UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ORANGEBURG DIVISION

Sentry Select Insurance Company, Plaintiff, v. Maybank Law Firm, LLC, and Roy P. Maybank; Defendants.	Civil Action No. 5:15-cv-04984-JMC **ORDER**

This matter is before the court pursuant to Defendants Maybank Law Firm, LLC's and Roy P. Maybank's ("Defendants") Motion to Dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No. 6.) Plaintiff Sentry Select Insurance Company ("Plaintiff") filed this action asserting multiple counts of legal malpractice against Defendants, including both direct claims and claims based on assignment. (ECF No. 1.) In their Motion to Dismiss, Defendants allege that South Carolina does not recognize legal malpractice claims by an insurer against its defense counsel, and that South Carolina courts prohibit the assignment of legal malpractice claims. (ECF No. 6.)

In addressing the merits of these pending motions, the court must consider 1) whether South Carolina courts recognize a direct legal malpractice claim by an insurer against defense counsel it hired to represent its insured; and 2) whether a legal malpractice claim is assignable to a third-party who incurs a financial responsibility as a result of the litigation. These issues have not been addressed by controlling precedent of the South Carolina appellate courts. As a result, the court must certify these issues to the South Carolina Supreme Court.

I. RELEVANT BACKGROUND AND FACTUAL FINDINGS[1]

This matter arises out of Defendants' representation of the defendants in a lawsuit alleging personal injuries related to a motor vehicle accident in Orangeburg County ("Underlying Litigation"). In the Underlying Litigation, Plaintiff Sentry Select Insurance Company ("Plaintiff") was the insurance carrier for the underlying defendants. (ECF No. 1 at ¶¶11-12.) Plaintiff hired Defendants to defend the underlying defendant trucking company in the Underlying Litigation. During the Underlying Litigation, the underlying plaintiff served Requests to Admit upon the underlying defendants on January 25, 2013. (ECF No. 1 at ¶ 19.) Defendants were required to respond to the Requests within thirty days. (ECF No. 1 at ¶ 20.) Defendants failed to submit responses to the Requests to Admit and did not discover this failure until June 25, 2013. (*Id.*) As a result of Defendants' failure to respond on behalf of the underlying defendants, the underlying defendants effectively admitted to liability for the accident without an opportunity to provide a meritorious defense. (*Id.* at ¶ 21.) Defendants filed a motion for extension of time to respond to the requests to admit on September 5, 2013. (*Id.* at ¶ 22.) The trial court held a hearing, but declined to rule on the motion until after mediation. (*Id.* at ¶ 23-24.) The underlying defendants' policy with Plaintiff set coverage limits in the event of collision at $1,000,000.00. Prior to mediation, Defendants recommended that the settlement range in the Underlying Litigation would be between $75,000.00 and $125,000.00. (*Id.* at ¶ 29.) Plaintiff alleges that as a result of Defendants' failure to respond to the Requests to Admit, Plaintiff reluctantly settled the action for $900,000.00, with the consent of the underlying defendants. (*Id.* at ¶ 30.)

Subsequently, the underlying defendants assigned their claims against Defendants to Plaintiff. (*Id.* at ¶ 31.) As a result, Plaintiff filed a complaint on December 17, 2015, alleging five

[1] In light of the procedural posture of this case, the facts set forth herein are essentially the allegations in the complaint.

causes of action: (1) negligence—assignment of claim; (2) breach of contract—intended third party beneficiary; (3) negligence; (4) breach of contract; and (5) breach of fiduciary duty. On January 25, 2016, Defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). (ECF Nos. 6, 6-1.) Plaintiff filed a response in opposition on February 11, 2016. (ECF No. 10.) On February 22, 2016, Defendants filed a reply to Plaintiff's response. (ECF No. 11.) Plaintiff later filed a Surreply on April 16, 2016. (ECF No. 15.) A hearing on the motion to dismiss was held on April 20, 2016.

II. LEGAL STANDARD

Federal courts in diversity cases apply the law of the forum state. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). In situations in which "there is no case law from the forum state which is directly on point, the district court attempts to do as the state court would do if confronted with the same fact pattern." *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir. 1994) (internal citations omitted). The Fourth Circuit has noted that "[o]nly if the available state law is clearly insufficient should the court certify the issue to the state court." *Id.* (citing *Smith v. FCX, Inc.*, 744 F.2d 1378, 1379 (4th Cir. 1984)).

South Carolina Appellate Court Rule 244 provides that the Supreme Court of South Carolina "in its discretion may answer questions of law certified to it by any federal court of the United States . . . when requested by the certifying court if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause then pending in the certifying court when it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court." Rule 244(a), SCACR. The certification order must set forth: (1) "the questions of law to be answered"; (2) "all findings of fact relevant to the questions certified"; and (3) "a statement showing fully the nature of the controversy in which the

questions arose." Rule 244(b), SCACR.

