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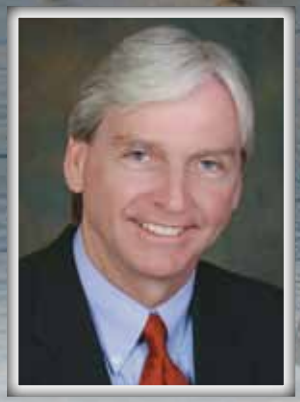

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FROM DEFENDER TO DEFENDANT: EXCESS INSURERS TARGETING PRIMARY INSURERS' DEFENSE COUNSEL FOR PROFESSIONAL MALPRACTICE

By: Christina M. Adcock and Neal Townsend

For the insurance defense lawyer, the fairytale begins by undertaking representation of a client with multiple policies of insurance, a clear primary policy and at least one excess or umbrella policy. The happy ending should be guaranteed for the client because there is sufficient insurance coverage to satisfy any settlement or verdict, the primary and excess carriers will obviously cooperate for the benefit of the insured, defense counsel will mount a competent and cost effective defense and, regardless of the final result, the outcome will serve the equities, with everyone getting the respective benefits of their bargains. But what happens when the fairytale unravels into a horror story, with defense counsel becoming the unwitting villain in a contentious mix of miscommunication, errors in judgment, Oscar-worthy performances seeking to shift blame and responsibility, with all of the once one happily aligned co-participants looking to save reputations, jobs, and, of course, money?

A recent case, *Great American E&S Insurance Company v. Quintairos, Prieto, Wood & Boyer, P.A.* presented a matter of first impression in Mississippi: whether an excess insurer can pursue legal malpractice claims against the insured's attorney (retained by a primary carrier) through equitable subrogation.[1] This issue is currently unresolved in Alabama. The Alabama Supreme Court has found excess carriers have no right to equitable subrogation recovery from primary carriers for alleged breaches of duties of good faith in deciding whether and/or when to settle and for breach of the duty to keep an excess carrier informed of settlement negotiations and case developments. *Federal Ins. Co. v. Travelers Cas. and Sur. Co.,* 843 So. 2d 140 (2002). The Alabama Supreme Court has not been presented with a case targeting the primary carrier's chosen counsel for alleged malpractice resulting in an excess verdict or settlement amount.

Using Mississippi's *Quintairos* case as a point of reference, this article analyzes the rationale of different jurisdictions in allowing excess carriers to utilize equitable subrogation as a vehicle to pursue a professional malpractice claim, beginning with a discussion of the pivotal question as to whether those jurisdictions permit the assignment of legal malpractice claims to third parties. It also analyzes the practical repercussions of a decision to permit equitable subrogation of legal malpractice claims and discusses certain implications and questions the remedy has on defense practitioners going forward.

The *Quintairos* Case

Quintairos arises from the *Chase* Lawsuit,[2] wherein a nursing home allegedly provided negligent and inadequate care to Huldah Chase.[3] The defendant nursing home had two insurance policies in place: a primary policy through Royal Indemnity Company ("Royal") with limits of $1,000,000 and an excess policy through Great American E&S Insurance Services ("Great American") with limits of $8,000,000 over-and-above the primary policy's limits.[4]

Although not primarily obligated to defend the case, Great American requested reports providing evaluations of the claims from the nursing home's defense counsel chosen by Royal.[5] The reports opined the *Chase* Lawsuit's settlement value was between $150,000 and $400,000 and advised counsel would need to designate experts.[6] At the time of these reports, a physician expert had been contacted but not retained.[7]

