Legal Malpractice

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An Excess Insurer’s Right to Maintain a Malpractice Action Against the Insured’s Attorney — An Undecided Issue in Illinois

I. Introduction

Increasingly, clients are turning on their attorneys to pursue claims of legal malpractice. The legal malpractice claims are not limited to small, individual clients. Claims are being pursued by larger, sophisticated entities, including corporations and insurance companies for claimed malpractice in high stakes litigation. Moreover, many courts are taking broad views of liability.

Against this climate, the question remains unsettled whether excess insurers, who often have enormous dollars at risk, have valid claims against attorneys retained by the primary insurer to defend the insured. In the event the retained counsel commits malpractice, the insured’s right to file a claim is beyond dispute. The insured is a party to the attorney-client relationship. The rights of the insurers are not so clear cut.

The “duty” owed to the malpractice plaintiff arises in three broad circumstances. First is the duty based upon a direct duty owed to the plaintiff arising from the contractual relationship. In some jurisdictions, the primary insurer is also a party to this relationship and, theoretically, a proper party plaintiff. Second, certain plaintiffs are the intended beneficiaries of the attorney-client relationship and, therefore, are entitled to sue. Finally, certain plaintiffs have the right to sue based upon the doctrine of equitable subrogation. The latter theory is the lone basis on which excess insurers have been able to pursue malpractice claims against defense counsel.

The excess insurer has no contractual nexus with the defense counsel. Unlike the insured and primary insurer, it is neither the attorney’s client, nor does it control the litigation. Because the excess insurer has no direct contractual relationship with the selected counsel, the excess insurer is in a quandary if it bears the financial consequences of the malpractice committed by an attorney it did not select. Thus, while the outcome of the litigation may have a substantial financial impact on the excess insurer, in most jurisdictions the excess insurer cannot sue on a direct-duty malpractice or negligence claim because it is not the attorney’s client and it is not the intended beneficiary of the attorney’s efforts. Only a few jurisdictions now permit the excess insurer to bring a malpractice action against the attorney as the insured’s equitable subrogee.

Illinois courts have not decided whether an excess insurer may sue the attorney retained by the primary insurer. The right of recovery in an attorney malpractice action in Illinois primarily focuses on the attorney-client relationship. While the equitable subrogation theory has been available to excess insurers in certain “bad faith” contexts, to date, it is uncertain how Illinois courts will rule on an equitable subrogation case by the excess insurer against the retained attorney for malpractice.

This article surveys cases from the few jurisdictions that have addressed the issue of whether the excess insurer may pursue an equitable subrogation claim against the insured’s attorney. This article further discusses Illinois law and the benefits and drawbacks of extending the doctrine of equitable subrogation to permit the excess insurer to sue the attorney retained by the primary insurer.

II. Cases That Have Addressed the Excess Insurer’s Right to Maintain a Malpractice Action Against the Insured’s Attorney
Few jurisdictions have addressed the issue of whether an excess insurer may maintain a cause of action against the attorney retained by the primary insurer to defend a suit. To date, no jurisdiction has permitted the excess insurer to sue the attorney based upon a duty of care owed the excess insurer on a contract theory. Instead, courts that have addressed the issue of whether an excess insurer may sue the attorney retained by the primary insurer have focused on the doctrine of equitable subrogation as the theory of recovery.

Equitable subrogation has been defined by courts and commentators as a “legal fiction” that permits one party to stand in the shoes of another.\(^1\) Historically, equitable subrogation is a method whereby one who has involuntarily paid a debt or claim of another succeeds to the rights of another with respect to the claim or debt.\(^2\) Unlike contractual subrogation, equitable subrogation is a creation of law that is designed to achieve an equitable result.\(^3\) “[S]ubro-gation often is appropriately viewed as an important technique for serving the ends of justice by placing the economic responsibility for injuries on the party whose fault caused the loss ...”\(^4\) Of those courts that have addressed this issue under the doctrine of equitable subrogation, the courts are split on whether an excess insurer is permitted to maintain a malpractice action against the retained attorney employing this theory.

