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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIFIED QUESTIONS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

J. Michelle Childs, United States District Judge

Appellate Case No. 2016-001351

Sentry Select Insurance Company, Plaintiff,

v.

Maybank Law Firm, LLC and
Roy P. Maybank,

Defendants.

BRIEF OF DEFENDANTS

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STATEMENT OF THE CERTIFIED QUESTIONS

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

II. May a legal malpractice claim may be assigned to a third party, who is responsible for payment of legal fees and any judgments incurred because of the litigation in which the alleged malpractice arose?

STATEMENT OF THE CASE

The certified questions presented to this Court arise out of litigation pending in South Carolina district court between Plaintiff Sentry Select Insurance Company ("Sentry") and Defendants Maybank Law Firm, LLC and Roy P. Maybank (collectively, "Attorney"). In the pending litigation, Insurance Company has asserted five legal malpractice claims against Attorney arising out of Attorney's representation of Herman Shaw, Wall Street Systems, Inc. and Madison Intermodal, LLC (collectively, "Client") in an underlying personal injury lawsuit in Orangeburg County. Sentry provided liability insurance coverage to Client and hired Attorney to defend Client in the underlying litigation. Attorney moved to dismiss Sentry's lawsuit on grounds that Sentry cannot maintain direct or assigned claims for legal malpractice against Attorney. The district court certified these questions in connection with Attorney's motion to dismiss.

The district court observed in its certification order that "[i]n light of the procedural posture of this case, the facts set forth herein are essentially the allegations in the complaint." With the understanding that many of those allegations are disputed–yet accepted as true for purposes of a

Rule 12(b)(6) motion–Attorney incorporates the district court's recitation of the relevant background.[1]

To recap, Client was insured under a liability policy issued by Sentry. Client was named as a defendant in an underlying lawsuit in Orangeburg County arising from an automobile accident. Sentry hired Attorney to represent Client in the underlying lawsuit. Sentry alleges that in the course of Attorney's representation of Client, Attorney failed to timely respond to requests to admit that had the effect of admitting liability. Attorney filed a motion to extend the time to respond to the requests to admit. The motion was heard by the trial court and kept under advisement until after the parties mediated. Sentry provided $1,000,000 in coverage. Sentry alleges that the settlement range recommended by Attorney was between $75,000 and $125,000. Sentry alleges that as a result of Attorney's failure to respond to the requests to admit, Sentry reluctantly settled the lawsuit for $900,000 with Client's consent. Sentry alleges that it subsequently obtained an assignment of Client's claims against Attorney.

Sentry filed suit against Attorney on December 17, 2015, alleging five 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. Attorney moved to dismiss the complaint on January 25, 2016. The motion was heard on April 20, 2016. The district court entered its certification order on June 21, 2016. This Court accepted certification on August 19, 2016.

[1] Sentry has taken liberty in its Statement of the Case to include matters not within the certified record that serve little purpose to the disposition of these certified questions and should not be considered. *See* Rule 244(b), SCACR ("the Supreme Court will not consider any documents or other evidentiary materials unless the certifying court has submitted those materials.").

ARGUMENTS

Although courts in other jurisdictions have failed to reach a consensus on whether and how an insurer may assert a claim for legal malpractice against defense counsel hired to represent its insured, the issues before this Court have generally been decided by weighing the public policy considerations that support preserving the sanctity of the attorney-client relationship against favoring the economic interests of the insurer under the guise of accountability.

Courts on both sides recognize that the relationship between insurers, insureds, and defense counsel is rife with actual and potential conflicts that can arise at any point in the representation. Courts that have declined to allow insurers to pursue malpractice claims against defense counsel have generally found that a bright line rule prohibiting malpractice claims by insurers is the only way to maintain the undivided duties of loyalty, fidelity and confidentiality that attorneys owe to their clients. Courts on the other side have generally favored the economic interests of insurers, finding that shifting the loss to the malpracticing attorney outweighs any detrimental impact on the attorney-client relationship. These courts have based their decisions almost exclusively on the false premise that a malpracticing attorney would otherwise avoid liability, disregarding that the actual client has always had standing to pursue such claims in favor of expanding liability to a third-party that might be more incentivized to pursue such claims.

Regardless of the facts under which the certified questions before the Court have been presented or the potential theories of recovery at issue, answering either question in the affirmative will make attorneys hired by non-client third party payers beholden to two masters rather than to solely their clients, allow insurance companies rather than clients to unilaterally decide whether to pursue legal malpractice claims, and place an insurer's economic interests above the attorney-client relationship.

Attorneys are always accountable to their clients for malpractice; answering both questions in the negative will not insulate them from liability. It will, however, ensure that the interests of the client are always paramount to the economic interests of a nonclient third-party payer.

I. South Carolina law does not permit an inurance company to assert a claim for legal malpractice against defense counsel.

Under South Carolina law it is well established that "a claimant in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate causation of the client's damages by the breach." Holmes v. Haynsworth, Sinkler & Boyd, P.A., 408 S.C. 620, 636, 760 S.E.2d 399, 407 (2014). "Before a claim for malpractice may be asserted, there must exist an attorney-client relationship." Am. Fed. Bank, FSB v. No. One Main Joint Venture, 321 S.C. 169, 174, 467 S.E.2d 439, 442 (1996).

In Fabian v. Lindsay, 410 S.C. 475, 491, 765 S.E.2d 132, 141 (2014), this Court recognized a very narrow exception to this rule, finding that under a third-party beneficiary theory, a very specific class of non-clients – beneficiaries named or otherwise identified by status in an estate planning document – may pursue legal malpractice claims "against a lawyer whose drafting error defeats or diminishes the client's intent."

The Court explained that relaxing the strict privity requirement in the case of third parties named as beneficiaries in an estate planning document *was,* in effect, enforcing the client's intent. Id. at 140. This Court stated:

> Recognizing a cause of action is not a radical departure from the law of legal malpractice that requires a lawyer client relationship, which is equated with privity and standing. Where a client hired an attorney to carry out his intent for estate planning and to provide for his beneficiaries, there ***is*** an attorney-client relationship that forms the basis for the attorney's duty to carry out the client's intent. The intent in estate planning is directly and inescapably for the benefit

> of the third-party beneficiaries. Thus imposing an avenue for recourse in the beneficiary, where the client is deceased, is effectively enforcing the ***client's intent***, and the third party is in privity with the attorney.

Id. (emphasis added).

This Court carefully, and narrowly, recognized an exception to the requirement of an attorney-client relationship in only the specific circumstances identified therein. The two primary considerations in Fabian – that the main purpose of the representation was to benefit the third-party and that the client's intent can only be effectuated by giving the third-party beneficiary a right of action – are not present here.

Notably, just five years before Fabian was decided, this Court declined to recognize a cause of action by prospective beneficiaries against an attorney for negligent failure to timely draft a will. Rydde v. Morris, 381 S.C. 643, 675 S.E.2d 431, 432 (2009). In Rydde, the Court foreshadowed the decision in Fabian by approving of the approaches taken by courts in jurisdictions that have declined to further expand third-party liability beyond beneficiaries identified in an estate planning document. Id. at 433-34. Nothing in Fabian suggests that this Court intended to expand an attorney's liability to non-clients beyond this narrow exception.