In November 2003, however, Royal reassigned the *Chase* Lawsuit to Quintairos, Prieto, Wood & Boyer, P.A. ("the Quintairos firm").[8] While the Plaintiff timely identified two experts by the December 15, 2003 deadline, the Quintairos firm did not timely designate experts and had no attorneys licensed in the State of Mississippi who could represent the nursing home at trial.[9] Nevertheless, the Quintairos firm, in January 2004, provided a report evaluating the *Chase* Lawsuit at $250,000 as to compensatory damages "based on known facts" with a "trial value" of $500,000.[10] In February 2004, the Quintairos firm belatedly attempted to identify an expert witness, but the plaintiff successfully had the expert struck.[11] Not surprisingly, the Quintairos firm increased its valuation of the case from $500,000 to "between $3,000,000 and $4,000,000."[12] This was Great

American's first notice the *Chase* Lawsuit may implicate its excess coverage.[13]

Great American consequently retained counsel to protect its interests and the interests of the nursing home.[14] Royal tendered its policy limits and turned the case over to Great American, which eventually paid an undisclosed sum of money to settle the *Chase* Lawsuit.[15] Great American then sued Royal and the Quintairos firm asserting claims for equitable subrogation, legal malpractice, and several negligence-based claims.[16]

After the Quintairos firm found success at the trial court level, the Mississippi Court of Appeals reversed, finding the firm provided legal services to Great American sufficient to entitle Great American to maintain an action for legal malpractice. The Quintairos firm sought certiorari review, and the Mississippi Supreme Court took a different view.[17] Namely, a plurality of the court rejected Great American's direct legal malpractice claim, opining no attorney client relationship existed between the firm and Great American. This critical, fiduciary relationship is grounded in expertise, experience, respect and the absolute knowledge that client confidences will be protected. Clients rightly have an expectation of loyalty from their attorneys, and attorneys have a heightened duty to their clients in the performance of services.

The *Quintairos* Court indicates the services the Quintairos firm rendered were not sufficient to create such a relationship and the insured gained no real benefit from counsel sharing information with excess insurers. Nevertheless, while finding Great American lacked standing to bring the malpractice claim on its own; the Court nonetheless allowed the equitable subrogation of the claim thereby necessarily permitting excess insurers to stand in insureds' shoes in the attorney client relationship. Thus, despite an excess insurer's inability to bring them directly, legal malpractice claims could proceed as if the insured were the Plaintiff. Thus, an excess insurer may have full access to once-forbidden, privileged information and ultimately be in almost the identical position it would have occupied had the direct claim for legal malpractice been allowed.

I. Assignability Generally

Mississippi, although there is little discussion to clarify the rationale, has no prohibition against aggrieved clients assigning legal malpractice claims to third parties, thus opening the door to equitable subrogation of those claims. However, this is a minority position and a position likely not favored in Alabama. While varying views exist with regard to permitting excess insurers to use equitable subrogation to assert legal malpractice claims against an insured's defense counsel,[18] the majority view is excess insurers should not be permitted to assert legal malpractice claims through equitable subrogation because legal malpractice claims are not assignable.[19]

Although it works to distinguish the line of cases precluding equitable subrogation based on the non-assignability of legal malpractice claims, reliance on assignability, without more, may prove confusing in future litigation. It does not appear this concept is uniformly accepted in the minority of jurisdictions allowing equitable subrogation, as most of those jurisdictions do not permit blanket assignment of legal malpractice claims.[20] Some proffered rationales for allowing equitable subrogation despite non-assignability include the alleviation of public policy concerns with subrogation because insurers are simply enforcing duties already owed to insureds, and unforeseeable, unrelated strangers cannot capitalize on such claims in the marketplace.[21]

In an excess situation, however, the attorney for the insured is hired by the primary insurer paying the defense costs and to whom the attorney has a duty with regard to reporting and evaluation governed by the insurance contract with the insured and the insurer's guidelines. Given there is no direct relationship between the excess insurer and the attorney, complying with the excess policy provisions could create an attorney client relationship and/or constitute an additional benefit to the insured outside the terms of the primary policy. If the case reports and evaluations contain confidential client information and provide a benefit to the insured, then an excess insurer may find itself in a better position to establish an attorney client relationship than Great American did. Yet, by adopting an opinion that holds legal malpractice claims are assignable to justify subrogation of such claims, courts may, in the future, see litigants assign malpractice claims to unknown or unforeseen third parties without the need to assert claims through equitable subrogation.[22] Thus, in order to properly discuss claims for legal malpractice against the insured's attorney through equitable subrogation, assignability is, at least, a feasible starting point.

