IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

GREAT AMERICAN E&S INSURANCE COMPANY

Plaintiff – Appellant

Supreme Court No. 2009-CA-01063

VS.

Warren County Circuit Court No. 06-0231-CI

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

Defendant - Appellees

REPLY BRIEF OF GREAT AMERICAN E&S INSURANCE COMPANY PLAINTIFF-APPELLANT

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PARTIES

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.

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I. INTRODUCTION

1.1 The issue before this Court—as stated by the Quintairos Firm in its Appellee Brief—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." Brief of Appellee at p. 2. In other words, Quintairos is requesting this Court to create a blanket rule that under no set of facts can an attorney ever be sued by a non-client excess insurance carrier. In framing its Appellee Brief, Quintairos wholly ignores long-standing Mississippi law concerning equitable subrogation, Mississippi's allowance of assignment of all causes of action and abrogation of any privity requirement in all causes of action, and explicit instruction in the Mississippi Rules of Civil Procedure that the real party in interest must bring all suits against a defendant. Instead, the Quintairos Firm requests this Court to create an exception, applicable only to attorneys and no other professionals, which would insulate attorneys from the damage caused by their malpractice, no matter how egregious. In fact, because Quintairos alleges that all of Great American's claims are tantamount to a single claim for legal malpractice, Quintairos seeks blanket immunity for attorneys for any type of negligence that in any way relates to the practice of law. Such a rule surely opens the door for further erosion of public confidence in the legal profession.

1.2 Instead, Great American urges this Court to uphold the current legal landscape in Mississippi which has been handed down by the Mississippi legislature and upheld by the Mississippi Supreme Court: In Mississippi, professionals are liable to foreseeable third parties for damage caused by their negligently rendered professional services. Even if this Court does not embrace Great American's contention that it possesses and has rightly asserted a direct claim against the Quintairos Firm, the law of equitable subrogation is well-settled in Mississippi, and courts possess the discretion to weigh the equities at issue in each case and determine whether

liability on the part of an attorney for alleged wrongdoing is appropriate. Certainly this Court should stop short of adopting a blanket prohibition of all liability between excess and primary insurance carriers when the rule currently in place whereby the facts of each particular case are individually examined properly balances the concerns voiced by Quintairos. In this case, where it is undisputed that the Quintairos Firm committed malpractice as a matter of law, Quintairos should be held accountable for its conduct.

II. FACTS

2.1 As explained in detail in the Brief of Appellant, this case involves claims by Plaintiff/Appellant Great American E&S Insurance Company ("Great American"), an excess insurance carrier, which was forced to expend significant sums of money due to the actions of attorneys in the defense of a series of nursing home liability cases filed in the Circuit Court of Warren County, Mississippi. This case addresses the relationships between a primary insurance carrier, an excess insurance carrier, the named insured and the attorneys hired to defend the named insured.

2.2 Royal Indemnity Company ("Royal") issued the primary policy and named as insureds the owners and/or operators of Shady Lawn Nursing Home and Vicksburg Convalescent Home (the nursing homes are hereinafter collectively referred to as the "nursing home insureds"). (R.E. 4, Amended Complaint, at ¶ 3.1).[1] Great American provided excess insurance coverage for the nursing home insureds for losses that exceeded $1 million. (Id.).

2.3 Royal, as the primary insurance carrier, retained Quintairos, Prieto, Wood & Boyer, P.A. ("the Quintairos Firm" or "Quintairos") to defend the nursing home insureds in the Vicksburg litigation cases. (Id. at ¶¶ 3.16-3.19).

[1] Great American submitted Record Excerpts with its Brief of Appellant and all citations herein pertain to those Record Excerpts. Cites to the Record Excerpts appear as "(R.E. ____)." Cites to paragraphs within a record excerpt are denoted with "¶ ____."