Other courts that have drawn the line where this Court did in Fabian have declined to allow insurers to recover under a third-party beneficiary theory. *See* Krawczyk v. Stingle, 208 Conn. 239, 543 A.2d 733, 735 (1988) (declining to extend attorney third-party liability to "encompass negligent delay in completing and furnishing estate planning documents for execution by the client."); Continental Cas. Co. v. Pullman, Comley, Bradley & Reeves, 929 F.2d 103, 106 (2d Cir. 1991) (rejecting insurer's "attempt to equate an attorney's 'dual representation' of the insurer and insured with that of the testator and his beneficiary[,]" based upon its prediction that the

Connecticut Supreme Court would not find "the primary or direct purpose of the transaction was to benefit the third party.") (*quoting* Krawczyk, 543 A.2d at 735).

A. The approaches to third-party liability adopted in Fabian do not support an expansion of liability to insurance companies.

In Fabian, the Court approved of two approaches for evaluating whether an attorney should be liable to a non-client third party: the California multifactor balancing test set forth in Lucas v. Hamm, 56 Cal.2d 583, 364 P.2d 685, 15 Cal.Rptr. 821 (1961), and a third-party beneficiary to contract approach based on existing South Carolina law.

The factors considered under the California multifactor balancing test include "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, the policy of preventing future harm [and] whether the recognition of liability . . . would impose an undue burden on the profession. Fabian, 765 S.E.2d at 137-38 (*quoting* Lucas, 364 P.2d at 687-88).

The Court found support for the third-party beneficiary theory in existing South Carolina law, which provides that "if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential benefit to such third person." Id. at 139 (*quoting* Windsor Green Owners Association, Inc. v. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004).

(1) An insurance company is not an intended beneficiary of the attorney-client relationship between an insured and defense counsel.

Under both the California multifactor balancing test and the third-party beneficiary approaches adopted in Fabian, 765 S.E.2d at 139-141, the threshold inquiry is whether the client intended to benefit the third-party. *See* id. at 140 (finding the "intent in estate planning is *directly*

and inescapably for the benefit of third-party beneficiaries"); id. (". . . imposing an avenue for recourse in the beneficiary, where the client is deceased, *is effectively enforcing the client's intent*[.]")(emphasis added); Windsor Green Owners Assn., Inc., 605 S.E.2d at 752 ("[I]f a contract *is made for the benefit of a third person*, that person may enforce the contract *if the contracting parties intended* to create a direct, rather than an incidental or consequential benefit to such third person.")(emphasis added).

The approaches adopted in Fabian were previously adopted by the Supreme Court of Washington in two separate cases before being combined into a single balancing test. Trask v. Butler, 123 Wash.2d 835, 872 P.2d 1080, 1083 (1994). The Trask court observed that [t]he two tests are indistinguishable in that their primary inquiry focuses on the purpose for establishing the attorney-client relationship." The court then combined the two tests "[t]o eliminate any confusion to the trial courts[,]" and stressed that "[t]he intent to benefit the plaintiff is the first and threshold inquiry[.]" Id. at 1084. *See* Strait v. Kennedy, 103 Wn. App. 626, 631-32, 13 P.3d 671 (Ct. App. 2000) (the relevant inquiry under Trask is what the client intended to accomplish in the litigation, not what the nonclient hoped to gain by it).

Washington appellate courts have had the opportunity to apply this combined multifactor test to claims by insurers against defense counsel on three separate occasions. In Stewart Title Guar. Co. v. Sterling Sav. Bank, Corp., 178 Wash.2d 561, 311 P.3d 1, 3-4 (2013), the court addressed the novel issue of "whether an attorney hired by a title insurer to represent its insured owed a duty to the nonclient insurer and, hence, whether that insurer can sue the lawyer for negligently representing the insured during the defense." The court observed that "the threshold question is whether the plaintiff is an intended beneficiary of the transaction to which the advice

pertained . . . [N]o further inquiry need be made unless such an intent exists." Id. at 3 (*quoting* Trask, 872 P.2d at 1080).

The title insurer argued that because the interests of an insurer and insured are generally aligned, as long as there is no actual conflict of interest, a non-client insurer is presumed to be an intended beneficiary. Id. at 4. The Supreme Court of Washington rejected this analysis, finding that an alignment of interests is insufficient to establish a duty running from defense counsel to an insurer for purposes of a malpractice claim. "The fact that an insurer's and insured's interests happen to align in some respects—though perhaps not in all respects, as shown by contrasting [defense counsel's] strategy of seeking a speedy, yet just, settlement with Stewart Title's different strategy—does not by itself show that the attorney or client intended the insurer to benefit from the attorney's representation of the insured." Id. The court also observed that it "could also make any third party payor an intended beneficiary of a legal services contract to whom a duty of care runs, in violation of RPC 5.4(c)." Id.

The Stewart Title court also rejected the insurer's notion that an attorney's duty to keep a third-party payer informed about the litigation gives rise to a broad duty of care that would support a malpractice claim by the third party payer:

> It does not create that separate duty of care for the same reasons that the client's and nonclient payor's alignment of interests does not create such a separate duty: first, because acceptance of a duty to inform a nonclient third party payor does not show that the attorney's representation was intended to benefit the third party payor, as *Trask* requires; and second, because an attorney cannot contract away his or her professional duty to 'not permit a person who ... pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.' RPC 5.4(c).

Id. at 5.

One year after Stewart Title, the Washington Court of Appeals had the opportunity to reiterate this holding in Clark Cnty. Fire Dist. No. 5 & Am. Alt. Ins. Corp. v. Bullivant Houser

Bailey P.C., 180 Wash.App. 689, 324 P.3d 743 (Ct. App. 2014). In Clark Cnty. Fire Dist. No. 5, the client and its insurer sued the attorneys hired by the insurance company to defend a gender discrimination and sexual harassment lawsuit. Id. at 746-47. The court affirmed the trial court's grant of summary judgment against the insurer, finding that there was "no indication in Stewart Title that there could be circumstances under which the representation of an attorney retained to represent an insured would be for the benefit of the insurer." Id. at 749-750.

The Washington Court of Appeals addressed the issue again in 2015, this time in the context of a legal malpractice claim by a medical malpractice insurer against the attorney it retained to defend its insured doctors. In an unpublished opinion, the court in Doctors Co. v. Bennett Bigelow & Leedom, P.S., No. 72163-1-1, 2015 WL 3385264 (Wash. App. May 26, 2015) (unpublished), affirmed the trial court's grant of summary judgment against the insurer, observing that "[n]o Washington court has ever applied Trask to hold that an attorney retained by an insurer to defend its insureds owes an additional duty of care to the insurer."

Those courts that have allowed insurers to recover under a third-party beneficiary theory have improperly focused on what *the insurer* expected from the representation rather than what *the client* intended. This is also a flaw in the Restatement approach discussed below, which incorrectly assumes that that when a non-party third party payer agrees to pay litigation expenses for a client, that it is one of the client's primary objectives to benefit the third party payer. There is a significant difference between a third party whom the client intends to directly benefit through the representation and a third party that has a foreseeable incidental or consequential interest in the outcome of the litigation.