**A. Courts That Have Permitted an Excess Insurer to Maintain an Equitable Subrogation Claim Against the Insured’s Attorney**

One of the earliest cases to address the issue of an excess insurer’s right to equitable subrogation was *Valentine v. Liberty Mutual Ins. Co.*, 620 F.2d 583 (6th Cir. 1980) (applying Michigan law). Recognizing that under Michigan law the attorney-client relationship does not include the insurer, the court reached out to the doctrine of equitable subrogation. Specifically, in *Valentine*, an excess insurer brought an action against the primary insurer’s retained attorney to recover money paid in excess of the primary policy. The Michigan district court allowed the excess insurer to sue the attorney as the equitable subrogee of the insured. After a bench trial on the merits, however, the district court held in favor of the attorney. The district court, applying Michigan law, held that the attorney had not been negligent. On appeal, the Sixth Circuit Court of Appeals upheld the district court’s ruling.

In its decision, however, the Sixth Circuit implicitly recognized the excess insurer’s right of equitable subrogation against the attorney. While the court did not expressly grant the excess insurer the right to sue the retained attorney, it did not deny it either. Instead, the Sixth Circuit applied a “clearly erroneous” standard to the district court’s findings of facts and upheld the district court’s determination that the attorney had not been negligent. At least one commentator has inferred from this holding that, had the attorney been negligent, the court would have upheld the excess insurer’s cause of action.\(^5\)

Eleven years later, the Michigan Supreme Court issued an opinion which unequivocally established the doctrine of equitable subrogation as a viable theory of recovery for primary insurers. In *Atlanta International Ins. Co. v. Bell*, 438 Mich. 512, 475 N.E.2d 294 (Mich. 1991), the Michigan Supreme Court held that a primary insurer could sue the attorney it retained to defend the insured for malpractice under the doctrine of equitable subrogation. The Michigan court reached this decision notwithstanding the fact that Michigan law does not recognize an attorney-client relationship between the insurer and the retained attorney. Instead, motivating the court to apply equitable subrogation was its reluctance to leave insurers without a remedy:
To completely absolve a negligent defense counsel from malpractice liability would not rationally advance the attorney-client relationship. Moreover, defense counsel’s immunity from suit by the insurer would place the loss for an attorney’s misconduct on the insurer. The only winner produced by an analysis precluding liability would be the malpracticing attorney. Equity cries out for application under such circumstances.6

The court reasoned that equitable subrogation “best vindicates the attorney-client relationship and the interests of the insured, properly imposing the social costs of malpractice where they belong.”7 The same logic may be applied in the case of excess insurers, although a Michigan court has yet to extend Bell that far and at least one lower Michigan court, prior to Bell, has held that an excess insurer cannot sue the insured’s attorney.8

In Great Atlantic Ins. Co. v. Weinstein, 125 A.D.2d 214, 509 N.Y.2d 325 (N.Y. App.Div. 1986), a New York court recognized the right of an excess insurer to seek equitable subrogation from an attorney. The excess insurer brought a professional negligence action based on equitable subrogation against the two attorneys retained to represent its insured in the underlying action. The trial court dismissed the complaint for failure to state a cause of action. On appeal, the New York Appellate Division reversed the trial court’s dismissal order. The appellate court held that the complaint was legally sufficient to plead a cause of action for equitable subrogation. Although the court’s opinion did not expound on the doctrine of equitable subrogation, except to state that the pleadings raised serious issues involving ethical considerations, the decision implicitly accepted the excess insurer’s argument that it was subrogated to the insured’s right of action.

Most recently, a New York district court, applying the reasoning set forth in Great Atlantic v. Weinstein as well as the Michigan Supreme Court’s decision in Atlanta International Ins. Co. v. Bell, expressly held that an excess insurer could sue the insured’s attorney for malpractice. In Allstate Ins. Co. v. American Trust Ins. Co., ___ F.Supp. ___, 1997 WL 598049 (E.D.N.Y. 1997), the district court recognized that the few other jurisdictions to consider the question were divided on whether to permit an action by an excess insurer against the insured’s defense counsel. The court determined, however, that the New York Court of Appeals, if given the opportunity, would permit excess insurers to sue the insured’s attorney for malpractice:

By establishing direct fiduciary duties between excess insurers and primary insurers, New York has evidenced the strength of its concern that the parties responsible for defense of an underlying claim be held accountable to excess insurers for wrongdoing. This leads further support to the likelihood that the New York Court of Appeals would recognize the malpractice claim at issue here.