2.4 Because of their respective actions in mishandling the defense of the Vicksburg litigation, Great American has asserted claims against both Royal and the Quintairos Firm. Pertinent to this appeal, Great American has asserted direct claims against the Quintairos Firm for legal malpractice, negligence, gross negligence, negligent misrepresentation, and negligent supervision. (Id. at ¶¶ 4.6-4.37). In addition, Great American has pleaded an alternate theory of recovery against Quintairos based on equitable subrogation. (Id. at ¶¶ 4.1-4.5).

2.5 Numerous underlying lawsuits predicate this lawsuit, several of which are discussed in detail in Great American's Amended Complaint. Great American fully explained the factual allegations from its Amended Complaint in its Appellant Brief, and for purposes of brevity, Great American will not fully restate all of those facts herein. Nonetheless, Great American has alleged at least two incidents of negligence per se:

- Failing to timely designate expert witnesses in a nursing home lawsuit (Id. at ¶¶ 3.7-3.8, ¶¶3.12-3.14);
- Failure to retain attorneys licensed in Mississippi and capable of trial practice (Id. at ¶ 3.10, ¶ 3.15).

These factual allegations must be taken as true at this stage in the proceedings. The allegations in the Amended Complaint adequately placed all defendants on notice as to the nature and substance of the claims against them in this matter. Furthermore, these allegations state a claim against all defendants, including specifically the Quintairos Firm.

III. REPLY ARGUMENT

3.1 The Quintairos Firm's Appellee Brief can be reduced to three main issues: Quintairos argues that (1) all of Great American's claims are tantamount to a single claim for legal malpractice, (2) under Mississippi law, one who lacks a direct attorney-client relationship with a lawyer cannot maintain an action for legal malpractice against that lawyer under any set of facts, and (3) this Court should refuse to allow an excess insurance carrier to stand in the shoes

of its insured and assert the insured's claim for legal malpractice even when the excess carrier has been forced to satisfy a loss proximately cause by a malpracticing attorney.

3.2 In anticipation of these issues, Great American addressed each of these arguments in its Appellant Brief. Nonetheless, for purposes of a precise reply, Great American will briefly respond to each herein. First, the Mississippi Supreme Court, in Century 21 Deep South Properties, LTD. v. Courson, expressly discusses the similarities and/or differences between a "garden variety" negligence claim and a claim for legal malpractice. 612 So. 2d 359 (Miss. 1992). The Mississippi Supreme Court has expressly rejected the idea that an individual's status as an attorney insulates him as a matter of law from suit where an injured party has pleaded the requisite elements of a negligence claim. Second, under Mississippi law, the requirement of privity—a direct contractual relationship between two parties—has been abrogated as to all causes of action, including claims for legal malpractice. Accordingly, in Mississippi, claims for legal malpractice are transferrable, whether by assignment or subrogation. Even a case relied upon by the Quintairos Firm in its Appellee Brief, Baker Donelson Bearman & Caldwell, P.C. v. Muirhead, involves a suit for legal malpractice brought by an individual to whom a lawsuit was assigned and who never maintained a direct attorney-client relationship with the defendant law firm. 920 So. 2d 440, 442-43 (Miss. 2006). Third, regarding equitable subrogation, all authorities cited by Quintairos come from foreign jurisdictions that either do not allow assignment of legal malpractice claims or require privity of contract for such claims. The clear majority rule in the United States is that where the laws of a state, like Mississippi, allow for assignment of claims for legal malpractice or do not require privity for such claims, equitable subrogation is allowed to permit recovery for aggrieved parties.

A. The Mississippi Supreme Court Expressly Rejects the Notion that an Individual's Status as an Attorney Insulates Him from Suit as a Matter of Law Where an Injured Party Has Pleaded the Requisite Elements of a Negligence Claim

3.3 In Century 21, the Mississippi Supreme Court carefully examined whether privity was required to maintain a claim for legal malpractice. 612 So. 2d at 359. The Century 21 Court struggled to reconcile Miss. Code Ann. § 11-7-20 with the essential elements of a claim for legal malpractice: "While privity is a necessary component of the attorney-client relationship, a requirement of privity in other cases of negligence is 'forbidden under our law.'" Century 21, 612 So. 2d at 373 (quoting Touche Ross v. Commercial Union Ins., 514 So. 2d 315, 321 (Miss. 1987)). Pertinent to the instant case, in Century 21, the Court addressed the immaterial difference between a legal theory premised on "garden variety" negligence as opposed to legal malpractice:

