SUPREME COURT OF KENTUCKY
CASE NOS. 2008-SC-000037-DG AND 2008-SC-000044-DG

ASSOCIATED INSURANCE SERVICE INC. **APPELLANTS**
AND
AON RISK SERVICE, INC. OF OHIO

VS.

DANIEL GARCIA, M.D. **APPELLEES**
AND
RITA GARCIA

* * * * *

APPEAL FROM COURT OF APPEALS
CASE NO. 2006 CA-001737-MR AND
JEFFERSON CIRCUIT COURT
CASE NO. 02-CI-009027

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BRIEF FOR APPELLEES

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CERTIFICATE

It is hereby certified that a true and correct copy of this Brief for Appellees was served by first class mail this 7th day of January, 2009 upon the following: Mark S. Riddle, Brent R. Baughman, P. Blaine Grant, Greenbaum Doll & McDonald PLLC, 3500 National City Tower, 101 S. Fifth Street, Louisville, KY 40202; Frank P. Doheny, Jr. and Michael C. Merrick, 1400 PNC Plaza, 500 W. Jefferson, Louisville, KY 40202; Hon. Geoffrey P. Morris, Jefferson Circuit Court, Division 11, 700 W. Jefferson, Louisville, KY 40202 and the Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.

LEE E. SITLINGER

STATEMENT CONCERNING ORAL ARGUMENT

While Appellees, Dr. and Mrs. Daniel Garcia, do not agree with Appellants' statements that the within action involves issues of first impression in the Commonwealth of Kentucky or that Appellees seek to make significant changes in Kentucky law which would result in the creation of a new class of claims, Appellees have no objection to oral argument in this action if this Court feels that such argument might be beneficial to it in its consideration of this discretionary appeal.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

This discretionary appeal emanates from a summary judgment granted to Appellants by the Trial Court. That summary judgment was reversed by an Opinion rendered December 12, 2007 by the Kentucky Court of Appeals' panel consisting of Honorable Thomas B. Wine, Honorable Kelly Thompson and Honorable Glenn E. Acree.

In viewing this matter on appeal, the facts and all reasonable inferences therefrom should be viewed in a light most favorable to Appellees, the non-moving parties.[1] Appellants' statement of the case ignores that accepted principle and, therefore, Appellees will offer the following counterstatement of the case for this Court's consideration.

Summary of Material Facts:

On April 18, 1998, Rita Garcia and her husband, Daniel Garcia, M.D., suffered substantial injuries in a mishap aboard the Star of Louisville, a pleasure craft then operating on the Ohio River by the City of Louisville. On April 14, 1999, the Garcias brought a personal injury action against the Star's owner, the Star of Louisville Inc. (the Star). The Star was defended by its liability carrier, HIH Casualty and General Insurance LTD (HIH). In April 2001 while the litigation was pending, HIH declared bankruptcy, thereupon withdrawing its defense of the Star and, in effect, repudiating coverage. Suddenly faced with the prospect of a large, uninsured liability, the Star negotiated a settlement with the Garcias in exchange for the Garcias' promise to "forebear" seeking enforcement against the Star.

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[1] Horton v. Union Light, Heat & Power Co., 690 S.W.2d 382 (Ky. 1985); Maskowitz v. Peariso, 458 F.2d 240 (6th Cir. 1972).

Pursuant to the Settlement Agreement, the Star conceded liability for the 1998 accident, agreed to arbitrate the amount of the Garcias' damages, and further agreed to assign to the Garcias any and all claims the Star might have against its insurance agent and broker for insuring the Star with an unreliable carrier. In June 2002, an arbitration order, incorporating the parties' agreement and independently fixing the Garcias' combined damages at $742,193.10 concluded the litigation against the Star.

In November 2002, pursuant to the assignment of the Star's claims, the Garcias brought the present action against the Star's insurance agent, Associated Insurance Services Inc. (Associated), an insurance agency operating in Louisville. Associated then filed a Third Party Complaint against AON Risk Services Inc. of Ohio (AON), an insurance brokerage service with offices in Cleveland, Ohio. In December 2003, the Garcias amended their Complaint to include claims against AON. The Garcias allege that Associated and AON breached insurance procurement contracts with the Star by negligently placing its coverage with HIH, and that this breach damaged the Star by exposing it to, and rendering it incapable of satisfying, the Garcias' claims for damages.

