state become scapegoats for the excess insurance industry? Will the excess insurance carriers file claims of legal malpractice asserting that strategies different than the ones chosen by the insured, the primary carrier and defense counsel should have been used at the trial? Will the excess carrier use this opportunity to attempt to spread their risk by filing legal malpractice actions against defense counsel in hopes that defense counsel's professional liability carriers will come in and settle the case and pay at least some of the amount of the settlements or judgments that were entered into? What will the effect be on the lawyers professional liability insurance premiums if

they have an additional master that they must serve? While these are likely not issues of paramount concern to the Court, they are issues which will be faced by attorneys and clients if the Court were to adopt Plaintiff's equitable subrogation remedy.

CONCLUSION

Great American has not established, and cannot establish, the existence of an attorney-client relationship with Quintairos. Indeed, Great American does not even allege that such a relationship existed. Under Mississippi law, in the absence of proof of this requisite element, a legal malpractice claim must be dismissed.

Further, this Court should adopt the reasoning of numerous cases from other jurisdictions that have rejected the pursuit of legal malpractice claims by an excess insurer under an equitable subrogation theory. Allowing an excess insurer to pursue such claims under circumstances like those presented here could do great damage to attorney-client relationships, would place attorneys in a position even more precarious than the already difficult position that they have in a tripartite relationship, and could likely present significant procedural and evidentiary problems if the attorney seeks to use confidential client information in the defense of the excess insurer's legal malpractice claims.

Respectfully submitted this the 1st day of April, 2010.

QUINTAIROS PRIETO WOOD & BOYER P.A.

BY: _____
David A. Barfield

BY: _____
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CERTIFICATE OF SERVICE

We, David A. Barfield and Steven L. Lacey, attorneys for the Defendant, Quintairos Prieto Wood & Boyer P.a., do hereby certify that we have this day caused a true and correct copy of the foregoing document to be mailed via United States Mail to the following:

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SO CERTIFIED, this 1st day of April, 2010.

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CERTIFICATE OF SERVICE

We, David A. Barfield and Steven L. Lacey, attorneys for the Defendant, Quintairos Prieto Wood & Boyer P.a., do hereby certify that we have this day caused a true and correct copy of Quintarios, Prieto, Wood & Boyer, P.A. Appellees Brief to be mailed via United States Mail to the following:

The Honorable Frank G. Vollor
Circuit Judge for the Ninth Circuit Court District
Post Office Box 351
Vicksburg, Mississippi 39181-0351
TRIAL COURT JUDGE

SO CERTIFIED, this 5th day of April, 2010.

David A. Barfield

Steven L. Lacey

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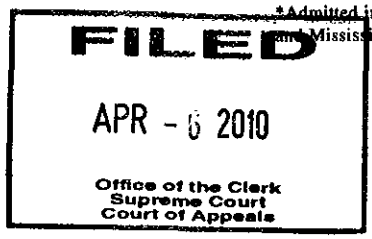

Ms. Kathy Gillis
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Re: *Great American E&S Insurance Services, Inc. v. Quintairos, Prieto, Wood & Boyer, P.A.;* In the Supreme Court of Mississippi; Case No. 2009-TS-01063

Dear Ms. Gillis:

Pursuant to your letter dated April 2, 2010, I am enclosing the original and three copies of the Brief's Certificate of Service on the Trial Court Judge.

Thank you for your assistance in this matter. If you have any questions, please do not hesitate to contact me.

Very truly yours,

Carole Richardson

Carole Richardson, Legal Assistant

/cr
Enclosure