> Our case law regarding legal malpractice is, to the extent that privity is required, in conflict with Miss. Code Ann. § 11-7-20 unless there is a distinction between garden variety negligence cases and actions for legal malpractice. The elements of negligence are duty, breach, proximate cause, and damages. The elements of legal malpractice are attorney-client relationship (which imposes a duty), negligence (breach), proximate cause, and damages. At most, a legal malpractice action is a negligence action dressed in its Sunday best.

Century 21, 612 So. 2d at 373 (internal citations omitted). Accordingly, in Century 21, the Mississippi Supreme Court seized the opportunity to "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." Id. at 374. The Century 21 case makes clear that this Court no longer requires privity for a party to pursue a claim for legal malpractice as long as the party is a foreseeable third party that detrimentally relied on an attorney's negligently rendered services.

3.4 Nevertheless, the Century 21 Court also addressed the contrasting view that a claim for legal malpractice might be distinguishable from a claim against an attorney for simple negligence in his performance of legal services. The Century 21 Court posed a fitting question

in light of the appeal before this Court today: "Even if these are viewed as two separate and distinct causes of action, does one's status as an attorney insulate him from a suit based on negligence wherein the plaintiff would be required to prove only the traditional elements of duty, breach, proximate cause, and damages?" Id. In answering this question, the Century 21 Court drew an analogy to what was, at the time, a recent decision to abolish the doctor-patient requirement in medical malpractice suits and announced "that the same reasoning should apply to negligence actions against attorneys, to wit: the presence or absence of an attorney-client relationship is merely one factor to consider in determining the duty owed rather than being the single factor which establishes that a duty is owed." Id. Instead, the more appropriate question "'to whom is a duty owed?' takes center stage." Id.

3.5 Although the Mississippi Supreme Court's express language in the Century 21 case needs no further support, the Court of Appeals for the Fifth Circuit has recently reiterated that "Mississippi's rule [concerning professional liability] is . . . expansive. . . . [The] relevant inquiry for purposes of Mississippi law is whether [the Defendant] could have reasonably foreseen that [the Plaintiff] would rely on the [professional service]—not whether [the Plaintiff] was a member of a limited group for whose benefit the [service] was intended." Paul v. Landsafe Flood Determination, Inc., 550 F.3d 511, 518 (5th Cir. 2008).

3.6 In addition to a claim for legal malpractice, Great American has pleaded claims for negligence, gross negligence, negligent misrepresentation, and negligent supervision as well. Whether or not this Court determines that claims for legal malpractice are distinguishable from those for negligence, the simple fact remains that one's status as an attorney does not insulate him from suit as a matter of law in any and all circumstances that involve his professional conduct. The Century 21 case makes this fact abundantly clear.

B. Mississippi Case Law Illustrates that Legal Malpractice Claims are Transferrable in Mississippi

3.7 Mississippi law allows assignment of "any chose in action." Miss. Code Ann. § 11-7-3. In two published cases, the Mississippi Supreme Court specifically has allowed a legal malpractice claim to proceed where another assigned the plaintiff the claim: (1) MS Comp Choice v. Clark, Scott & Streetman, 981 So. 2d 955 (Miss. 2008); and (2) Baker Donelson Bearman & Caldwell, P.C. v. Muirhead, 920 So. 2d 440 (Miss. 2006). In each of these cases, the Mississippi Supreme Court had the recent opportunity to instruct that under Mississippi law, claims for legal malpractice are exceptions to the rule set forth under Miss. Code Ann. § 11-7-3. Instead of seizing these opportunities, the Mississippi Supreme Court has refused to diverge from the Mississippi Legislature's mandate to allow claim assignment.