In a June 21, 2006 summary judgment, the Jefferson Circuit Court dismissed the Garcias' claims against Associated and AON on the ground that those claims sound in tort rather than contract and thus were not assignable. Agreeing with the Garcias that the Trial Court misconstrued Kentucky law and that the Star's assignment of its claims against Associated and AON was valid, the Kentucky Court of Appeals rendered its Opinion reversing and remanding for additional proceedings.[2]

[2] This factual summary is taken from the Court of Appeals' Opinion. (Appendix, pps. 1-12).

Factual and Procedural Summary:

On the evening of Saturday, April 18, 1998, Dr. Daniel Garcia and his wife, Rita Garcia, were guests aboard the Star for the aeronautical and firework display of Thunder Over Louisville. After Thunder concluded and the Star had docked for the evening, all of the guests were invited to disembark the ship. As Rita Garcia stepped down the stairway, a mechanical wheelchair lift platform suddenly activated and caused Rita Garcia to lose her balance. As she attempted to steady herself, the ascending mechanical platform trapped and began crushing her left foot and ankle. Dr. Garcia immediately went to her aid and the ascending metal platform trapped his foot and ankle as well. The mechanical platform continued its ascent causing further trauma and injury to both Dr. and Mrs. Garcia's pinned legs.

Attempts to extricate Dr. and Mrs. Garcia through the use of Jaws of Life were unsuccessful. Ultimately, the Coast Guard was summoned and through the utilization of a hydraulic lift and wooden studs, they were able to free Dr. and Mrs. Garcia's severely injured legs. They were immediately transported to University of Louisville Hospital for emergency treatment.

Consequent to the Garcias' injuries, the Star was cited by the Coast Guard for not complying with published safety regulations which directly caused the injuries to both Dr. and Mrs. Garcia.

In sum, the liability of the Star for Dr. and Mrs. Garcia's injuries was quite clear. The Star owed them the "highest degree of care"[3] in providing for their safety and the Star had clearly breached that duty.

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[3] Louisville and N.R. Co. v. Johnson, 182 S.W. 214 (Ky. 1916); Coney Island Co. Inc. v. Brown, 162 S.W.2d (1942); Louisville Ry. Co. v. Allen, 246 S.W.2d 443 (Ky. 1952).

To the same effect, Dr. and Mrs. Garcia's injuries and resultant damages were also well-established. Those injuries were both serious and permanent and resulted in substantial economic losses to the Appellants. The primary, if not sole, dispute between Dr. and Mrs. Garcia and the Star was the amount of monetary damages which they were entitled to receive for their injuries.

In brief, it was more than likely that any reasonable jury would return a verdict in favor of Appellants against the Star for a substantial sum of monetary damages.

UNDERLYING PROCEEDINGS

A lawsuit was filed by Daniel Garcia M.D. and his wife, Rita Garcia, against the Star and was in litigation for several years. Extensive discovery was conducted and both sides were vigorously represented by capable counsel. During this course of discovery, it became evident that liability clearly rested with the Star and that Dr. and Mrs. Garcia sustained serious and permanent injuries. As a practical matter, the only remaining issue after discovery had been concluded was the amount of compensation which Dr. and Mrs. Garcia were entitled to receive.

On or about April 30, 2001, Dr. and Mrs. Garcia's counsel received notification that the Star's liability insurance carrier, HIH Insurance, had filed bankruptcy.

Because of the limited remaining dispute of fact between the parties coupled with the Star's liability carrier, HIH Insurance Company, going bankrupt, the parties elected to have that disputed issue of fact submitted to an arbitrator rather than a jury. An agreement was thereupon entered into between Dr. Daniel Garcia and Rita Garcia and the Star on February 28, 2002, agreeing to binding arbitration. (T.R., pps. 568-570; Appendix, pps. 13-15) Although they were not necessary parties to that arbitration

proceeding, both Associated and AON were invited to participate in those arbitration proceedings and both declined. The arbitration was even postponed initially as an accommodation to Associated. The purpose of the arbitration was to resolve the factual issue as to the amount of damages owed by the Star to Dr. and Mrs. Garcia for their injuries. **The arbitration in no way addressed any claims of the Star against its agent or broker** (Associated or AON).