III. NATURE OF THE CONTROVERSY

A. The Parties' Arguments

First, Defendants assert that Plaintiff may not assert a direct legal malpractice action because direct legal malpractice claims by third party insurance companies against attorneys representing an insured have not been recognized in South Carolina. (*See* ECF No. 6-1 at 6 (citing, *e.g.*, *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 697 S.E.2d 551 (S.C. 2010) (noting that in South Carolina an "attorney is immune from liability to a third person arising from the performance of his professional activities as an attorney.")).) Defendants further assert that if a court were to recognize such a claim, the attorney-client relationship between the insured and the attorney would be jeopardized. In support of their position, Defendants cite Rule 5.4(c) of the South Carolina Rules of Professional Conduct which prohibits lawyers from allowing a third-party payer to control its relationship with the client. (*Id.* at 6-7.) Defendants contend that if an insurer were allowed to bring direct claims against an attorney, the attorney would act in constant fear of malpractice claims by the insurance carrier which could cause an attorney to act in contrast to the best interests of the client. Defendants also assert that there is no South Carolina law indicating that the courts recognize a dual attorney-client relationship between insurer, client, and defense counsel. Accordingly, Defendants contend that Plaintiff does not have standing to bring a direct legal malpractice claim against them.

Second, Defendants assert that Plaintiff may not assert a legal malpractice action against them based on assignment because legal malpractice claims are not assignable under South Carolina law. In support of this position, Defendants cite to *Skipper v. Ace Property and Cas. Ins. Co.*, 775 S.E.2d 37 (S.C. 2015). In *Skipper*, pursuant to a question certified to the Court, the

Supreme Court of South Carolina determined that adversaries in litigation cannot assign legal malpractice claims arising from the same litigation. *Id.* In reaching this conclusion, the Court noted that permitting the assignment of such claims between adversaries would threaten the integrity of the attorney-client relationship and incentivize plaintiffs and defendants to collude against the defendant's attorney. *Id.* at 38-39. Accordingly, Defendants assert that those same public policy concerns "warrant the prohibition of assignments between the insured and the insurer." (ECF No. 6-1 at 10.)

Plaintiff contends that South Carolina law does not prohibit a direct legal malpractice action by a third-party who benefits from the existence of the attorney-client relationship. In support of its position, Plaintiff relies on *Fabian v. Lindsay*, 765 S.E.2d 132, 136 (S.C. 2014). In *Fabian*, the plaintiff brought an action for legal malpractice and breach of contract by a third party beneficiary against the attorneys who drafted her uncle's trust instrument. *Id.* at 134. She alleged that the attorneys made a drafting error, which effectively caused her to be disinherited. *Id.* The Supreme Court of South Carolina reversed the order dismissing Plaintiff's complaint and held that actions in both tort and contract were cognizable if brought by a third-party beneficiary of an existing will or estate planning document against a lawyer whose drafting error defeats or diminishes the client's intent. *Id.* at 141. The Court further held that the recovery under either cause of action is limited to persons named or identified in the estate planning document. *Id*; *but see Rydde v. Morris*, 675 S.E.2d 431 (S.C. 2009) (holding that relaxed privity requirements for maintaining legal malpractice actions in South Carolina did not extend to a prospective beneficiary of a nonexistent will). In *Fabian*, though the Court did not find that an attorney-client relationship existed between the plaintiff and the attorney, the Court found that nonetheless, the attorney owed the plaintiff a duty. Plaintiff recognizes that the Supreme Court of South Carolina has not yet

extended this analysis to the insurance carrier context, but asserts that the analysis in *Fabian* is very similar to that of the Restatement (Third) of the Law Governing Lawyers (2000), which recognizes that a duty is owed by an attorney to a third party in certain situations. (ECF No. 10 at 6-7.)

According to the Restatement, a lawyer owes an actionable duty to a non-client when the lawyer knows that the client intends that one of the primary objectives of the representation is to benefit the non-client, the duty would not significantly impair the lawyer's duty to the client, and that the absence of a duty to the non-client would make the enforcement of the obligations to the client unlikely. Restatement (Third) of the Law Governing Lawyers § 51(c) (2000). The Restatement provides guidance specific to the insurance defense context and notes that "a lawyer designated by an insurer to defend an insured owes a duty of care to the insurer with respect to matters as to which the interests of the insurer and insured are not in conflict, whether or not the insurer is held to be a co-client of the lawyer." *Id.* §51, cmt. g. Plaintiff asserts that even though they might not be recognized as clients, the court should recognize that Defendants owed a duty of care to Plaintiff, which was breached. (ECF No. 10 at 7-8.) Accordingly, Plaintiff concludes that its claim for direct legal malpractice against Defendants should not be dismissed.