1. MS Comp Choice v. Clark, Scott & Streetman

3.8 Most recently, in MS Comp Choice v. Clark, Scott & Streetman, the Court considered a claim "aris[ing] from a legal malpractice suit filed by an insurance company's third-party administrator against a law firm that defended the insurance company in a workers' compensation case." 981 So. 2d at 956. At a later date, the third-party administrator assigned the claim to the insurer who proceeded against the Clark firm. Id. at 957. In reviewing the case, neither party nor the Court ever even insinuated that assignment of the legal malpractice claims was inappropriate. Instead, the Court reversed and remanded the trial court's dismissal of the claim for further proceedings. Id. at 963.

3.9 Although subrogation does not equate assignment, the MS Comp Choice case reveals striking parallels to the facts at hand. There, a claim for legal malpractice was assigned from one party (the third-party administrator) to another (the insurer) where both parties possessed aligned interests (both parties desired competent defense). Similarly, in the case at hand, Great American (the subrogor) and the insured (the subrogee) also both possess aligned interests (again, competent defense). The MS Comp Choice case is important not so much for

what is says but for what is does not say. There, in a decision rendered on May 8, 2008, the Mississippi Supreme Court took no issue with the assignment of a legal malpractice claim.

2. Baker Donelson Bearman & Caldwell, P.C. v. Muirhead

3.10 In Baker Donelson Bearman & Caldwell, P.C. v. Muirhead, an insured's employee (Muirhead) was involved in an altercation in which he severely injured another individual. 920 So. 2d at 442-43. As a result, the individual brought suit against Muirhead for his damages. Id. at 443. After judgment was rendered against Muirhead, he requested that his employer's insurer (Great River) reimburse his attorney fees and judgment because, according to Muirhead, the altercation occurred during the scope of his employment. Id. at 445. Next, Great River retained Baker Donelson to provide a coverage opinion concerning the claim and, because Baker Donelson advised that Muirhead was not covered by the insurance policy at issue, the insurer denied coverage. Id. at 446. Muirhead then filed suit against the insurer for bad faith. Id. at 447. Rather than proceed with the litigation, Great River settled Muirhead's claim for $500,000.00 and an assignment of any potential claims Great River possessed against Baker Donelson for advising that Muirhead was not covered by the policy. Id.

3.11 In its Appellee Brief, the Quintairos Firm properly notes that in Baker Donelson, "the appellant firm asked the Supreme Court of Mississippi to decide whether public policy prohibited a client assigning ***to an adversary*** a claim for legal malpractice against his attorney(s). The Supreme Court of Mississippi declined to address that issue[.]" (Quintairos' Appellee Brief, 22 n. 5) (emphasis added). Importantly, from a policy standpoint, the issue in Baker Donelson is an entirely different and more concerning circumstance than an insurer asserting its equitable rights under a theory of subrogation. Baker Donelson involved a client's assignment of a claim for legal malpractice to his adversary. Thus, the client's adversary would hold rights against the client's attorney who may need to divulge legitimate client confidences in order to defend

himself. This scenario somewhat turns the attorney-client privilege on its head because the adversary's interests undoubtedly conflicted with the client's. Where such conflicting interests exist, the client confidences would be of far greater concern. Yet even in Baker Donelson, where more serious policy concerns were implicated when compared to the facts at bar, the Supreme Court decided against reaching the argument.

3.12 An action in equitable subrogation implicates no such concerns. Beside the fact that subrogation does not amount to assignment, an insured and his insurers possess overlapping interests that do not implicate client confidentiality concerns. From the outset of the instant litigation, the insured, Quintairos, and Royal—if operating in good faith—would all have had one common goal: defending the claims with the utmost prudence and cooperation. This is precisely the goal shared also by Great American. What was beneficial for one should have been beneficial for all. As it relates to Quintairos, Royal, Great American and the Nursing Home Insureds, there is no actual or potential conflict of interest regarding the necessity of competent counsel representing the Nursing Home Insureds in the underlying nursing home negligence cases. Mississippi law makes clear that equitable subrogation is appropriate in limited circumstances such as those sub judice.