In Texas, where the attorney owes a dual duty to the insured and the insurer, the courts have twice held that an excess insurer can sue an attorney retained by the primary insurer for malpractice as the equitable subrogee of the insured. First, in Stonewall Surplus Lines Ins. Co. v. Drabek, 835 S.W.2d 708, 711 (TX.C.A. Corpus Christi 1992), the Texas court of appeals held that an excess insurer is “subrogated to the insureds’ claim for legal malpractice and negligence” and can correspondingly sue the attorney retained by the primary insurer for malpractice. In that case, the excess insurer brought an equitable subrogation suit against the insured’s attorney because it alleged the actions of the primary insurer and its attorneys caused the excess insurer to pay more than was necessary to satisfy a judgment. The trial court had entered a sanction order against the insureds because they abused the discovery process by refusing to submit to depositions and failing to reply to discovery requests, struck their pleadings and rendered a partial default judgment against them. After the sanction was entered, the case settled for $1.8 million, of which the excess insurer paid $1.3 million. The excess
insurer sued the attorney for malpractice based upon equitable subrogation. The trial court entered summary judgment in favor of the attorney and held that the attorney owed no duty to the excess insurer. The appellate court reversed.

The Texas appellate court held that the excess insurer could maintain an equitable subrogation malpractice claim against the attorney hired to represent the insured. The appellate court reasoned that under the general principles of equitable subrogation adopted in Texas, an excess insurer is subrogated to the rights of the insured.

Six months later, the Texas Supreme Court cited Drabek in American Centennial Ins. Co. v. Canal Ins. Co., 843 S.W.2d 480 (TX. 1992), and again held that the excess insurer may bring an equitable subrogation malpractice action against the insured’s attorney. In that case, the court expounded on the interplay between permitting an equitable subrogation action and preserving the attorney-client relationship:

The attorney owes the insured the same type of unqualified loyalty as if he had been originally employed by the insured.

* * *

Recognizing an equitable subrogation action by the excess carrier against defense counsel would not, however, interfere with the relationship between the attorney and the client nor result in additional conflicts of interests. Subrogation permits the insurer only to enforce existing duties of defense counsel to the insured.9

The court further stated that under the subrogation theory “[n]o new or additional burdens are imposed on the attorney, who already has the duty to represent the insured.”10 Thus, the attorney owed no new standard of care to the excess insurer. The attorney is only required to live up to his duties to the insured—duties the attorney would have regardless of whether excess insurance is involved. Similar to Illinois, Texas law recognizes that a dual attorney-client relationship exists in the defense of an insured by a primary insurer.

The court in American Centennial Ins. Co. v. Canal Ins. Co. further stressed the equitable nature of the remedy: “[r]efusal to permit the excess carrier to vindicate that right would burden the insurer with a loss caused by the attorney’s negligence while relieving the attorney from the consequences of legal malpractice.”11 As in Atlanta International Ins. Co. v. Bell, the Texas court did not want the attorney to benefit from his malpractice at the excess insurer’s expense.

**B. Courts That Have Refused to Permit an Excess Insurer to Maintain an Equitable Subrogation Claim Against the Insured’s Attorney**

Several courts have rejected excess insurers’ attempts to sue the insured’s attorney. For example, in 1988, a Michigan appellate court, prior to the Bell decision, denied an excess insurer’s equitable subrogation claim against a retained attorney.12 In American Employers’ Ins. Co. v. Medical Protective Co., 165 Mich.App. 657, 419 N.W.2d 447 (Mich.App. 1988), the Michigan court of appeals held that an excess insurer was an equitable subrogee of the insured but the right of equitable subrogation did not extend to an action against the insured’s attorney for malpractice. The court wrote:

Although the plaintiff excess insurer may be characterized as an equitable subrogee of the insured physician, it may not sue the insured’s defense attorney for legal malpractice. To hold otherwise would in our judgment acknowledge a direct duty owed by the insured’s attorney to the excess insurer and would be tantamount to saying that insurance defense attorneys do not owe their duty of loyalty and zealous representation to the insured client alone. Such a holding would contradict the personal nature of the attorney-client relationship, which permits a legal
malpractice claim to accrue only to the attorney’s client. Such a holding would also encourage excess insurers to sue defense attorneys for malpractice whenever they are disgruntled by having to pay within limits of policies to which they contracted and for which they received premiums. Were this to occur, we believe that defense attorneys would come to fear such attacks, and the attorney-client relationship would be put in jeopardy.\textsuperscript{13}

The court reasoned that, to protect the rights of the insured, it had to deny the right of the excess insurer to sue the defense attorney for malpractice.

The current validity of this reasoning is in question given the Michigan Supreme Court’s more recent decision in \textit{Atlantic International Ins. Co. v. Bell}, wherein the doctrine of equitable subrogation was applied to permit a primary insurer to bring a malpractice action against its retained attorney.\textsuperscript{14} The court in \textit{Bell} considered the same concerns raised by the appellate court and found them unpersuasive when applied to primary insurers. The \textit{Bell} court recognized that the application of equitable subrogation in the defense counsel-insurer context might detract from the attorney’s duty of loyalty to the client in a potentially conflict-ridden setting. Yet, the Supreme Court reasoned that to completely absolve negligent defense counsel from malpractice liability would not rationally advance the attorney-client privilege.

The Court of Appeals for the Fifth Circuit, in \textit{St. Paul Ins. Co. v. AFIA Worldwide Ins. Co.}, 937 F.2d 274 (5th Cir. 1991), similarly held that Louisiana law does not allow an excess insurer to sue the insured’s attorney for malpractice. The excess insurer in that case brought suit against both the primary insurer and the law firm it had retained in the underlying litigation. The complaint alleged that the primary insurer and attorney had not notified it of the underlying claim until after the trial began, failed to settle within the primary policy limits and failed to notify the excess insurer of an offer to settle. The district court dismissed the excess insurer’s claim against the law firm, and the Fifth Circuit affirmed.

\textbf{N}otwithstanding the fact that Louisiana recognizes an excess insurer’s right of equitable subrogation against a primary insurer, the Fifth Circuit refused to extend an excess insurer’s rights as an equitable subrogee of the insured to include a malpractice action against the attorney retained by the primary insurer. The court supported its holding by noting that the excess insurer was not in privity of contract with the attorney, a requirement for a malpractice action under Louisiana law.

The Court of Appeals for the Second Circuit, interpreting Connecticut law, has also held that an excess insurer cannot sue an attorney retained by the primary insurer to defend the insured. In \textit{Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves}, 929 F.2d 103 (2d Cir. 1991), judgment was entered against the insured that exceeded the limits of the primary policy. The excess insurer sued the attorney for malpractice, as both the intended beneficiary of the contract between the primary insurer and the law firm and as the equitable subrogee. The court rejected both claims. First, the court held that the excess insurer was not the intended beneficiary. The court reasoned that under Connecticut law, attorneys are not liable to persons other than their clients for the negligent rendering of services and, therefore, attorneys cannot be liable to non-client excess insurers. The court determined that the primary or direct purpose of the transaction was not to benefit the excess insurer. Second, the court held that the excess insurer is not entitled to equitable subrogation against the retained attorney. The court reasoned that to recognize such a claim would “drive a wedge between counsel and the insured to the inexorable detriment of the attorney-client relationship” and
would be contrary to the public policy of the state. The court relied upon the Michigan appellate court’s decision in *American Employers v. Medical Protective Co., supra*, to find no right of subrogation.

III. Is Equitable Subrogation a Viable Theory in Illinois?

Illinois has not yet addressed the issue of whether an excess insurer may sue an attorney retained by the primary insurer. Illinois courts have, however, often addressed the issues of attorney malpractice and equitable subrogation in other contexts.