In any event, at the arbitration, evidence was presented in an adversarial manner following which Judge Corey[4] rendered an award on June 11, 2002 (T.R., pps 572-576; Appendix, pps. 16-20) assessing damages as follows:[5]

	Rita	
1.	Reasonable and necessary medical expenses	$2,310.96
2.	Past and future mental and physical pain and suffering	$60,000.00
3.	Loss of consortium	$10,000.00
4.	Lost wages	$1,920.00
5.	Punitive damages	$ 0
TOTAL		**$74,230.96**

	Daniel:	
1.	Reasonable and necessary medical expenses	$6,962.14
2.	Past and future mental and physical pain and suffering	$125,000.00
3.	Loss of consortium	$10,000.00
4.	Lost wages	$102,500.00

[4] Honorable Ken Corey, former Judge of the Jefferson Circuit Court was agreed upon by the parties to perform services as the Arbitrator.

[5] The reasonableness of Judge Corey's award is further demonstrated by the fact that the award fell within the high/low parameters agreed upon by the parties prior to the arbitration.

5.	Impairment of earning power	$423,500.00
6.	Punitive damages	$ 0
TOTAL		**$667,962.14**

Thereafter on November 27, 2002, the Star executed an assignment of its claims against Associated and AON (T.R., pps. 578-579, Appendix, pps. 21-22) to Dr. and Mrs. Garcia.

INSURANCE COVERAGE DISPUTE

At the time of the accident giving rise to Dr. Garcia and his wife's injuries, the Star was insured by HIH Insurance. That coverage had been purchased for the Star through its agent, Associated, and broker, AON, Appellants herein.

As previously stated, HIH Insurance filed for liquidation on March 15, 2001. By subsequent agreement between Dr. Daniel Garcia and Rita Garcia and the Star, the Star assigned its claims against Associated and AON to Dr. and Mrs. Garcia in exchange for their agreement to forebear execution against the Star on any and all claims or awards.[6]

Dr. and Mrs. Garcia have thereafter pursued this case directly against AON and Associated under that assignment. Discovery in this case has clearly demonstrated that both Associated and AON[7] were negligent in placing the Star's insurance coverage with HIH Insurance. Evidence discovered by Appellees demonstrates that HIH Insurance was experiencing serious financial difficulty at the time Associated and AON placed the

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[6] An initial agreement was entered into between Dr. & Mrs. Garcia and the Star on February 28, 2002 including an agreement to submit a resolution of the tort action to Arbitration (Appendix, pps. 13-15). Following the Arbitrator's Findings and Award of June 11, 2002 (Appendix, pps. 16-20), an Assignment of Rights and Claims was entered among the parties on November 27, 2002. (Appendix, pps. 21-22).

[7] The time for identification of expert witnesses had not even been reached at the time the Trial Court granted Defendants/Appellants, AON and Associated, a summary judgment. Plaintiffs/Appellees' expert witnesses will testify that both AON and Associated were negligent in the procurement of liability insurance for the Star. Issues pertaining to whether the underlying facts were sufficient to establish a breach of duties owed by AON and Associated to the Star were not addressed by the Trial Court since such arguments, at best, would have been premature.

Star's insurance coverage with it and that a reasonable insurance agent and insurance broker could have and should have learned of that adverse financial situation and that a reasonable insurance agent and insurance broker should not have placed the Star's insurance coverage with HIH Insurance Company under the facts and circumstances presented. The negligence of Associated and AON in the present case is particularly aggravating since the Star was contractually mandated to provide liability coverage for the protection of its patrons in view of the nature of the services which it was offering to the general public and citizens of our community.

Therefore, Dr. Daniel Garcia and Rita Garcia are pursing this action directly against Associated and AON at this time under the assignment given to them by the Star in exchange for their agreement to forebear pursuing collection of their damages against the Star.

By Opinion and Order entered June 21, 2006, (T.R., pps. 730-736) the Trial Court granted Appellants' summary judgment motions erroneously concluding that the Star's negligence claims against its agent, Associated, and broker, AON are not assignable.

By subsequent Order entered August 16, 2006 denying Appellees' CR 59.05 motion, (T.R., pps. 777-779) the Trial Court further held that the Star's agent, Associated, and broker, AON, were not bound by the arbitration's results which assessed the damages sustained by Dr. and Mrs. Garcia as a result of the Star's negligence because neither Associated nor AON were parties to the arbitration.