C. The Mississippi Legislature's Policy Decisions to Allow Assignment of all Actions (Miss. Code Ann. § 11-7-3) and to Abrogate the Privity Requirement (Miss Code Ann § 11-7-20) Starkly Contrast with the Foreign Policies of the Authority Relied Upon by the Quintairos Firm in its Appellees Brief

3.13 Review of case law in the United States addressing the question of whether an excess insurer can pursue a claim for legal malpractice under a theory of equitable subrogation reveals that, for various reasons, authorities are divided on the matter. In all, research yields thirteen states that have considered this precise issue. Seven (Texas, Michigan, New Hampshire, Ohio, Pennsylvania, Illinois, and New York) have determined that an excess carrier's subrogation rights may extend to claims for legal malpractice. Six have decided otherwise.

Contrary to Quintairos' contention, the majority rule is that equitable subrogation is allowed in this context.

3.14 As discussed below, the cases relied on by the Quintairos Firm come from states that do not allow assignment of legal malpractice claims. Mississippi law, on the other hand, as explained above, allows assignment of "any chose in action." Miss. Code Ann. § 11-7-3. Accordingly, in Mississippi, the distinction between subrogation and claim assignment is merely academic. The clear majority rule in the United States is that where the laws of a state, like Mississippi, allow for assignment of legal malpractice and/or do not require privity, equitable subrogation also is allowed.

1. Several States Allow *Subrogation* of Legal Malpractice Claims, When Equity Requires, Despite Laws Prohibiting *Assignment* of Such Claims

3.15 Mississippi allows outright assignment of legal malpractice claims and recognizes equitable subrogation. Accordingly, a federal court attempting to predict how the Mississippi Supreme Court would handle this case likely would determine that Mississippi law aligns with those jurisdictions that allow both assignment and subrogation of legal malpractice claims. States falling into this category include Massachusetts, St. Paul Fire and Marine Ins. Co., 379 F.Supp. 2d at 189-90 (noting that "the Supreme Judicial Court of Massachusetts has permitted the voluntary assignment of legal malpractice claims" and that, having examined the policies of Massachusetts, the excess insurer "has standing to pursue its legal malpractice action against the Defendant under its right of subrogation"); Pennsylvania, Ohio Casualty Ins. Co. v. Southland Corp., 1999 WL 236733 (E.D. Pa. 1999) (applying Pennsylvania law and concluding that because Pennsylvania courts permit the assignment of legal malpractice claims, they would also permit the subrogation of those claims); and New York, Greevy by Greevy v. Becker, Isserlis, Sullivan & Kurtz, 240 A.D. 2d 539, 658 N.Y.S. 2d 693, 696 (2nd Dept. 1997) (noting that all claims are assignable unless expressly prohibited, and those claims expressly prohibited do not

include claims for legal malpractice); Great Atlantic Insurance Co. v. Weinstein, 509 N.Y.S. 2d 325, 327-28 (1st Dept. 1986) (determining that the plaintiff had standing to bring a cause of action for legal malpractice based on equitable subrogation).

3.16 Some states, however, have chosen to prohibit assignments. Yet, even so, several states that prohibit assignment of legal malpractice claims allow subrogation of such claims. The Texas Supreme Court, while noting that Texas courts have not permitted assignment of legal malpractice claims, allows equitable subrogation of such claims where appropriate. American Centennial Ins. Co., 843 S.W. 2d at 483-84 (applying theory of equitable subrogation to permit excess carrier to pursue legal malpractice claim as subrogee of insured and noting that Texas courts have not permitted assignment of legal malpractice claims). Similarly, Michigan also permits equitable subrogation of legal malpractice claims while prohibiting assignment. Atlanta Int'l Ins. Co., 475 N.W.2d at 299 (permitting subrogation although other Michigan case law prohibits assignment of claims). In Illinois, a federal court took the same approach when predicting that the Illinois Supreme Court, while prohibiting assignment of legal malpractice claims, would permit a subrogation action brought by an excess carrier to prevent an inequitable result. Nat'l Union Ins. Co. v. Dowd & Dowd, P.C., 2 F.Supp. 2d 1013, 1023 (N.D. Ill. 1998) (noting that subrogation presents fewer concerns for commercial exploitation and affirming placing social costs of malpractice on attorneys). As previously discussed, "these courts have noted that the policy concerns implicated in assignment of legal malpractice claims are minimized in the context of subrogation, or outweighed by a policy that places the social costs of legal malpractice on the malpracticing attorney." St. Paul Fire and Marine Ins. Co., 379 F.Supp. 2d at 195.