In South Carolina, "foreseeability of injury is an insufficient basis for recognizing a duty." Charleston Dry Cleaners & Laundry, Inc. v. Zurich American Insurance, Co., 355 S.C. 614, 586

S.E.2d 586, 588 (2003) (*citing* S.C. Ports Authority v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324, 326 (1986)); Huggins v. Citibank, 355 S.C. 329, 585 S.E.2d 275, 278 (2003) ("Even though it is foreseeable that injury may arise by the negligent issuance of a credit card, foreseeability alone does not give rise to a duty").

In purchasing an insurance policy, an insured pays thousands of dollars in premiums to protect his or her own interests, not the interests of the insurer. Part of the protection afforded by liability insurance is the insurer's duty to defend, which is a valuable right that belongs to the insured and exists for the insured's benefit. *See* Nationwide Mut. Ins. Co. v. Simmonds, 315 S.C. 404, 434 S.E.2d 277, 278 (1993) ("The defense of such suits by the insurer is a valuable right of the insured for which he pays and to which he is entitled by the very words of the policy.") (*quoting* American Casualty Company v. Howard, 187 F.2d 322, 327 (4th Cir. 1951)). It defies common sense to say that an insured purchased this valuable right for the purpose of benefitting the insurer.

Likewise, it defies common sense to reason that once an insured is named in a lawsuit, that a primary objective of the client's participation in the lawsuit would be to benefit the insurer. To the contrary, the primary objective of the client is protecting his own interest, whether that be minimizing personal exposure, pursuing a quick resolution to avoid the stress and inconvenience of litigation, preserving his reputation, avoiding potential regulatory fallout from an adverse outcome, avoiding embarrassing media coverage, or other factors that are distinct from an insurer's primary interest, which is always to pay as little as possible in defense and indemnity costs.

As the Supreme Court of Montana recognized:

> Both insurance companies and insureds have important and meaningful stakes in the outcome [of] a lawsuit against the insureds, stakes that include not just money that the insurance company must pay in defense and settlement, but also the uninsured liabilities of the insured, which include not just any judgment in excess of

> liability limits, but also the insured's reputation and other non-economic stakes.

In re Rules of Prof'l Conduct, 299 Mont. 321, 2 P.3d 806, 814 (2000)(*citing* Kent D. Syverud, What Professional Responsibilities Scholar Should Know About Insurance, 4 Conn.Ins.L.J. 17, 23-24, 1997). To the client who purchased liability insurance coverage, the benefit that the representation provides to the insurance company is of little significance, if any, when facing far more personal adverse consequences.

Although an insurer stands to benefit from the representation to the extent that its interests are advanced, that does not make the insurer the client's intended beneficiary of a legal services contract between the attorney and client. "The mere fact that [a third-party] might ultimately and indirectly benefit from the contract between the [parties to the contract] is not sufficient." Bob Hammond Const. Co., Inc. v. Banks Const. Co., 312 S.C. 422, 440 S.E.2d 890, 892 (Ct. App. 1993). The same holds true where the parties to the contract intend to benefit the third-party in an incidental or consequential manner. *See* Windsor Green Owners Ass'n, 605 S.E.2d at 752; Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611 S.E.2d 485, 488 (2005) (finding real estate agent's expected benefit from a sales contract – her commission – was merely incidental, which is insufficient to establish third-party beneficiary status).

At best, an insurer is an incidental or consequential beneficiary of the legal services contract between an attorney and client. Accordingly, the Court should find that an insurer is not an intended beneficiary and decline to extend an attorney's liability to a third-party insurer.

(2) Recognizing an insurer's cause of action against defense counsel would create conflicts and divided loyalty on the part of the attorney and impose an undue burden on the profession.

The last of the California test factors approved of in Fabian is "whether the recognition of liability . . . would impose an undue burden on the profession." 765 S.E.2d at 138 (*quoting* Lucas,

364 P.2d at 688). In Fabian, the Court found that recognizing a cause of action for third-party beneficiaries of estate planning documents "does not impose an undue burden on estate planning attorneys as it merely puts them in the same position as most other legal professionals by making them responsible for their professional negligence to the same extent as attorneys practicing in other areas." Id. at 140-41.

In contrast to the malpracticing estate planning attorney in Fabian, it is not necessary to expand liability to third parties to make malpracticing insurance defense attorneys responsible for their professional negligence. Insurance defense attorneys are always accountable to their actual clients. Moreover, the third-party claim recognized in Fabian, which does not arise until after the client's death, does not implicate the broader concerns of recognizing a third-party claim that would have a contemporaneous impact on the attorney-client relationship in an already conflict-ridden setting.

"[T]he policy considerations against finding a duty to a non-client are the strongest where doing so would detract from the attorney's ethical obligations to the client." Trask, 872 P.2d at 1085 (*citing* R. Mallen & J. Smith, LEGAL MALPRACTICE (3d ed. 1989) § 7:11). *See e.g.* Fox v. Pollack, 181 Cal.App.3d 954, 962, 226 Cal.Rptr. 532, 536 (Cal.App. 1 Dist. 1986) ("The effect of such a duty on respondent would be the eradication of confidentiality, the creation of a conflict of interest and the consequent destruction of the attorney-client relationship between respondent and his clients. The strong public policy in maintaining and enforcing the fidelity and duty of the attorney toward the client militates against the imposition of a duty to non-clients under these circumstances.").

Sentry repeatedly urges this Court to ignore the reality that the relationship between insurer, insured and defense counsel is rife with potential conflicts, instead arguing that there was

no actual conflict here, and therefore, the Court should not take into account the policy considerations that implicate the attorney-client relationship and an attorney's ethical obligations to the client. To the contrary, every court that has decided the issues presented in these certified questions has weighed the policy considerations that favor preserving the attorney-client relationship against the policy considerations that favor holding malpracticing attorneys accountable to insurers. *Compare* Atlanta Int'l Ins. Co. v. Bell, 438 Mich. 512, 475 N.W.2d 294, 299 (1991) (recognizing insurer's equitable subrogation claim against defense counsel, notwithstanding that "expanding the parameters of the attorney-client relationship in the defense counsel-insurer context might well detract from the attorney's duty of loyalty to the client in a potentially conflict-ridden setting."), *with* Querrey & Harrow v. Transcontinental Ins., 861 N.E.2d 719, 724 (Ind. App. 2007) (declining to recognize insurer's equitable subrogation claim, finding "[t]he potential conflict is ever present, and we do not deem it appropriate that the attorney's loyalty should be divided.").

In light of the procedural posture of this case, the Court has only been provided the opportunity to consider allegations rather than facts. Those allegations are, in effect, that the interests of the insurer and insured were perfectly aligned in every respect throughout the entire representation. Whatever relevance the Court attaches to the allegations in this case, the Court's decision should take into account that there are perceived and actual conflicts that can and frequently do arise at any point throughout the representation. "The courts have recognized that, even if an implied duty does not interfere with the fiduciary obligations in a given case, it may do so in other cases under different facts. For that reason, policy considerations are not developed on an *ad hoc* basis, but from a broader perspective concerning the potential adverse effects on future relationships." R. Mallen, J. Smith, LEGAL MALPRACTICE (2011 ed.), § 7:8, p. 798.