A. States that Prohibit the Assignment of Legal Malpractice Claims

In determining whether to permit or prohibit the assignment of legal malpractice claims, most jurisdictions

have held legal malpractice claims are nonassignable.[23] Louisiana, Florida, Colorado and California are examples. States opposing assignment support their positions with a variety of policy arguments. The primary argument against assignment of legal malpractice claims is that such an action would interfere with the confidential attorney-client relationship, the ongoing fiduciary relationship, and would run counter to public policy. For example, in *Goodley v. Wank & Wank, Inc.*, 133 Cal Rptr. 83 (Cal. Ct. App. 1976) the California Court of Appeals unequivocally rejected the assignment of legal malpractice claims.[24]

The California Court's primary policy argument was that the attorney-client relationship should be free from interference by uninterested third parties. Moreover, the Court, in espousing its traditional stance stated, "[I]t is 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 that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment."[25] Similar states agree with this public policy consideration.[26]

Furthermore, in asserting other policy considerations, the Court in *Goodley* was concerned assignment would open the door to a commercial market for malpractice claims. Particularly, the court opined "the assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights."[27] Moreover, the court stated and other states have agreed, "[T]he almost certain end result of merchandizing such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers."[28] While there are a variety of arguments opposing the assignment of legal malpractice claims, these are the most frequently cited and are given the greatest weight by courts.

B. States that Permit the Assignment of Legal Malpractice Claims

While a number of jurisdictions have held that legal malpractice claims are nonassignable, a minority of jurisdictions (Pennsylvania, Maine and New York for example) have found a case-by-case determination is more appropriate when meritorious public-policy concerns are implicated, and within those jurisdictions, some authorities note the economic, rather than the personal, nature of the harm alleged. For example, in *Thurston v. Continental Cas. Co.*, 567 A.2d 922 (Me. 1989) Maine's Supreme Court analyzed the nature of the claim and held that a legal malpractice claim is not for personal injury, but for economic harm.[29] In rejecting an assertion championing the confidentiality of the attorney-client relationship, the court stated "the argument that legal services are personal and involve confidential attorney-client relationships does not justify preventing a client from realizing the value of its malpractice claim in what may be the most efficient way possible, namely, its assignment to someone else with a clear interest in the claim who also has the time, energy and resources to bring the suit."[30] Thus, the Court was persuaded that the cost required to maintain a malpractice action should be incurred by the party most able to afford it.[31] Similar courts have agreed with this rationale.[32] Nevertheless, these courts allow the assignment of legal malpractice claims as a means of holding attorneys accountable for their malpractice.

Other courts have evaded the assignment issue by using an equitable subrogation analysis. These courts provide strong legal arguments as well as compelling policy considerations closely akin to discussions surrounding the assignment of legal malpractice claims.

II. Equitable Subrogation

Most commonly, equitable subrogation arises in the insurance context when an insurance carrier brings a malpractice action on behalf of the insured. In Alabama, the doctrine of equitable subrogation has long been recognized in the context of the insured-insurer relationship:

Under equitable principles of subrogation the insurer of the employer who has been compelled to pay the judgment against the employer may recover against the negligent employee or the employee's insurer.[33]

Under this rule, the doctrine of equitable subrogation provides that an insurer who pays a loss is thereby placed by operation of law in the position of its insured so that the insurer may recover from a third-party tortfeasor whose negligence or wrongful act caused the loss.[34] However,

if the loss is caused by the attorney(s) representing an insured with whom an excess carrier has no attorney client relationship, the doctrine is not so clearly applicable. Over the past decade, many jurisdictions have addressed the issue and come to differing conclusions.