In its August 16, 2006 Order, the Trial Court also mentioned Appellants' additional claim that Dr. and Mrs. Garcia had granted the Star a full release in exchange for the assignment before the arbitration which Appellants contended rendered the

arbitration void as against public policy. While not adopting that argument, the Trial Court stated that this argument was "less convincing" than Appellants' other arguments. It is thus unclear whether the Trial Court felt that this additional argument entitled Appellants to a summary judgment.

On August 18, 2006, Appellees, Daniel Garcia M.D. and Rita Garcia, filed their Notice of Appeal from these Trial Court rulings to the Kentucky Court of Appeals. (T.R., pps.780-781)[8]

By Opinion rendered December 14, 2007 by the Kentucky Court of Appeals, the Trial Court's summary judgment granted to AON and Associated was reversed. (Appendix pps. 1-12). In its Opinion, the Kentucky Court of Appeals held that public policy does not preclude the assignment of an insured's negligence claim against his or her insurance agent and that the agreement between the Star and Dr. and Mrs. Garcia providing for the assignment of the Star's claims against AON and Associated was valid and enforceable. The Court of Appeals' Opinion therefore reversed the Trial Court's summary judgment and ordered that the case be remanded to the Trial Court for further proceedings.

By Order entered September 10, 2008, discretionary review was granted by the Supreme Court of Kentucky.

[8] An amended Notice of Appeal was subsequently filed on August 22, 2006 adding an inadvertently omitted attorney for intervening plaintiff, Anthem Health Plans of Kentucky Inc., to Appellants' mailing certificate. (T.R., pps. 782-784)

ARGUMENT

Although AON and Associated each argue various points for relief in their respective briefs, their arguments essentially make the same allegations. First, they claim that an insured cannot assign a cause of action against its insurance broker and agent. In this case, those claims arose out of the agent/broker's breach of their insurance procurement contracts with its insured by negligently placing its coverage with a carrier which it knew or should have known would not be financially able to provide liability coverage to its insured in the event of a subsequent claim for substantial damages against it.

Secondly, AON and Associated contend that the assignment between Dr. and Mrs. Garcia and the Star was "illusory" and therefore unenforceable. Both of these issues were decided by the Kentucky Court of Appeals adverse to AON and Associated's position. Appellees will therefore address each of those issues and in so doing will address the various sub-parts contained in Appellants' briefs.

I. A TORTFEASOR'S NEGLIGENCE CLAIMS AGAINST HIS INSURANCE AGENT AND BROKER ARE ASSIGNABLE.

(a) Assignments are both recognized and favored in Kentucky.

Assignments have been both recognized and favored in Kentucky for decades. Grundy v. Manchester Insurance & Indemnity Co., 425 S.W.2d 735 (Ky. 1968); State Farm Mutual Automobile Insurance Co. v. Marcum, 420 S.W.2d 113 (Ky. 1967); Terrell v. Western Casualty & Surety Co., 427 S.W.2d 825 (Ky. 1968).

There are obvious policy considerations which favor the recognition of assignments by an insured/tortfeasor of his claims against his insurance company. An

insured pays a valuable premium for the protection afforded him by a policy of liability insurance. This fiduciary relationship between the insured and his insurance company imposes by law the obligation upon the carrier to exercise the highest degree of care to ensure that its insured is protected from personal liability exposure beyond that afforded by its insurance policy. The favoring and recognition of the assignability of an insured's claim against its insurance carrier for violating that fiduciary obligation enables the claimant to directly assert his claims against the liability carrier whose violations unreasonably exposed the insured to personal liability while simultaneously affording protection to the insured. The insured thus receives the protection from personal liability which he was entitled to receive under his policy of insurance had the carrier complied with its fiduciary obligations.

Although the general rule in Kentucky is that tort claims for personal injuries may not be assigned[9], Kentucky has long recognized that tort claims could be assigned for torts which are founded upon contracts and grow out of the contractual relations between the parties.[10] In the present case, the duty of care Associated and AON breached arose from their contracts with the Star to procure appropriate liability coverage and are assignable. Thus, the Star's claims against Associated and AON was assignable under long-standing and controlling Kentucky case law.