Under Illinois law, a complaint against a lawyer for professional malpractice may be couched in either contract or tort. The elements of an attorney malpractice action in Illinois focus on the attorney-client relationship. To maintain a direct action for malpractice under Illinois law, the plaintiff “must plead facts establishing an attorney-client relationship, the breach of a duty owed by virtue of that relationship, and loss or injury proximately caused by that breach.” Illinois courts have further recognized that in select instances the attorney-client relationship can extend to third parties who are the direct beneficiaries of the attorney-client relationship. An indispensable element of third-party beneficiary theory of recovery is that the contract for services was entered into for the direct benefit of the plaintiff.

Illinois courts have also held that when a primary insurer retains an attorney to defend the insured there is an attorney-client relationship between the attorney, the primary insurer and the insured. Accordingly, “[w]hen an insurance company retains an attorney to defend an action against one of its insureds, the attorney must work toward furthering the interests of the insured and the insurance company.” Therefore, in theory, both the insured and the primary insurer can sue the attorney for malpractice under Illinois law because they both share an attorney-client relationship with the attorney. Notably, however, there are no published decisions of a primary insurer’s malpractice actions against its selected counsel.

The excess insurer is one step removed from this tripartite relationship. Under Illinois law, an excess insurer is not in an attorney-client relationship with the attorney retained by the primary insurer to defend the insured. Moreover, the excess insurer cannot claim a third-party beneficiary interest because the attorney’s contract is not entered into for the direct benefit of the excess insurer. Accordingly, the attorney owes no direct duty to the excess insurer. The logical conclusion, therefore, would seem to be that the excess insurer cannot bring a direct legal malpractice action against the attorney.

The existence or lack of an attorney-client relationship, however, is not a prerequisite for a cause of action based on equitable subrogation. Indeed, in some states, it is the lack of that relationship that has led the courts to apply the doctrine of equitable subordination. In *Atlanta International Ins. Co. v. Bell, supra*, the Michigan Supreme Court expressly held that there is no attorney-client relationship between a primary insurer and the insured’s retained counsel. Nevertheless, the court held that the insurer could sue the insured’s retained counsel under the doctrine of equitable subrogation. The Michigan court reasoned that even without an attorney-client relationship, equity cries out for the application of equitable subrogation to redress attorney malpractice. Accordingly, even though no Illinois court has ever found a direct attorney-client relationship between the excess insurer and the attorney retained to defend the insured, one of the options available to the Illinois courts to redress the harm caused by attorney malpractice is the doctrine of equitable subrogation.

Federal courts sitting in Illinois, applying their interpretation of Illinois law, have recognized a cause of action for equitable subrogation between excess and primary insurers in other situations. For example, Illinois federal courts recognize the excess insurer’s status as an equitable subrogee of the
insured for purposes of claims against the primary insurer. Illinois courts permit an excess insurer to bring a suit against the primary insurer for bad faith failure to settle. In Twin City Fire Ins. Co. v. Country Mutual Ins. Co., 23 F.3d 1175, 1180 (7th Cir. 1994), the Seventh Circuit allowed an excess insurer to sue the primary insurer for bad faith as an equitable subrogee of the insured. In Twin City Fire Ins. Co., the court held that “[w]hen by virtue of an excess insurance policy the victim of the behavior that we have described is the excess insurer rather than the insured, the former is permitted to step into the shoes of the latter and assert the latter’s implied contractual right against the misbehaving insurer.” The behavior referenced by the court concerned the court’s hypothetical involving a primary insurer’s refusal to settle for its policy limits because it would not have to pay more than its limits even if it lost at trial and a jury awarded damages in excess of the primary limits. The court concluded that the excess insurer had an equitable subrogation right against the primary insurer for bad faith failure to settle. In Ranger Ins. Co. v. Home Indemnity Co., 714 F.Supp. 956, 960 (N.D.Ill. 1989), the Illinois district court also recognized that under Illinois law an excess carrier may be equitably subrogated to the insured’s rights against the primary insurer but that court refused to apply the equitable subrogation doctrine to the facts of the case before the court. No Illinois state court has yet applied these equitable subrogation principles to a state case.