A. States Prohibiting Equitable Subrogation

The majority of jurisdictions agree with the *Quintairos* dissent, including Arizona, Arkansas, California, Colorado, Connecticut, Florida, Louisiana and Missouri. Several states explain the prohibition against equitable subrogation of legal malpractice claims in terms of assignability. Specifically, those jurisdictions are cognizant of the possible commercialization of legal malpractice claims, resulting in increased burdens on lawyers, which, in turn, could have a negative impact on the public's access to legal services.[35] California rigidly aligns assignability and subrogation.[36] In addition, Colorado, while agreeing in principle, relies more heavily on the sanctity of the attorney-client privilege and the potential for conflicts of interest and unlimited liability to unknown third parties in the equitable subrogation of legal malpractice claims.[37]

The *Quintairos* dissents argued excess carriers could/should not be permitted to utilize equitable subrogation because it would impose additional burdens on counsel to excess carriers, it does not follow precedent protecting the attorney client relationship, it would result in increased malpractice suits and those carriers should be/are on notice of the amount of damages claimed in underlying lawsuits and thus are negligent in failing to protect their interests by hiring their own counsel.[38] With that said, even in the jurisdictions where equitable subrogation is allowed to pursue legal malpractice claims, it still remains vital for the insurer to meet the statutory or common law requirement for any equitable subrogation in order to recover for a malpractice claim.

B. States Permitting Equitable Subrogation

Some states, including Illinois, Massachusetts, Michigan, New York, Texas and Washington have permitted the equitable subrogation of legal malpractice claims. For example, a federal Court in Illinois reasoned subrogation claims cannot become commodities, as those claims are restricted to those entities which had a duty to, and which did, pay for the loss of another.[39] The Court further maintained equitable subrogation claims would not result in an unjustified increase in legal malpractice lawsuits, as insureds would have little incentive to pursue legal malpractice claims against counsel because the underlying claim was ultimately paid by insurance. However, insurers are heavily incentivized to recoup losses resulting in an equitable increase in legal malpractice claims, while the malpracticing attorneys would be prohibited from essentially keeping unearned fees at the expense of insurers.[40]

Michigan, in relying on public policy, opined the best interests of both the insured and its counsel are aligned by "competent representation."[41] Thus, the threat of an equitable subrogation claim from an insurer would not jeopardize an attorney's reasoning skills when choices between the best interests of the insured compete with the best interests of the insurer.[42]

In addition, the Supreme Court of Texas noted that refusing to provide insurers with an equitable subrogation claim would allow a negligent attorney to escape the consequences of his/her malpractice, forcing insurers to cover the losses with no recourse.

C. Practical Implications

At the end of the day, the implications of *Quintairos* and its predecessors for defense practitioners are many. First, defense counsel for insureds retained by primary insurers should now consider, in addition to serving both the insured and primary insurer's interests, taking steps to obtain waivers and disclaimers from excess insurers. In addition, defense counsel for insureds should consider changing or implementing reporting strategies which clearly explain the relationship between the insured, its counsel, the primary carrier and the excess carrier and the excess carrier's right to employ separate counsel at any point. Additionally, practitioners may propose a shift in the direct communication with excess insurers from counsel to the insured.[43] Additionally, permitting equitable subrogation commands insurance defense counsel to remain aware their actions will not only be measured by the insured and the primary insurer, but now by any excess insurer whose policy may be implicated. However, none of these suggestions are without problem, and counsel has to endeavor to maintain the sanctity of the attorney client relationship with the insured at all costs.