3.17 The Quintairos Firm erroneously cites Ohio as a jurisdiction that does not allow equitable subrogation of legal malpractice claims. In its Brief of Appellees, Quintairos provides

a detailed explanation of Swiss Reinsurance America Corporation, Inc. v. Roetzel & Andress, 837 N.E. 2d 1215 (Ohio App. 2005). Swiss Reinsurance America Corporation, however, turned on one simple fact: Because the interest of the insured in the litigation conflicted with that of the insurer, equity required a holding that subrogation was inappropriate. Id. at 1224. When an attorney has complied with the interests of his client to the detriment of the insurer, the Ohio court determined that a claim for legal malpractice is foreclosed. Indeed, in Mississippi the attorney would have had to wholly withdraw from the representation. Moeller, 707 So. 2d at 1070. Quintairos cites partial language—out of its proper context—from the Swiss Reinsurance America Corporation opinion. The full quote from the case states:

> To permit equitable subrogation in this context "would drive a wedge between counsel and the insured to the inexorable detriment of the attorney-client relationship[.]" Indeed, the attorney would be placed in an even more precarious position than is inherent in a tripartite relationship. In the case presented, a conflict clearly existed between the insurer and the insured. Treadon, an attorney paid by the insurance company but with primary allegiance to the insured, could not escape liability if this court chose to follow the doctrine of equitable subrogation. If Treadon maintained his allegiance to [the insured], [the insurer] would file suit; if Treadon fell victim to the pressure exerted by [the insurer], [the insured] would file suit. To permit such a result would "substantially impair an attorney's ability to make decisions that require a choice between the best interests of the insurer and the best interests of the insured."

Id. at 1224-25. The Ohio court made clear that merely the factual circumstance barred application of subrogation in Swiss Reinsurance. To the contrary, the case at bar presents no such concerns for this court. Because Great American and the insured's interests were not in conflict, equitable subrogation is entirely appropriate in this case. Further, the factual circumstance of whether a conflict actually exists in this case (as Quintairos wrongly asserts) is an ideal issue for discovery.[2]

2. States That Do Not Recognize an Insurer's Rights to Subrogation in Legal Malpractice Claims Also Flatly Prohibit Assignment of Legal Malpractice Claims

[2] Not surprisingly, the Quintairos Firm, prior to dismissal, sought to stay discovery.

3.18 As this Court knows, Mississippi law has abolished the requirement of privity of contract for actions based on economic loss, Miss. Code Ann. § 11-7-20, and Mississippi law allows assignment of tort-based claims such as legal malpractice. Mississippi Code Ann. § 11-7-3. On the other hand, the authorities relied upon by Quintairos in its Appellee Brief differ in at least one of these crucial respects from these Mississippi laws (Arkansas, in fact, differs in both). Because these jurisdictions base their holdings on policies which conflict with Mississippi law, they should not be considered by this court.