In its well-reasoned opinion, the Kentucky Court of Appeals clearly and correctly summarized existing Kentucky case law on this point:

> "Where an insurer denies coverage of a claim against its insured, refuses to defend, or unreasonably refuses to settle, the insured, to protect itself against the threatened out-of-pocket loss, will frequently have a strong incentive to settle with the plaintiff.

[9] State Farm Mutual Automobile Insurance Co. v. Roark, 517 S.W.2d 737 (Ky. 1974)
[10] Grundy v. Manchester Insurance & Indemnity Co., supra

Such settlements often take the form of a stipulated judgment against the insured, the insured's assignment to the plaintiff of its claims against the insurer, and the plaintiff's agreement not to seek execution of the judgment against the insured. Although each of the elements of these agreements has been challenged, these agreements have been widely upheld. See Note, 'Judicial Approaches to Stipulated Judgments, Assignments of Rights, and Covenants not to Execute in Insurance Litigation,' 47 Drake L. Rev. 853 (1999). In Kentucky, although the law in this area is sparse, our highest Court has approved an insured's assignment of his claims against his insurer. *Terrell v. The Western Casualty & Surety Company*, 427 S.W.2d 825 (Ky. 1968); *Grundy v. Manchester Insurance & Indemnity Company,* 425 S.W.2d 735 (Ky. 1968).

However, where an insured's exposure is not attributable to the insurer, or where, as in this case, the insurer is insolvent, an obvious variation on the above agreement is for the insured to assign his claims against some other entity, such as an insurance agent allegedly responsible for the failure of coverage. In the context of such settlements, assignments of claims against allegedly negligent insurance agents have also been upheld. *Stateline Steel Erectors, Inc. v. Shields*, 837 A.2d 285, 288 (N.H. 2003).

* * *

As the trial court correctly noted, the general rule in Kentucky is that tort claims for personal injuries may not be assigned. *State Farm Mutual Automobile Insurance Company v. Roark*, 517 S.W.2d 737 (Ky. 1974). The trial court believed that this rule extended to all tort-based claims. Further convinced that the Star's malpractice-like claims against its agent and broker sounded in tort, it concluded that those claims were not assignable. However, in *Grundy v. Manchester Insurance & Surety Company, supra,* however, our state's highest Court indicated that tort claims could be assigned "for torts which are founded upon contracts and grow out of the contractual relations between the parties." *Id.* at 736 (citation and internal quotation marks omitted). The Court upheld, therefore, an insured's assignment of his bad faith settlement claim against his insurer on the ground that the duty of good faith the insurer allegedly breached arose from the insurance contract. Likewise, the duty of care Associated and AON allegedly breached arose from their contracts with the Star and the alleged breaches gave rise to

purely economic injury. Thus, under *Grundy*, the Star's claims are assignable.[11]

(b) The relationship of an insured and his insurance agent and broker is not analogous to the relationship of a client and his attorney.

In its Opinion and Order, the Trial Court erroneously analogized the relationship of an insured and his insurance agent or broker to that of an attorney/client relationship and erroneously concluded that an insured could not assign his claims against his insurance agent or broker. In reaching this erroneous conclusion, the Trial Court misplaced its reliance on the Kentucky case of Coffey v. Jefferson County Board of Education, 756 S.W.2d 155 (Ky.App. 1998).

In Coffey v. Jefferson County Board of Education, the Kentucky Court of Appeals made a limited exception to the general rule favoring assignability of such claims arising out of an attorney/client relationship due to the unique nature of that relationship. Although there was no intent, either express or implied, in that Opinion to extend that holding to other contractual relationships, the Trial Court erroneously concluded that a cause of action by an insured against his insurance agent or broker was also non-assignable. As previously stated, no Kentucky appellate court has ever extended the Coffey holding to other contractual relationships other than the attorney/client relationship.

Coffey v. Jefferson County Board of Education, supra, relied upon by the Trial Court, is actually authority for the proposition that the Star's negligence claims against Associated and AON **are assignable**. In Coffey, the Court of Appeals was clearly

[11] Court of Appeals Opinion, pps. 3-5; Appendix pps. 3-5)

making an exception to the general rule favoring assignability of such claims in a case involving a "chose in action for a legal malpractice":

> "Our view that a chose in action for a legal malpractice is not assignable is predicated on the uniquely personal nature of legal services and the contract out of which a highly personal and confidential attorney-client relationship arises, and public policy consideration based thereon."