Moreover, counsel for excess insurers face obstacles as well. If an excess carrier is considered "on notice" of the value of a claim by an initial complaint or filing, then how does counsel advise the excess carrier with regard to obtaining separate counsel when the contract or policy contains no such duty? Also, counsel for excess insurers

can assert no greater right in the claims than the insured possesses and must understand the excess insurer simply "stands in the shoes" of the insured. [44] The excess insurer is susceptible to the very same defenses that may have been asserted against the insured such that counsel must try to factor those likely unknown factors into their strategy.[45]

Counsel for the excess insurer should know it is limited to asserting only those claims the insured may have been able to assert against its attorney.[46] Under *Quintairos*, the available recovery for excess insurers, at most, is the amount of money the insurer was required to pay on behalf of the insured in whose shoes the insurer stands, arguably precluding an award of pre-judgment interest or punitive damages thus necessitating a cost-benefits analysis.[47] However, excess carriers are not traditionally in control of litigation until the primary limits are exhausted. Thus, if an excess counsel monitors litigation and disagrees with primary counsel as to the defense, does the excess carrier have any additional remedies? Excess counsel should be cognizant of the fact equitable subrogation is not available where the excess insurer conducted itself wrongfully and where allowing the excess insurer to assert claims against the insured's defense counsel would result in injustice.[48] Lastly, limiting the avenue for claims to equitable subrogation prevents excess insurers from asserting their remedy until payment is actually made and only where that payment is not considered voluntary.[49]

Conclusion

Currently, based on the Alabama Supreme Court's stance on subrogation generally and its silence as to the assignment of legal malpractice claims, it does not appear likely the Alabama Supreme Court would expand the doctrine of equitable subrogation to permit excess insurers to pursue the primary carrier's chosen counsel for malpractice as a way to recoup payments the excess carrier would not have otherwise had to pay absent counsel error. However, depending on the facts, the Court could determine it would be inequitable to leave the excess carrier without remedy. The *Quintairos* Court, along with those concurring in the result of its decision, take meandering paths to reach similar results while affording a level of certainty with respect to what issues primary and excess defense practitioners can expect to face and from whom.

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[1] *Great American E&S Insurance Company v. Quintairos, Prieto, Wood & Boyer, P.A.*, No. 2009-CA-01063 COA, 2012 WL 266858, at *11 (Miss. Ct. App. 2012) *rev'd on other grounds* No. 2009-CT-01063 SCT, 2012 WL 4945958 (Miss. 2012).

[2] The lawsuit, filed in the Circuit Court of Warren County, was styled *The Estate of Huldah Chase, et. al. v. International HealthcareProper-*

ties, et al., No. 02–0133CT ("Chase lawsuit").

[3] *Quintairos II*, 2012 WL 4945958, at *1.

[4] *Id*. at *1.

[5] *Id*. at *1.

[6] *Id*. at *1.

[7] *Id*. at *1.

[8] *Id*. at *1.

[9] *Quintairos II*, 2012 WL 4945958, at *2.

[10] *Id*. at *1.

[11] *Id*. at *2.

[12] *Id*. at *2.

[13] *Id*. at *2.

[14] *Id*. at *2.

[15] *Quintairos II*, 2012 WL 4945958, at *2.

[16] *Quintairos I*, 2012 WL 266858, at *3 *rev'd on other grounds* No. 2009-CT-01063 SCT, 2012 WL 4945958 (Miss. October 18, 2012). The negligence-based claims were claims for negligence, gross negligence, negligent misrepresentation, and negligent supervision.

[17] *Quintairos II*, 2012 WL 4945958, at *2.

[18] *Quintairos I*, 2012 WL 266858, at *14-15 (Carlton, J., dissenting) *rev'd on other grounds* No. 2009-CT-01063 SCT, 2012 WL 4945958 (Miss. October 18, 2012) (citing *State Farm Fire and Casualty Company v. Weiss*, 194 P.3d 1063, 1065 (Colo. Ct. App. 2008)).

[19] *Capitol Indem. Corp. v. Fleming, 58 P.2d 965, 969* (Ariz. Ct. App. 2002); *Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg*, 30 Cal. Rptr. 2d 424, 426-30 (Cal. Ct. App. 1994); *Weiss*, 194 P. 2d at 1068.