The duties of loyalty and confidentiality are cornerstones of the attorney-client relationship; clients are owed these duties without regard to who hires the attorney or who pays the attorney's bills. *See* Rules 1.6, 1.7, 1.8 and 5.4 of the Rules of Professional Conduct, Rule 407, SCACR. Perhaps nowhere is this more important than when an attorney is hired and paid by a third-party, and perhaps nowhere is this more prevalent than in the insurance defense practice. *See* Swiss Reinsurance America Corporation v. Roetzel & Andress, 163 Ohio.App.3d 336, 837 N.E.2d 1215, 1221 (2005) ("The inherent danger in tripartite relationships is that defense counsel may be tempted to help the [insurer] who pays the bills, who will send further business, and with whom long-standing personal relationships have developed.") (*quoting* Pine Island Farmers Coop v. Erstad & Riemer P.A., 649 N.W.2d 444, 451 (Minn. 2002).

As the court explained in Federal Insurance Company v. North American Specialty Insurance, Co., 47 A.D.3d 52, 60 (1st. App. Div. 2007), recognizing such an insurer's claim against defense counsel would be irreconcilable with the highly fiduciary and delicate relationship between attorney and client:

> Strict adherence to the rule prohibiting legal malpractice claims by non-clients serves an important policy consideration. An attorney's paramount duty is to protect zealously the interests of his or her client, and if that duty is breached and the breach proximately causes injury, the attorney may be subject to a malpractice claim, but only by his or her client. While, concededly, third parties may be interested in the actions by another's attorney and even benefit therefrom, that circumstance does not give rise to a duty on the part of the attorney to the third party. Were it otherwise, the attorney would be faced with the constant burden of weighing all of the competing interests attendant upon such diverse obligations to the potential detriment of his or her client, to whom he owed undivided fidelity.

Id. at 60.

Recognizing an insurer's claim against defense counsel – whether directly as a third-party beneficiary or indirectly as an assignee or subrogee – would unquestionably detract from an

insurance defense attorney's ethical obligations to the client by creating conflicts, dividing loyalty and allowing an insurer to unilaterally waive privilege and confidentiality.

Those courts that have declined to allow insurers to pursue claims against defense counsel have found that the sanctity of the attorney-client relationship outweighs any actual or perceived windfall to the malpracticing attorney. *See* State Farm Fire and Casualty Company v. Weiss, 194 P.3d 1063, 1069 (Colo. App. 2008) ("While we recognize that insurance companies and ultimately the public will pay the cost, or the bulk of the cost, of this burden, protecting every attorney-client relationship must take precedence over allowing lawsuits against attorneys whose clients do not want to sue but their subrogees do."); Querrey & Harrow v. Transcontinental Ins., 861 N.E.2d 719, 724 (Ind. App. 2007) ("[W]e do not agree with those jurisdictions that hold the possibility of the attorney garnering a windfall by not having to defend against his or her malpractice outweighs the sanctity of the attorney-client relationship. [The insured] still possesses the right to pursue a malpractice claim. Thus the attorney is not getting a free ride.").

Answering either certified question in the affirmative would, without question, have a detrimental impact on the attorney-client relationship and the representation that insureds receive through attorneys hired by insurance companies. Answering either certified question in the affirmative would make the defense attorney beholden to two masters and only serve to exacerbate the already heightened potential for conflicts and divided loyalty.

B. The Restatement approach does not comport with Fabian.

Sentry's citation to Section 51 of the Restatement of the Law Governing Lawyers (Third) is not persuasive in the context of South Carolina law following this Court's decision in Fabian. Section 51 of the Restatement sets forth an abbreviated balancing test, which provides that a lawyer owes an actionable duty of care to a non-client when:

> (a) the lawyer knows that the client intends as one of the primary objectives of the representation that the lawyer's services benefit a non-client;
> (b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and
> (c) the absence of a legal duty would make enforcement of those obligations to the client unlikely . . . .

Restatement (Third) of the Law Governing Lawyers § 51(3) (2000).

As an initial matter, Fabian is controlling authority in South Carolina, not the Restatement. Moreover, the Restatement is not consistent with the common law approaches adopted in Fabian. The Restatement approach has been sharply criticized by the authors of the leading legal malpractice treatise, who described it as "unique and questionable" before concluding that "the Restatement's promulgation of a new standard is unwarranted and confusing." R. Mallen & J. Smith, LEGAL MALPRACTICE (2011 ed.), § 7:8, p. 797-98. The authors observed that "[t]he Restatement's approach creates duties not recognized in most jurisdictions, is less workable than existing standards and portends more litigation." Id.

Unlike the common-law focus on whether the nonclient is the intended beneficiary of the lawyer's retention, the Restatement asks only if a benefit is 'one of the primary objectives.'" Id.

> This deviation from the case law enables factual issues regarding the client's motives. Further, the multiple objectives could be inconsistent, so that claimant's perceptions of the lawyer's obligations could be in conflict with the client's objectives. The risk of conflicting interests is minimized, if not eliminated, by "the intended beneficiary" standard.

Id.

The Restatement also deviates from the common-law by "focusing on the attorney's obligations in the particular transaction and ignoring the broader policy considerations on the effect of the attorney-client relationship generally." Id. "Notably, unlike California law, the Restatement standard does not call for consideration of the burden on the legal profession." Id. That California law, of course, is what this Court adopted in Fabian, 765 S.E.2d at 141.

Application of the Restatement Section 52 to determine the existence of an insurance defense counsel's liability to a non-client insurer is not adequate to protect the client and attorney-client relationship under South Carolina law. Cases following the Restatement approach do not comport with South Carolina law as adopted in Fabian. *Cf.* Paradigm Ins. Co. v. Langerman Law Offices, P.A., 200 Ariz. 146, 24 P.3d 593, 596 (2001).

Courts that have allowed insurers to pursue malpractice claims against defense counsel have recognized what amounts to a conditional duty that exists whenever the interests of the insurer and insured are aligned, but vanishes whenever a conflict arises. Some of these courts have found support in a comment to Section 51 of the Restatement that addresses its applicability in the context of insurance defense. Comment (g) provides 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. at cmt. g. The comment further provides that "such a duty does not arise when it would significantly impair, in the circumstances of the representation, the lawyer's performance of obligations to the insured." Id.

The problem with this approach is that it would be unworkable in the actual practice of law. It would require the attorney to constantly monitor and evaluate whether the client's interests are consistent with the insurer's and then communicate the attorney's conclusion with both parties. It would require the client and the insurer to communicate openly and candidly with the attorney about all of their goals and interests, whether aligned or not. Even assuming open communication from an insurer, the process of constantly evaluating whether the interests are aligned is an uncertain process that would subject an attorney second-guessing and undermine the attorney's focus on the client's interest. *See* In re Rules of Prof'l Conduct, 2 P.3d at 814. ("Whether the

interests of insurers and insureds coincide can best be determined with perfect clarity of hindsight. Before final resolution of any claim against an insured, there exists a potential for conflicts of interest to arise.").

Moreover, this approach would require the attorney to not only constantly evaluate for potential conflicts, but also determine the point at which a potential conflict in any given case rises to the level of eliminating malpractice liability to the insurer. Because conflicts must be evaluated in the context of the specific facts and circumstances present at that time, it would be difficult to provide any blanket pronouncements as to when potential conflicts rise to this level, *e.g.* receipt of a reservation of rights letter, a policy limits demand, a disagreement over resolution strategy, the client's exposure exceeds available coverage, the attorney receives information implicating coverage issues, and so on.