Many states allow the excess insurer to bring an equitable subrogation suit against the primary insurer for bad faith failure to settle. However, extending the doctrine to permit excess insurers to sue retained counsel has not been as widely embraced. Whether a state allows an excess insurer to sue a primary insurer on a theory of equitable subrogation does not necessarily predict whether the state will allow an excess insurer to sue the primary insurer’s selected defense counsel on the same basis. It does, however, lay the groundwork for extending the doctrine of subrogation to excess insurer malpractice claims.

In Illinois, as in many other states, the right to sue an attorney for malpractice is personal and may not be assigned. Illinois courts do not allow the insured to assign his malpractice claim to the plaintiff. It logically extends from this that the insured cannot assign his legal malpractice action to his insurer, much less his excess insurer.

Yet, the assignability of a legal malpractice claim does not seem to be an indicator of a court’s ruling on an equitable subrogation claim for legal malpractice. Both Michigan and Texas deny assignability of legal malpractice actions. Texas, however, allows the equitable subrogation action by the excess insurer against the retained attorney while at least one Michigan court decision has denied an equitable subrogation action by the excess insurer.

As the above discussion demonstrates, the answer to whether an Illinois court will extend the doctrine of equitable subrogation to protect the excess insurer against malpractice by the insured’s attorney will most likely not come from an analysis of Illinois case law alone. Rather, the answer will most likely include the weighing of various policy considerations.

IV. Should Illinois Allow an Excess Insurer to Sue the Insured’s Attorney for Malpractice?

Courts have wrestled with the pros and cons of permitting the excess insurer to sue the attorney retained by the primary insurer to defend the insured. Their considerations can be reduced to two equally-prevailing policy considerations: protecting the attorney-client relationship verses providing an equitable remedy.

A. The Policy Arguments Denying an Excess Insurer the Right to Sue the Insured’s Attorney

The most obvious reason why the Illinois courts may be reluctant to extend equitable subrogation rights to an excess insurer suing the insured’s attorney is to protect the attorney-client relationship. The excess insurer is not a client of the retained counsel and should not be able to interfere with the attorney-client relationship. An attorney retained by the primary insurer to defend its insured is
already in the complicated position of having to represent the interests of two clients. Illinois law requires an insurance company to pay for the insured’s choice of counsel when an insured’s liability interests diverge from those of the insured. This should not be needlessly complicated by adding a third client to the picture. The inherent conflicts in the excess-primary insurer relationship may only exacerbate the conflicts of the already-existing tripartite relationship if the excess insurer is added to the attorney’s list of clients. The interests of these three entities will diverge more often because there are competing interests. Elevating the excess insurer to the status of client, or “equitable” client, could force the primary insurer to pay for an attorney chosen by the excess insurer, create a basis for interference in case management, and ultimately lead to pressures to settle cases to avoid risk of excess verdicts or to try cases that should be settled. Such scenarios would compromise the primary insurer’s “duty to defend” and the attorney’s duty to the insured. Accordingly, the attorney could face even more ethical dilemmas. Peppers conflicts might abound and litigation could be protracted.

Moreover, such a holding may contradict the personal nature of the attorney-client relationship. As addressed by the Michigan appellate court in American Employers’ Ins. Co. v. Medical Protective Co., supra, permitting the excess insurer to sue the retained attorney could be “tantamount to saying that insurance defense attorneys do not owe their duty of loyalty and zealous representation to the insured client alone.” There is a continuing concern over the chilling effect of third-party intrusion into an attorney’s primary duty of loyalty to the best interests of his or her client. Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves, supra.

An attorney is in a further quandary if the excess insurer is the “silent client or pseudo client” that lurks in the background. The attorney would be required to speculate about the interests of this silent client and protect them. While often such interests will coincide with the primary insurer, there may be circumstances where these interests diverge and the attorney is left to divine the silent client’s position. For instance, excess insurers might be encouraged to sue the retained attorneys for malpractice whenever they are disgruntled by verdicts that reach into the excess policy limits. If this were to happen, the retained attorney could come to fear such suits and be too eager to settle within the limits of the primary policy. Under Illinois law, this would compromise the relationship between the primary insurer and the retained attorney.