[20] *See, e.g.*, *TIG Ins. Co. v. Chicago Ins. Co.*, 00 C 2737, 2001 WL 99832 (N.D. Ill. Feb. 1, 2001) (applying Illinois law) (finding Illinois courts would allow legal malpractice claims to be asserted through subrogation despite the fact legal malpractice claims are not assignable under Illinois law because subrogation would have fundamentally different results than assignment: "Unlike assignment, subrogation would not lead to the merchandising of malpractice claims. Though a claim can be assigned to anyone willing to pay for it, subrogation rights can be exercised only by those who have fulfilled a duty . . . to pay for another's loss. . . . [S] ubrogation [would not render] legal malpractice claims . . . a commodity available to the highest bidder.").

[21] *Nat'l Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 F. Supp. 2d 1013, 1023-24 (N.D. Ill. 1998).

[22] *Accord St. Paul Fire & Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP.*, 379 F. Supp. 2d 183, 196 (D. Mass. 2005) *order confirmed sub nom. St. Paul Fire & Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP*, 408 F. Supp. 2d 59 (D. Mass. 2006) (applying Massachusetts law) (reasoning that because Massachusetts courts permit legal malpractice claims to be assigned in certain circumstances, Massachusetts courts would permit legal malpractice claims to be brought through equitable subrogation).

[23] *Essex Ins. Co. v. Tyler*, 309 F. Supp. 2d 1270 (D. Colo. 2004) (applying Colorado law); *General Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP*, 357 F. Supp. 2d 951 (E.D. Va. 2005) (applying Virginia law); *Botma v. Huser*, 39 P.3d 538 (Ct. App. Div. 1 2002); *Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone*, 93 Cal. Rptr. 2d 534 (2d Dist. 2000), as modified, (Mar. 17, 2000); *Law Office of David J. Stern, P.A. v. Security Nat. Servicing Corp*., 969 So.2d 962 (Fla. 2007); *Brandon Apparel Group v. Kirkland and Ellis*, 887 N.E.2d 748 (App. Ct. 1st Dist. 2008); *State Farm Mut. Auto. Ins. Co. v. Estep,* 873 N.E.2d 1021 (Ind. 2007); *Professional Fiduciary, Inc. v. Silverman*, 713 N.W.2d 67 (Minn. Ct. App. 2006), review denied, (July 19, 2006); *Freeman v. Basso*, 128 S.W.3d 138 (Mo. Ct. App. S.D. 2004); *Delaware CWC Liquidation Corp. v. Martin*, 584 S.E.2d 473 (2003).

[24] *Goodley v. Wank & Wank, Inc*, 133 Cal Rptr. 83 (Cal. Ct. App. 1976).

[25] *Id.* at 397.

[26] *Kilgore Marine Services, Inc. v. Fireman's Fund Ins. Co*., 2008 WL 3557711 (W.D. La. 2008) (applying Louisiana law, the court held that the obligation of an attorney to his client is a personal, rather than heritable, obligation. Thus, a legal malpractice claim is not subject to assignment); *General Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP,* 357 F.Supp.2d 951, 958–59 (E.D.Va.2005) ("In Virginia as in most other jurisdictions, a claim for legal malpractice is not assignable"); *Essex Ins. Co. v. Tyler,* 309 F.Supp.2d 1270, 1274 (D.Colo.2004) (Colorado Court of Appeals clearly prohibits the assignment of legal malpractice claims on the policy interests of the "highly confidential and fiduciary relationship existing between attorney and client" and the compromised duty of loyalty to the attorney's client based on the anticipation of "possible legal malpractice claims" by third parties); *National Union Fire Ins. Co. v. Salter,* 717 So.2d 141, 142 (Fla.App. 5 Dist.1998) ("Florida law views legal malpractice as a personal tort which cannot be assigned because of the personal nature of the legal services which involve highly confidential relationships"); *American Employers' Insurance Co. v. Medical Protective Co.,* 419 N.W.2d 447 (1988), *appeal denied* (holding that allowing an excess insurer to pursue a legal malpractice action against the insured's attorneys would "contradict the personal nature of the attorney-client relationship, which permits a legal malpractice action to accrue only to the attorney's client"); *Roberts v. Holland & Hart*, 857 P.2d 492, 495 (Colo. App. 1993) (Colorado court held that the "assignment of legal malpractice claims involve matters of personal trust and personal service and do not lend themselves to assignability because permitting the transfer of such claims would undermine the important relationship between an attorney and client"); *Earth Science Labs., Inc. v. Adkins & Wondra, P.C.,* 523 N.W.2d 254, 257 (Neb. 1994) (quoting *Roberts v. Holland & Hart*, 857 P.2d 492, 495 (Colo. App. 1993)).