The practical difficulties in adopting a case-by-case approach where the attorney constantly evaluates the respective alignment of interests would carry over to the legal malpractice litigation as well, presumably leaving open the question of whether the insurer even has standing to bring the claim until the summary judgment or directed verdict stage. These concerns favor adopting a bright-line approach that places the interests of the client and the attorney-client relationship above an insurer's economic interests.

II. Transfers of legal malpractice claims to third-party payers, whether voluntary or involuntary, are against public policy.

In addition to a direct action for legal malpractice, Sentry also seeks to assert legal malpractice claims against Attorney as Client's assignee.[2] However, as discussed supra, Sentry

[2] Sentry has pleaded that it received an assignment of the legal malpractice claims against Attorney, but at this stage of the litigation, the circumstances under which the assignment was given are unknown. The assignment is not attached to the complaint or otherwise part of the record.

does not fit in to the narrow intended third party beneficiary framework adopted by this Court in Fabian. Thus, the policy reasons underlying a prohibition of direct malpractice claims by third party payers, such as Sentry, similarly compel prohibition of assignments of legal malpractice claims to third party payers.

Absent a blanket rule prohibiting such assignments, an unavoidable and ongoing conflict of interest will tarnish the attorney-client relationship leaving an attorney uncertain if he or she is serving more than one master, and leaving the client to wonder if the attorney's loyalty is undivided in the client's favor. The damage done to the attorney-client relationship by diluting an attorney's duty of loyalty does not rest on the theory under which a third-party pursues a legal malpractice claim; it is based on the very existence of the attorney's potential liability to the third-party.

A. This Court should join the majority of jurisdictions that have adopted a blanket prohibition of legal malpractice assignments.

Across the United States, the majority of jurisdictions hold that legal malpractice claims are not generally assignable. *See* 6 Am. Jur. 2d Assignments §57 (2012)("most jurisdictions have held that legal malpractice claims are nonassignable."). Those jurisdictions applying a blanket prohibition on assigned legal malpractice claims are: Arizona, Botma v. Huser, 39 P.3d 538 (Ariz. Ct. App. 2002); Colorado, Roberts v. Holland & Hart, 857 P.2d 492 (Colo. Ct. App. 1993); Florida, Law Office of David Stern v. Sec. Nat'l Servicing Corp., 969 So.2d 962 (Fla. 2007); Indiana, Picadilly, Inc. v. Raikos, 582 N.E.2d 338 (Ind. 1991); Kansas, Bank IV Wichita, Nat'l Ass'n v. Arn, Mullins, Unruh, Kuhn & Wilson, 827 P.2d 758 (Kan. 1992); Kentucky, Davis v. Scott, 320 S.W.3d 87 (Ky. 2010) and Coffey v. Jefferson Cnty. Bd. of Educ., 756 S.W.2d 155 (Ky. Ct. App. 1988); Louisiana, Taylor v. Babin, 13 So.3d 633 (La. Ct. App. 2009); Michigan, Joos v. Drillock, 338 N.W.2d 736 (Mich. Ct. App. 1983); Minnesota, Wagener v. McDonald, 509 N.W.2d 188 (Minn. Ct. App. 1993); Missouri, VinStickers, LLC v. Stinson Morrison Hecker, 369 S.W.3d 764

(Mo. Ct. App. 2012) and Freeman v. Basso, 128 S.W.3d 138 (Mo. Ct. App. 2004); Nebraska, Earth Science Laboratories, Inc. v. Adkins and Wondra, P.C., 523 N.W.2d 254 (Neb. 1994); Nevada, Chaffee v. Smith, 645 P.2d 966 (Nev. 1982); New Jersey, Alcman Servs. Corp. v. Samuel H. Bullock, P.C., 925 F. Supp. 252 (D.N.J. 1996) affd, 124 F.3d 185 (3d Cir. 1997); North Carolina, Revolutionary Concepts, Inc. v. Clements Walker, PLLC, 744 S.E.2d 130 (N.C. Ct. App. 2013); Tennessee, Can Do, Inc. Pension & Profit Sharing Plan v. Manier, Herod, Hollabaugh & Smith, 922 S.W.2d 865 (Tenn. 1996); Virginia, MNC Credit Corp. v. Sickels, 497 S.E.2d 331 (Va. 1998); and West Virginia, Delaware CWC Liquidation Corp. v. Martin, 584 S.E.2d 473 (W. Va. 2003).

In addition to those jurisdictions that apply a blanket prohibition to the assignment of legal malpractice claims, another five jurisdictions also recognize that assignments of legal malpractice claims, on their own, violate public policy. However, these jurisdictions allow legal malpractice claims to be transferred as part of a larger commercial transaction, such as a stock or asset purchase. These jurisdiction are: California, White Mountain Reinsurance Company of America v. Borton Petrini, LLP, 164 Cal Rptr. 3d 912 (Cal. Ct. App. 2013); District of Columbia, Richter v. Analex Corp, 940 F.Supp 353 (D.D.C. 1996); Idaho, St. Luke's Magic Valley Regional Medical center v. Luciani, 154 Idaho 37, 293 P.3d 661 (Idaho 2013); Illinois, Learning Curve International, Inc. v. Seyfarth Shaw, LLP, 911 N.E.2d 1073 (Ill. Ct. App. 2009); and Rhode Island, Cerberus Partners, L.P., v. Gadsby & Hannah, 728 A.2d 1057 (R.I. 1999).

In South Carolina, this Court has only once examined the assignability of legal malpractice claims under a narrow set of facts. In Skipper v. Ace Property and Cas. Co., 413 S.C. 33, 775 S.E.2d 54 (2015), this Court determined that assignments of legal malpractice claims between adversaries in litigation were void as against public policy. In doing so, this Court highlighted not

only the potential for collusion and role-reversal, but also stressed the same primary public policy concerns relied on by the majority of jurisdictions that prohibit the assignment of legal malpractice claims standing alone. In Skipper, this Court stated:

> [t]he relationship between an attorney and a client is a fiduciary one by nature and "is founded on the trust and confidence reposed by one person in the integrity and fidelity of another." Moore v. Moore, 360 S.C. 241, 250, 599 S.E.2d 467, 472 (Ct. App. 2004) (citations omitted). Permitting these assignments would allow plaintiffs "to drive a wedge between the defense attorney and his client by creating a conflict of interest." Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313, 317 (Tex.App.1994).

Id. at 37.

While again recognizing that conflicts of interest are a substantial concern when discussing the assignability of legal malpractice claims, Sentry seeks to marginalize the potential for conflict between attorney, client, and the insurer by suggesting that the policy concerns in Skipper are inapplicable to the matter at bar, since the insurer and the insured were not adversaries in the underlying litigation.

Conflicts between an insured and an insurer are not avoided simply because they do not appear on opposite sides of a lawsuit. The potential for a conflict between an insurer and an insured is always present, and lasts throughout the duration of the subject lawsuit. Thus, the attorney-client relationship is subject to the potential for conflicts to arise throughout the entirety of the representation.