Because of the fear of compromising the attorney-client relationship, the Illinois courts could determine that an excess insurer should not be able to sue an attorney retained by primary insurer under any theory. Other courts find that these concerns can be dispelled by considering the extent and nature of the remedy provided by equitable subrogation.

As stated earlier, equitable subrogation is a method whereby one who has involuntarily paid a debt or claim of another succeeds to the rights of another with respect to the claim or debt. The subrogee acquires no greater or lesser rights than those possessed by the subrogor. The excess insurer may, at most, assert only those rights that the insured could have claimed. Similarly, the attorney may still assert any defense against the excess insurer as it would against the insured. As discussed at length by the Texas Supreme Court in Drabek, permitting the excess insurer to maintain an equitable subrogation suit against the insured’s attorney would not subject the attorney to any new duties or any different standard of care. The attorney would still only be required to fulfill his duties to the insured. Consequently, Illinois courts could find that permitting the excess insurer to maintain an equitable subrogation claim would not negatively impact the attorney-client relationship.

B. The Policy Arguments Allowing an Excess Insurer to Sue the Insured’s Attorney

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Simple equity provides the strongest argument for allowing an excess insurer an equitable subrogation right to sue an attorney for malpractice. If there is no excess insurance and the attorney’s malpractice results in a judgment in excess of the primary insurance, courts allow the insured to sue the attorney. Similarly, most courts allow the primary insurer to sue its retained attorney for malpractice. Why not extend this protection to the excess insurer? The harm and cause are the same, regardless of the plaintiff.

Moreover, denying the excess insurer the right to sue the retained attorney only protects the attorney to the detriment of the excess insurer. The excess insurer is thereby forced to bear the brunt of the malpracticing attorney with no remedy while providing a windfall to the malpracticing attorney. As the Texas court stated in *American Centennial v. Canal*, refusing “to permit the excess carrier to vindicate that right would burden the insurer with a loss caused by the attorney’s negligence while relieving the attorney from the consequences of legal malpractice.”

In the interests of fairness and equity, the Illinois courts could determine that excess insurers should be provided with a remedy. Nevertheless, the courts that have rejected this argument have done so on the basis that the attorney owes no direct duty to the excess insurer and further warn that to hold otherwise would be tantamount to saying that insurance defense attorneys do not owe their duty of loyalty and zealous representation to their clients alone.

V. Conclusion

It is still an open question in Illinois whether an excess insurer may sue an attorney retained by the primary insurer. The answer, however, may be found under the doctrine of equitable subrogation. Courts are divided about whether or not an excess insurer has the right to sue the attorney retained by the primary insurer for malpractice. There are persuasive policy arguments on both sides of the issue and no clear predictors of how the Illinois courts will address this issue. Existing case law and policy considerations support either outcome. The ultimate decision will require that the court carefully balance the attorney-client relationship against the interests of the excess insurer.

Endnotes

21 Pelham, supra, 92 Ill.2d 13, 18.
22 Id. at 1180.
23 Twin City Fire Ins. Co., supra, 23 F.3d 1175, 1178.
24 Certain Underwriters of Lloyd’s and Companies v. General Accident Ins. Co. of America, 909 F.2d 228, 232 (7th Cir. 1990).
30 See Illinois Municipal League Risk Management Assoc. v. Seibert, supra, 585 N.E.2d 1130, 1135 (“[A]n attorney might face insurmountable conflicts of interest between his or her employer, a commercial insurer, and an insured[client].”)
31 Maryland, supra, 64 Ill.2d 187, 198.
34 Certain Underwriters At Lloyd’s London v. Fidelity and Casualty Ins. Co., 4 F.3d 541, 546 (1993) (the primary insurer can assert any defense against the excess insurer it would have against the insured.).
36 American Centennial, supra, 843 S.W.2d 480, 485.

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