Further, Plaintiff rejects Defendants' argument that the assignment of legal malpractice claims is void against public policy. Plaintiff distinguishes *Skipper*, and notes that the adversarial relationship that was present between the parties in *Skipper* is not present in this case. Specifically, Plaintiff asserts that the interests of Plaintiff were also aligned with the interests of its insured, the underlying defendants. Because there is no risk of collusion between the insurer and the insured, the public policy concerns addressed in *Skipper* are not applicable here. In contrast, Plaintiff contends that there are some valid public policy reasons which should support an assignment of a

legal malpractice claim from insured to insurer. Of note, Plaintiff asserts that when an attorney commits malpractice in defending an insured, the damage caused by that malpractice affects the insurer more than the insured. (ECF No. 10 at 11 (citing *Atlanta Int'l Ins. Co. v. Bell*, 475 N.W.2d 294, 298 (Mich. 1991) ("defense counsel's immunity from suit by the insurer would place the loss for the attorney's misconduct on the insurer. The only winner . . . would be the malpracticing attorney.")).) Furthermore, even where the insured suffers some of the damage, the amount of damage caused might not be sufficient to motivate the insured to pursue a malpractice claim against the attorney. Plaintiff contends that allowing actions by an insurer against defense counsel "promotes enforcement of the lawyer's obligations to the insured by holding the lawyer accountable for breaches of a duty that the insured may not have had the incentive to litigate." (ECF No. 10 at 11) (internal quotations and citations omitted). Accordingly, Plaintiff asserts that its complaint should not be dismissed.

B. The Court's Review

After reviewing the authority cited by the parties, the court is persuaded that certification is appropriate in this case. There are very few cases addressing the issue of whether a third-party may bring a direct legal malpractice action against an attorney. Recently, in *Fabian v. Lindsay*, 765 S.E.2d 132 (S.C. 2014), the Supreme Court of South Carolina departed from the general rule requiring privity between the claimant and the attorney in order to maintain a legal malpractice action. *Id.* at 136 (citing *Rydde v. Morris*, 675 S.E.2d 431 (S.C. 2009)). In recognizing the appellant's cause of action, the Court adopted a third-party beneficiary theory and reasoned that the appellant was the intended beneficiary of her late uncle's attorney-client relationship with his attorney. *Id.* at 140. Although the Court limited the holding in the case to legal malpractice causes of action brought by intended third-party beneficiaries of existing will or estate planning

documents, it is not clear to this court whether the Court would be inclined to extend the third-party beneficiary analysis to the insurance defense context where insurers hire attorneys to represent their insured for the purposes of limiting the liability of both the insurers and the insured. There are no cases explicitly defining the relationship between insurers, the insured, and the attorneys hired to represent the insured, which might aid this court in determining whether or not the Court might find that the insurers are a third-party beneficiary of the attorney-client relationship between the insured and the attorney. Because determining whether or not a third-party legal malpractice claim is cognizable in this context in South Carolina is a determinative issue, the court finds that certification of that question to the Supreme Court of South Carolina is necessary.

Second, this court finds that there is only one case addressing the assignability of legal malpractice claims. *See Skipper v. Ace Property and Cas. Ins. Co.*, 775 S.E.2d 37 (S.C. 2015). In *Skipper*, the Supreme Court of South Carolina determined that legal malpractice claims cannot be assigned between adversaries in litigation because that would create risk of collusion which would threaten the integrity of the attorney-client relationship. *Id.* at 38-39. The case before this court does not involve the assignment of a legal malpractice claim between adversaries. Furthermore, the public policy concerns present in *Skipper* are not necessarily present in this case since the interests of the assignee and the assignor of the legal malpractice claim were aligned. It is not clear whether the Court would find, based on the facts of this case, that the assignment of the legal malpractice claim is void against public policy or otherwise not permitted in South Carolina. This court finds that the available state law on the assignability of a legal malpractice claim is insufficient to reach a decision. Therefore, because the assignability of a legal malpractice claim is a determinative issue, the court proceeds with certifying the question to the South Carolina

Supreme Court.

III. CERTIFIED QUESTIONS

The court certifies the following questions:

1. Whether an insurer may maintain a direct malpractice action against counsel hired to represent its insured where the insurance company has a duty to defend?

2. Whether a legal malpractice claim may be assigned to a third-party who is responsible for payment of legal fees and any judgments incurred as a result of the litigation in which the alleged malpractice arose?

IV. CONCLUSION

Based on the foregoing, the court **CERTIFIES** the foregoing questions to the South Carolina Supreme Court. The clerk shall forward a copy of this Order to the South Carolina Supreme Court under this court's official seal. In the interest of judicial economy and its docket considerations, the court **DENIES** without prejudice Defendants Maybank Law Firm, LLC's and Roy P. Maybank's Motion to Dismiss, (ECF No. 6), with leave to re-file after adjudication of the certified questions.

IT IS SO ORDERED.

J. Michelle Childs

United States District Judge

June 21, 2016
Columbia, South Carolina

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