3.19 Quintairos first cites Great American Insurance Co. v. Dover & Dixon, P.A. for support in its view that assignments of legal malpractice claims should be prohibited by this court. 402 F.Supp. 2d 1012 (E.D. Ark. 2005). Yet not only does Arkansas prohibit assignment of tort claims, it also has statutorily prohibited attorney liability to third parties not in direct privity of contract. Similarly, Florida flatly prohibits assignment of all personal claims. National Union Fire Insurance Co. v. Salter, 717 So. 2d 141, 143 (Fla. App. 1998). Colorado, and Connecticut each have state policies against assignment of legal malpractice claims. Essex Insurance Co. v. Tyler, 309 F.Supp. 2d 1270, 1274-75 (D. Colo. 2004); Continental Casualty Company v. Pullman, Comley, Bradley & Reeves, 929 F. 2d 103, 105 (2nd Cir. 1991). Contrary to Mississippi law, these states have made the decision that attorneys only owe a duty to the insured and not also to the insurer as well. In Indiana, the law is that assignments of legal malpractice claims are prohibited. Querrey & Harrow, LTD. v. Transcontinental Insurance Co. 885 N.E. 2d 1235, 1236 (Ind. 2008). For this reason, Indiana chooses not to allow equitable subrogation in the insurance context for claims involving legal malpractice. Finally, Kentucky also apparently prohibits assignment of legal malpractice claims. American Continental Ins. Co. v. Weber & Rose, 997 S.W. 2d 12 (Kent. App. 1998). The only Kentucky case dealing with this issue, however, bases its holding on a lack of privity between the insurer and lawyer. Id. at 13-

14. Mississippi law starkly differs from Kentucky, as Mississippi abrogated altogether any privity requirements.

3.20 Each of these States have simply adopted policies, by statute or otherwise, that conflict with Mississippi law.

D. The Policy Arguments Advanced by the Quintairos Firm Directly Contradict Well-Established Mississippi Law

First, the Quintairos Firm recognizes and admits at p. 21 of their Appellee Brief that Mississippi law recognizes equitable subrogation. Quintairos, however, urges this Court to except cases involving attorneys from the doctrine of equitable subrogation under Mississippi law. To justify the its request, Quintairos presents the Court with a theoretical litany of horrors which Quintairos simply has not shown could exist in *this* matter. Again, under equitable subrogation, each case is examined according to its particular facts. Further, Quintairos at p. 22 of their Appellee Brief argues that Great American is a "stranger to the attorney-client relationship" while wholly ignoring the allegations in Great American's Amended Complaint that Great American, in fact, was "to be informed of the status of the case[s,]" that Quintairos provided "evaluations and assessments of the [cases]" upon request from Great American, and that Great American relied upon Quintairos to provide an adequate defense in the underlying nursing home cases. See R.E. 4 at 3.5, 3.9, 3.15, 3.18, 4.4, 4.5, 4.8, 4.10, 4.22, 4.25, and 4.26.

Finally, Quintairos's argument that assignment and/or subrogation of a legal malpractice claim might cause a chilling effect between an attorney and client who "might not share confidences with his lawyer for fear that those confidences might later be exposed in the legal malpractice suit" is an attempt to fit a square peg into a round hole. In this matter, Quintairos actually shared attorney-client and attorney work product protected information with Great American because all parties had aligned interests as it related to the competent defense of the insured. Quintairos has not cited to this Court any real or perceived conflict of interest that

existed in this matter that prevented them from providing competent representation to the insured. Quintairos's concerns regarding the tripartite relationship between a lawyer, client and insurer, and Quintairos's concerns regarding attorney-client confidentiality were in fact not concerns in the underlying nursing home litigation because Quintairos freely shared attorney-client communications and attorney work product in those underlying cases. Quintairos should not now be allowed to propose theoretical conflicts to completely absolve itself of liability under any factual scenario, particularly where this case is in the initial pleading stage, and Great American has not yet had the opportunity to discover the facts of this case.

IV. CONCLUSION

4.1 For the above and foregoing reasons, Plaintiff/Appellant Great American respectfully requests this Court enter an order reversing the trial court's dismissal of Quintairos Prieto Wood & Boyer, P.A. from this matter. Great American respectfully requests this Court remand this case to the Circuit Court of Warren County, Mississippi, to proceed against the defendants therein.

Respectfully submitted,

GREAT AMERICAN E&S INSURANCE COMPANY

By: _____
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CERTIFICATE OF SERVICE

I, Christopher T. Graham, do hereby certify that I have this day caused to be served, via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing document to:

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This the 19th day of May, 2010.

Christopher T. Graham