Moreover, the same policy concerns underlying the Skipper decision *are* present in assignments of legal malpractice claims to third party payers. For instance, an assignment of a client's legal malpractice claims to a third party payer could be used as a bargaining chip in an insurance coverage dispute. Likewise, an insurer may demand an assignment of their insured's malpractice claims as a condition of the insurer's agreement to settle the subject litigation.

Similarly, an insurer may actively look to identify possible malpractice claims against their insured's attorney and use such alleged malpractice claims to offset their own risk. For example, upon discovery of circumstances that may constitute a technical breach of the attorneys standard of care, regardless of the technical breach's actual impact on the underlying case, the insurer could hastily push for a settlement conditioned upon an assignment of the client's legal malpractice claims against the attorney to the insurer.

Thereafter the insurer will pursue a legal malpractice claim against the insured's attorney to recover the full amount of the settlement payment without allowing the underlying case to proceed. In doing so, the insurer will foreclose the ability to determine whether or not the alleged malpractice actually caused damage or injury to the client. As a result, the insurer recoups the settlement payment, even if that payment was reasonable and justified under the merits of the case without consideration of any alleged malpractice.

Clearly, the mere potential for a client's legal malpractice claims to act as a bargaining chip between the client and a third party payer, inherently drives a wedge between the defense attorney and his client. An attorney will always be concerned about the potential for a claim by the third party payer, and will have to protect him or herself against potential claims from the non-client third party assignee. The only way to guarantee that the attorney client relationship will not be threatened by potential claims from non-clients is to bar assignments of legal malpractice claims in any circumstance.

Accordingly, for the same policy reasons compelling prohibition of a direct legal malpractice claims by a third party payers, this Court should join the majority of jurisdictions and hold that the assignment of legal malpractice claims, standing alone, are void as a matter of public policy.

B. Non-clients should not be permitted to do via assignment what they cannot do directly under Fabian.

It is unquestionable that the general rule requiring privity in order to bring a claim for legal malpractice arises out of the important public policy concerns that underlie the attorney-client relationship. "[T]he unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship ... invoke [broad] public policy considerations." Goodley, 62 Cal. App.3d at 397, 133 Cal. Rptr. at 87. "[T]he real substance of a malpractice action is a **client's claim** that his attorney breached his personal duty and trust to that client by failing to exercise the requisite degree of care and skill or by failing to give the utmost loyalty and fidelity to the client's interests." Christison v. Jones, 83 Ill. App.3d 334, 338, 39 Ill.Dec. 560, 563, 405 N.E.2d 8, 11 (1980)(emphasis added).

This Court, likewise, has long recognized the public policy importance of protecting the personal nature of a legal representation and the need to safeguard the attorney-client relationship. *See* Spence v. Wingate, 395 S.C. 148, 158-159, 716 S.E.2d 920, 926 (2011)("[t]he relationship of an attorney with his or her client is highly fiduciary in its nature and of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith."); Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions, 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010).

Allowing assignments of legal malpractice claims to non-clients, however, would threaten to severely impede these well established and accepted matters of law. As the Tennessee Supreme Court explained:

> We are particularly concerned that the relationship between an attorney and client remain a fiduciary relationship of the very highest character. As a result of that relationship, the attorney owes the client not only the duty to use skill, prudence and diligence in the rendition of services, but also the duty to act loyally towards the client and to maintain client confidences. These rules and their enforcement by this Court protect the public, and a violation may

> result in disciplinary action, as well as a legal malpractice claim. Allowing free assignment would be a disservice to the public by compromising both the attorney's duty of loyalty and the duty of confidentiality, resulting in a weakened attorney-client relationship.

Can Do, Inc. Pension and Profit Sharing Plan, 922 S.W.2d at 869 (internal citations omitted).

In this regard, there is no conceivable difference between a third party non-client asserting a claim for legal malpractice via an assignment or asserting such claims directly. An attorney cannot zealously represent his or her client, and exhibit the undivided loyalty and fidelity required under the law, when operating under a constant prospect that his or her client may sell or transfer their right to a non-client third party. Therefore, in *any* circumstance where the potential for an assignment of a legal malpractice claim hangs over the representation, the attorney-client relationship will be hindered, as the attorney must always be concerned about future claims brought by non-clients.

"[A]n attorney's duty of loyalty to his client could be compromised by anticipating an assignment of possible legal malpractice claims...the possibility of assignments places attorneys in the awkward position of both zealously protecting all of a client's rights and of being concerned that a possible future claim of malpractice could be used to settle a client's case or a client's debt to a stranger." Roberts, 857 P.2d at 496. "To permit the assignment of a claim that is firmly rooted in the highly personal attorney-client relationship would denigrate both the legal profession and the justice system. We will not allow this most certain consequence." Delaware CWC Liquidation Corp., 213 W.Va 617, 622, 584 S.E.2d 473, 479 (2003).

In fact, the potential for conflict is even more obvious in the third party payer context. The attorney will have express knowledge of the identity of the prospective assignee, will likely be in direct contact with the assignee, and moreover, will be dealing with his or her client and the third party payer without knowledge of whether or not malpractice claims have been or will be assigned.

Inherently, in such a situation, an attorney will be forced to weigh the interests of the third party payer against the best interests of the client. Thus, in every third party payer representation, the unique quality of legal services, the personal nature of the attorney's duty to the client, and the confidentiality of the attorney-client relationship will be threatened. This Court should not approve of such a clear and certain consequence.

(1) Assignments of legal malpractice claims will effectively become involuntary requirements of the insurer.

In addition to the clear public policy concerns underlying a general prohibition of the assignments of legal malpractice claims, the unique nature of the relationship between an insurer and the insured creates even greater potential for conflict.

Due to the unique nature of the insured-insurer relationship, practically speaking, there is no difference between a legal malpractice claim brought directly by an insurer, and a legal malpractice claim brought by an insurer pursuant to an assignment from their insured. A third party payer responsible for the payment of legal fees and any judgments incurred could *always* condition a payment of any settlement, judgment or litigation expenses on the client's agreement to assign his or her legal malpractice claims against his or her attorney to the insurer.

An insured will be compelled to assign a legal malpractice claim whenever the insuance company requests one. Because the bargaining power is generally swayed considerably in favor of the large, deep pocketed insurer, it is reasonable to foresee that in almost every lawsuit that an insurer has a duty to defend and/or indemnify, the insured will be compliant with the insurer's demand for an assignment in exchange for guaranteed protection if his or her own personal interests. Thus, when faced with the prospect of continuing a lawsuit that may result in an excess judgment, and cause further damage to the insured's reputation, if a conclusion to the litigation is

contingent upon the assignment of the insured's legal malpractice claims, an insured will be compelled to do so whether or not they in fact believe that their attorney committed malpractice.

In other words, in every case involving a third party payer, the third party payer could, in essence, require the client to assign to the third party payer his or her rights to a legal malpractice claim against their attorney. As a result, the third party payer always ends up in the same position as if they could maintain a direct malpractice action against the attorney—even though they have insufficient standing to sue as a third party beneficiary under Fabian. Just as with the possibility of a direct claim, if assignments of legal malpractice claims to third party payers are permitted, the attorney will continuously be put in the position of concurrently serving two masters.