[27] *Goodley v. Wank & Wank, Inc*, 133 Cal Rptr. at 87.

[28] *Id. See also Wagener v. McDonald,* 509 N.W.2d at 191-93 (Minn. App. 1993) (quoting "commodity" concerns raised by California court in *Goodley*); *White v. Auto Club Inter-Ins. Exchange,* 984 S.W.2d 156, 160 (Mo. App. 1998) (agreeing with this concern as articulated by California court in *Goodley*).

29 *Thurston v. Continental Cas. Co.*, 567 A.2d 922, 923 (Me. 1989) citing *Hedlund Mfg. Co. v. Weiser, Stapler & Spivak,* 539 A.2d 357, 359 (1988).

[30] *Id.*

[31] *Id.*

[32] *Oppel v. Empire Mut. Ins. Co.,* 517 F. Supp. 1305, 1307 (S.D. N.Y.

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1981); *Thurston*, 567 A.2d at 923; *Hedlund Mfg. Co., Inc. v. Weiser, Stapler, & Spivak*, 539 A.2d 357, 355 (Penn. 1988).

[33]*American Southern Insurance Co. v. Dime Taxi Service, Inc.,* 151 So.2d 783, 786 (1963).

[34]Am. Jur. 2d, Insurance § 1768; C.J.S., Insurance § 1993; *See Allstate Ins. Co. v. Amerisure Ins. Companies*, 603 So.2d 961 (Ala. 1992); *American Liberty Ins. Co. v. AmSouth Bank*, 825 So.2d 786, (Ala. 2002) (holding in an equitable subrogation case, the party claiming entitlement to subrogation "steps into the shoes" of the party allegedly responsible for the obligation paid).

[35]*Capitol Indem. Corp. v. Fleming,* 58 P.2d 965, 969 (Ariz. Ct. App. 2002).

[36]*Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg*, 30 Cal. Rptr. 2d 424, 426-30 (Cal. Ct. App. 1994).

[37]*Essex Ins. Co. v. Tyler*, 309 F. Supp. 2d 1270 (D. Colo. 2004) (applying Colorado law).

[38]While intuitive and certainly reasonable in theory, this contention arguably conflicts with prior Mississippi precedent making clear ordinary negligence is not a per se bar to equitable subrogation. *First Nat. Bank of Jackson v. Huff*, 441 So. 2d 1317, 1320 (Miss. 1983). The plurality thus rejected the position that Great American's failure to retain its own counsel upon notice of the *Chase* Lawsuit bars its use of equitable subrogation.

[39]*TIG Ins. Co. v. Chicago Ins. Co.*, 2001 WL 99832 (N.D. Ill. 2001).

[40]*Id*.

[41]*Atlanta Int'l. Ins. Co. v. Bell*, 475 N.W.2d 294, 298 (Mich. 1991).

[42]*Id*.

[43]As Professor Jeffrey Jackson points out, yet another potential implication for defense counsel may arise in the context of an excess insurer's attempt to assert legal malpractice claims through equitable subrogation against *Moeller* counsel whose sole obligation is to the insured and at times may be contrary to the insurer's interests. *See* Jeffrey Jackson, Miss. Ind. Law and Prac. § 12.14 (2012).