The uniqueness of a chose in action for a legal malpractice is obvious. In an attorney-client relationship, communications are confidential, sensitive and privileged. Therefore, if a client were permitted to assign his claim against his attorney to a third party, the attorney would be placed in the untenable position of having to defend himself while not being permitted to divulge such sensitive, confidential and privileged information communicated to him during the course of his representation. There is obviously a strong public policy in favor of protecting that attorney-client relationship and those communications which compel such an exception to the general rule of assignability of claims.

In the present case involving an insured assigning a cause of action for negligence against his agent and broker in negligently procuring liability insurance, such considerations are totally absent. There is no such privileged communications which would warrant the creation of any similar exception to the general rule favoring assignability of claims.

The Court of Appeals in Coffey, therefore, clearly tacitly recognized the assignability of such claims except in the unique exceptional situation involving a cause of action for legal malpractice. The Trial Court's reliance upon Coffey was therefore misplaced.

In its Opinion and Order granting summary judgment, the Trial Court's sole authority upon which it relied was a case decided by an Arizona Court of Appeals Court in Premium Cigars Int'l, LTD. v. Farmer-Butler Leavitt Ins. Agency, 96 P.3d 555 (Ariz. Ct. App., 2004). In their brief before the Kentucky Court of Appeals, Dr. and Mrs. Garcia argued that Kentucky should not adopt the Premium Cigar Int'l. LTD Opinion since it (1) would create an inappropriate extension of the Kentucky Court of Appeals' Opinion in Coffey, (2) was inconsistent with another Arizona case of Standard Chartered PLC v. Price Waterhouse, 945 P.2d 317 (Ariz. 1997) which had concluded that an auditor-client relationship was dissimilar from an attorney-client relationship thus permitting its assignability and (3) failed to recognize the material differences between an attorney-client relationship and other "professional" relationships and was therefore not persuasive.

In its Opinion herein, the Kentucky Court of Appeals refused to follow the Arizona Court of Appeals' Opinion in Premium Cigars finding that the Opinion was not persuasive;

> "...Relying on *Premium Cigars International, Ltd. v. Farmer-Butler-Leavitt Insurance Agency*, 96 P.3d 555 (Ariz. App. 2004), in which the Arizona Court of Appeals reached the same conclusion, the trial court ruled that an insured's business relationship with his or her insurance agent/broker was sufficiently similar to the relationship between attorney and client to require the same bar against the assignment of insurance agent malpractice claims. However, we are persuaded by the courts reaching the opposite conclusion that the insured-agent relationship is neither so highly personal nor so fraught with public implications as to preclude assignment of the insured's malpractice claims, at least where, as here, the assignment is to the insured's adversary in the underlying litigation. *Forgione v. Dennis Pirtle Agency, Inc.*, 701 So.2d 557 (Fla. 1997); *Daugherty v. Blaase*, 548 N.E.2d 130 (Ill.App. 1989); *Troost v. Estate of DeBoer*, 202 Ca.Rptr. 47 (Cal.

1984); *Esposito v. CPM Ins. Services Inc.*, 922 A.2d 343 (Conn. Super. 2006).

As the above courts have noted, the attorney-client relationship is uniquely personal and involves the highest fiduciary duties of confidentiality and loyalty. In contrast, the insured-insurance agent relationship imposes on the agent a duty to use reasonable skill and diligence in obtaining coverage. The relationship does not hinge on privileged communications and does not prevent the agent's substitution by a different agent. Rather, it exists in conjunction with the agent's duty of good faith and perhaps loyalty toward represented insurers. In sum, notwithstanding the fact that the agent is providing a 'personal' service, the insured-agent relationship is a simple, commercial transaction not genuinely comparable to the highly personal relationship between attorney and client and therefore not subject to the same bar against the assignment of malpractice claims.