Furthermore, allowing such assignments would be a direct attack on the duty of confidentiality and the free flow of information between attorney and client. As noted by the Tennessee Supreme Court:

> So long as the client brings the malpractice claim, the client has the power to drop the lawsuit to avoid the disclosure of embarrassing confidential communications. Once a legal malpractice claim is assigned, however, the client loses control of the litigation. The assignee controls the claim and may have little or no concern for the client's sensitivities. The client could thereby be harmed and such disclosures would foster disrespect for the attorney-client relationship in general.

Can Do, Inc. Pension and Profit Sharing Plan, 922 S.W.2d at 869 (citing Piccadilly, Inc., 582 N.E.2d at 343-344); *see also* Wagener, 509 N.W.2d at 192.

To defend against a proceeding related to an attorney's representation of a client, such as a malpractice action, a lawyer may be required to reveal confidential information obtained throughout his or her representation of their client, whether or not the client approves of such disclosure. *See* South Carolina Rules of Prof. Conduct, Rule 1.6(6). When the client gives up control of his or her legal malpractice claim, he or she gives up control over the disclosure of

embarrassing, incriminating, or other potentially sensitive information that was confidentially communicated to his or her attorney. The potential for a third party to control the waiver of a client's confidentiality will inherently stifle the free flow of information between attorney and client.

(2) Absent a blanket prohibition on assignment of legal malpractice claims, the Court should hold that assignments to third-party payers are void against public policy.

In response to the obvious threat that assignments of legal malpractice claims pose to the attorney-client relationship, Sentry advocates for a case-by-case approach as to whether or not an assignment of legal malpractice claims is against public policy. Sentry avers that assignments to third party payers should be upheld when the third party payer and the client's interests are aligned. However, as discussed *supra*, the interests of a third party payer and the attorney's client are rarely completely aligned. *See* In re Rules of Prof'l Conduct, 299 Mont. 321, 2 P.3d 806, 814 (2000); Stewart Title Guaranty Comp. v. Sterling Savings Bank, 178 Wash.2d 561, 569-570, 311 P.3d 1, 4 (2013).

Indeed, a case-by-case approach only exacerbates the conflict that will result if an attorney is continuous faced with uncertainty as to whether the interests of a third party payer and their client are in fact aligned. At all times throughout the representation, the attorney will be forced to determine whether or not a conflict may exist between his or her client and the third party payer, and if the interests of the third party payer are entirely aligned with the interests of the client.

Applying a case-by-case approach as to whether a conflict between the third party payer and the attorney's client exists would result in even more conflict, and continuous uncertainty as to which master(s) the attorney is serving. Therefore, if this Court elects not to adopt a blanket rule prohibiting all stand-alone assignments of legal malpractice claims, it should hold that

assignments of legal malpractice claims to third party payers, such as liability insurers, are void as against public policy.

B. Equitable subrogation invokes the same policy considerations that support prohibition of direct and assigned claims against attorneys by non-client third party payers.

As an initial matter, the Attorney notes that Sentry has not sought relief under a theory of equitable subrogation, and the question of whether an insurer can directly sue an attorney under a theory of equitable subrogation is not properly before this Court. Kuznik v. Bees Ferry Associates, 342 S.C. 579, 538 S.E.2d 15 (S.C. App. 2000) (where equitable subrogation is not pleaded it is not properly before the Court).

Ignoring this deficiency, *arguendo*, a direct action for legal malpractice by an insurer under an equitable subrogation theory invokes the same policy arguments that support prohibition of legal malpractice actions by a third party payer as an intended beneficiary or assignee.

Across the country, other jurisdictions recognize that allowing an insurer to bring an equitable subrogation action premised on professional negligence against an attorney is, in practice, no different than proceeding under an assignment and should be prohibited for the public policy concerns applicable to assignments. *See* Querrey & Harrow, LTD., 861 N.E.2d 719, 723-724 ("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."), *opinion adopted*, 885 N.E.2d 1235 (Ind. 2008); *see also*, State Farm Fire and Casualty Co. v. Weiss, 194 F.3d 1063, 1069 (Colo. Ct. App. 2008); Stewart Title Guaranty Comp. v. Sterling Savings Bank, 178 Wash.2d 561, 311 P.3d 1 (Wash. 2013); Fireman's Fund Insurance Company v. McDonald, Hecht & Solberg, 30 Cal.App.4th 1373, 30 Cal. Rptr.2d 424 (Cal. Ct. App. 1994); Bank IV Wichita, N.A. v. Arn, Mullins, Unruh, Kuhn & Wilson, 250 Kan. 490, 827 P.2d 758 (Kan.

1992)(creditor cannot sue debtor's attorney for malpractice via equitable subrogation theory for same policy reasons prohibiting assignment"). In other words, equitable subrogation is simply an involuntary assignment, and an assignment that violates public policy if done voluntarily should not be upheld when done involuntarily.

Highlighting the inherent and concurrent conflict that an attorney faces when a third party payer can sue the lawyer for malpractice, the State Farm court noted that "equitable subrogation creates a conflict of interest between the attorney and client. If the subrogation is allowed, an attorney contemplating a settlement agreement for a client, knowing that the client will be reimbursed by an insurer, must also consider that the insurer, unhappy with the settlement or the manner in which the matter was handled, may sue the attorney for professional negligence." State Farm Fire and Casualty Co., 194 P.3d at 1068.

Furthermore, the conflict of interest is not limited only to impediments to an attorney's independent exercise of their professional judgment. Since under an equitable subrogation theory the insurer would be entitled to directly sue the insured's attorney for malpractice, the duty of confidentiality that exists in every attorney-client relationship would also be directly under attack.

In sum and substance, by advocating for direct malpractice claims by non-clients, whether as a third party beneficiary or under an equitable subrogation theory, Sentry takes the position that a third party payer asserting a claim for legal malpractice should be able to unilaterally waive the client's attorney-client privilege—regardless of whether or not the client consents. *See* State Farm Fire and Casualty Co., 194 P.3d at 1068 ("an attorney faced with an equitable subrogation claim based on his or her alleged professional negligence may face the necessity of revealing client confidences to provide an adequate defense, which would undermine a fundamental principle in

the attorney-client relationship."). This Court should not allow such a clear detriment to the attorney-client relationship.

(1) Jurisdictions allowing equitable subrogation of legal malpractice claims rely on misguided considerations.

Although all jurisdictions acknowledge that the policy issues compelling prohibition of the assignment of legal malpractice claims also impact the availability of legal malpractice claims brought under an equitable subrogation theory, a limited number of jurisdictions do allow an insurer to bring a direct malpractice action against a defense attorney under the equitable subrogation theory. Those jurisdictions "have acknowledged the potential for interference with the attorney-client relationship, but have held that it is trumped by other public policy considerations, primarily that of requiring the malpracticing attorney to bear the cost of his malpractice." Querrey & Harrow, LTD., 861 N.E.2d at 723, (*citing* National Union Fire Insurance Co. v. Dowd & Dowd, P.C., 2 F.Supp.2d 1013 (N.D.Ill. 1998), *see also,* Atlanta Int'l Ins. Co. v. Bell, 438 Mich. 512, 521-522, 475 N.W.2d 294, 303-304 (1991).

Echoing the jurisdictions recognizing direct malpractice suits through equitable subrogation, Sentry suggests that a third party payer should have standing to directly sue an attorney for malpractice, because if it does not, a malpracticing attorney would be wrongfully insulated from liability.