[44]*Indiana Lumbermen's Mut. Ins. Co. v. Curtis Mathes Mfg. Co.,* 456 So. 2d 750, 754 (Miss. 1984) (citing cases).

[45]*St. Paul Prop. & Liab. Ins. Co. v. Nance*, 577 So. 2d 1238, 1240 (Miss. 1991).

[46]*See Huff*, 441 So. 2d at 1319 (noting subrogees are substituted in place of the subrogor and may assert any rights the subrogor may have against the particular alleged wrongdoer).

[47]*Employers Ins. Of Wausau v. Dunaway*, 626 F. Supp. 1144, 1146 (S.D. Miss. 1986) (citing *Oxford Production Credit Ass'n v. Bank of Oxford*, 16 So. 2d 384, 389 (Miss. 1944)) (applying Mississippi law) (reading Mississippi law as limiting subrogee's recovery to the amount of subrogee's payment). Although *Dunaway* is still good law, the district court's reading of Mississippi law was not as persuasive to the Fifth Circuit as compared to the fact that the particular policy at issue in Dunaway specifically provided the right to subrogation was limited to recovery of the amounts paid to the insured. *See Audubon Ins. Co. v. Lowery*, 9 F.3d 1547 (5th Cir. 1993). Additionally, the Seventh Circuit has disagreed with *Dunaway* to the extent it precluded the subrogee-insurer from obtaining pre-judgment interest on the money it paid in behalf of its insured. *See also Am. Nat. Fire Ins. Co. ex rel. Tabacalera Contreras Cigar Co. v. Yellow Freight Sys., Inc*., 325 F.3d 924, 938 n.9 (7th Cir. 2003) ("[T]he purpose of prejudgment interest is to compensate the injured party; and prejudgment interest is to accrue from the time of the injury. The insurance company has been deprived of the use of its money from the time that it paid the insured; it has suffered an injury because of the wrongdoing of a third party").

[48]*Huff*, 441 So. 2d at 1320 (citing *Lyon et al. v. Colonial United States Mortgage Co*., 91 So. 708, 708 (Miss. 1922)); see also *Huff*, 441 So. 2d at 1319 (noting that whether these conditions are present will very likely will be a factual determination reserved for each particular case).

[49]*See Great Am. Ins. Co. v. Smith*, 172 So. 2d 558, 559 (Miss. 1965).

Christina Adcock is a partner in the Mobile office of **Adams and Reese, LLP** in the firm's Litigation Practice Group. Licensed in Alabama and Mississippi, Christina's practice focuses on general, professional and products liability, including pharmaceutical and medical device litigation and direct action insurance suits and mass torts. She has successfully defended insurers, manufacturers and distributers in complex litigation, some of which involved matters of first impression, in both Alabama and Mississippi. Christina is a member of both the Alabama and Mississippi State Bar Associations, ADLA, MDLA, serves on the Alabama Bar Association's Task Force for Wills for Heroes, provides services to the South Alabama Volunteer Lawyers Program, serves on the Adams and Reese, LLP Diversity Committee, is a graduate of the 2013 class of Leadership Baldwin County and is a member of all Federal District Courts in both Alabama and Mississippi, in addition to participating in a host of other business and charitable endeavors.

Neal Townsend joined **Adams and Reese, LLP** in 2013 as an Associate in the Litigation Practice Group in the firm's Mobile office. Neal has handled hundreds of State and Federal cases, including litigation that covers a broad range of legal areas such as personal injury, wrongful death, workers compensation, medical malpractice, premise liability, and employment law. Neal earned his J.D. in 2012 from Cumberland School of Law where he was Scholar of Merit recipient, Dean's List recipient, a member of the American Association for Justice (AAJ) National Trial Team and the 2011-2012 top-ranked Cumberland School of Law National Trial Team.