However, as the Indiana Court of Appeals recognized in its opinion adopted by the Indiana Supreme Court, the assumption that a malpracticing attorney would be insulated from liability if an insurer cannot directly sue the attorney is misguided. The Indiana Court of Appeals reasoned:

> [W]e do not agree with those jurisdictions that hold the possibility of the attorney garnering a windfall by not having to defend against his or her malpractice outweighs the sanctity of the attorney-client relationship. Although the insured may not be as vigilant...it still

> possesses the right to pursue a malpractice claim. Thus, the attorney is not getting a free ride.

Querrey & Harrow, Ltd., 861 N.E.2d at 724, opinion adopted, 885 N.E.2d 1235.

Contrary to Sentry's contention, prohibiting direct lawsuits by a third party payer for legal malpractice does not lead to a free ride for the attorney who committed malpractice. Indeed, the client always maintains a right to pursue a malpractice claim against his attorney.

Moreover, the absence of common law duties running from an attorney to a third party payer does not leave the third party payer without avenues to protect their financial interests. For instance, a third party payer could enter into a contractual indemnity agreement with the attorney.

Alternatively, an insurer can protect itself by asserting a lien on the proceeds of a legal malpractice lawsuit that is ultimately brought by its insured. Just as a health insurer who is obligated to pay for corrective treatment following a doctor's malpractice does not have a direct right of action to sue the doctor for medical malpractice, it does have a contractual lien against the proceeds of a medical malpractice action initiated by the insured. Of course, a health insurer cannot force an insured to pursue a medical malpractice action; however, in the event the insured voluntarily pursues its right to sue for medical malpractice, the health insurer has a right to relief from the proceeds.

Accordingly, the absence of a direct cause of action for legal malpractice does not leave a liability insurer without remedies if defense counsel for their insured commits malpractice. Whether by assignment or equitable subrogation, the protection of the personal nature of the attorney-client relationship and the sanctity of the undivided duties of fidelity and good faith owed by an attorney to his or her client must take priority over the economic interests of third party payers. These public policy concerns compel the prohibition of legal malpractice claims by non-client third party payers against attorneys under both voluntary and involuntary assignments.

Accordingly, this Court should join the majority of jurisdictions and hold legal malpractice claims are not transferrable via assignment or equitable subrogation.

CONCLUSION

For the reasons set forth herein, the Court should answer both certified questions in the negative.

Respectfully Submitted,

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In the Supreme Court

CERTIFIED QUESTIONS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

J. Michelle Childs, United States District Judge

Appellate Case No. 2016-001351

Sentry Select Insurance Company, Plaintiff,

v.

Maybank Law Firm, LLC and
Roy P. Maybank

Defendants.

CERTIFICATE OF COMPLIANCE

Counsel for the Defendants hereby certifies that Defendants' Brief on Certified Questions complies with Rule 211(b).

November 21, 2016

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PROOF OF SERVICE

The undersigned hereby certifies that I served a copy of the enclosed *Brief of Defendants* upon Plaintiff by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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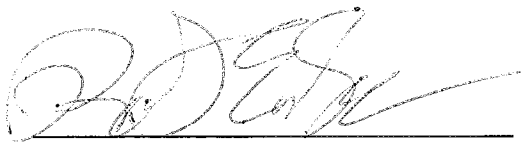

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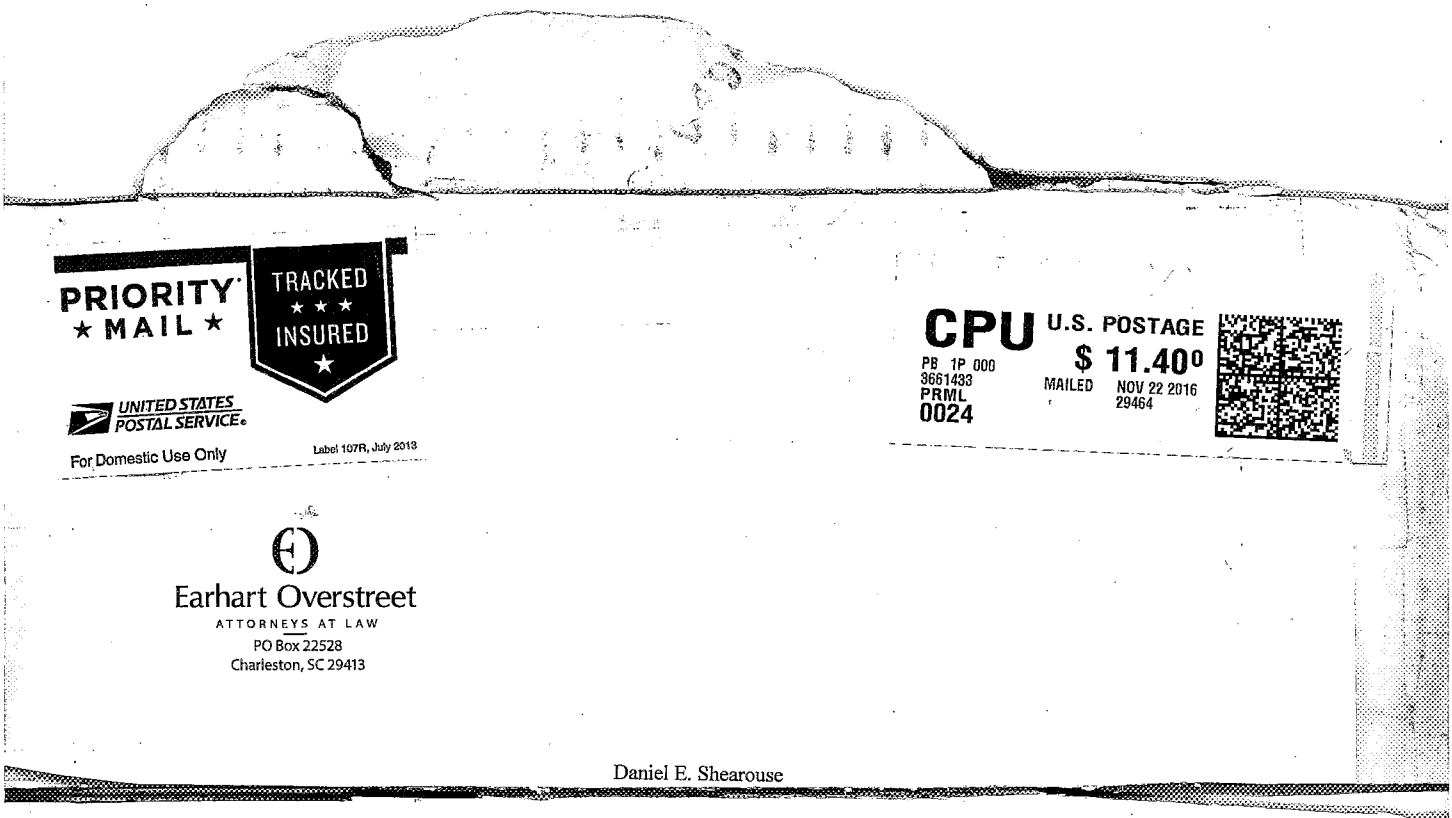

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