Nor does the assignment of an insured's claims against his insurance agent raise the public policy concerns courts have noted in the attorney-client context. The assignment of a legal malpractice claim to an adversary in the litigation involves the assignee in an unseemly reversal of roles. The assignee, the adversary in the underlying litigation, who argued in that litigation that she was entitled to judgment on the merits, must switch positions in the assigned case and there argue that she would have lost in the underlying litigation were it not for opposing counsel's negligence. This seeming reversal of roles would be confusing to juries and damaging to the credibility of the legal system. The assignment of an insured's claim against his or her agent/broker, on the other hand, does not require the adversary/assignee to reverse roles or to disavow in any way her former position. In the underlying litigation, the assignee argues that she was entitled to damages from the insured, and in the assigned case she argues, consistently, that she would have collected those damages from the insured, at least to the extent of insurance coverage, were it not for the negligence of the insured's agent. Therefore, public policy is not offended.

Finally, in *Premium Cigars International, Ltd. v. Farmer-Butler-Leavitt Insurance Agency, supra,* the Arizona Court of Appeals expressed concern at the prospect of a market in such claims if it permitted the assignment of an insured's malpractice claim against its insurance agent. Not only is this concern speculative, but it does not support the limited result

> Associated and AON seek. It may well be the insurance-agent malpractice claims should not be as freely assignable as claims for credit card debt or mortgages, but that does not imply that they should never be assignable. In the context presently before us, where the assignment was executed as a part of a settlement with the insured's adversary in the underlying tort litigation, we agree with the Courts cited above that public policy does not preclude the assignment of an insured's malpractice claim against his or her insurance agent."[12]

Subsequent to the Opinion rendered by the Kentucky Court of Appeals in this action, the Arizona Supreme Court rendered an Opinion in Webb v. Victoria Gittlen, 174 P.3d 275 (Ariz. 2008), copy attached, which expressly overruled the Arizona Court of Appeals' Opinion in Premium Cigars and utilized reasoning identical to that reasoned by the Kentucky Court of Appeals in its Opinion herein;

> "Gittlen argues that professional negligence claims against insurance agents are sufficiently analogous to legal malpractice claims to justify extending the prohibition on assignment. We disagree.
>
> The cases prohibiting assignment of legal malpractice claims do so because of the "uniquely personal" relationship between attorney and client, which gives rise to a "fiduciary relation of the very highest character." *Botma*, 202 Ariz, at 17 P. 11, 39 P.3d at 541 (quoting *Schroeder*, 142 Ariz, at 399, 690 P.2d at 118). Therefore, "considerations of public policy require that actions arising out of [the] relationship not be relegated to the market place and converted to a commodity to be exploited and transferred to economic bidders." *Id.* Rather, the cases conclude that malpractice claims should be asserted only by the wronged client to whom the attorney fiduciary duties. *Schroeder*, 142 Ariz, at 399, 690 P.2d at 118. (At p. 366)
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> * * *
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> "We reject the *Premium Cigars* rationale. The relationship between an insurance agent and client, while certainly important, differs from that between an attorney and client in several critical respects.

[12] Court of Appeals Opinion, pps. 5-8; Appendix pps. 5-8)

Attorneys are fiduciaries with duties of loyalty, care, and obedience, whose relationship with the client must be one of "utmost trust." *In re Piatt*, 191 Ariz. 24, 26, 951 P.2d 889, 891 (1997). By contrast, insurance agents generally are not fiduciaries, but instead owe only a duty of "reasonable care, skill and diligence" in dealing with clients. ..." (At p. 367)

* * *

"Similarly, although clients share information with both their insurance agents and attorneys, they typically share much less with their agents. While clients often inform their agents about their medical history, financial information, prior claim history, and personal habits, they provide their attorneys more extensive or sensitive information about their private and public conduct, including activities that may expose them to a civil or criminal liability.

Furthermore, attorney-client confidentiality protects broader interests than does insurance agent-client confidentiality. It protects the public interest in accessible legal advice by allowing people to consult their attorneys without fear of retribution. It also ensures that clients are effectively represented, which in criminal cases is essential to defendants' constitutional right to assistance of counsel. *Ariz. R. Sup. Ct. 42,* ER 1.6 cmt. 2; *cf. McClure v. Thompson*, 323 F.3d 1233, 1242-47 (9th Cir. 2003) (evaluating whether disclosure of client confidences constituted ineffective assistance of counsel). By contrast, insurance agent-client confidentiality appears to protect only the client's privacy, an interest that, while important, has fewer societal ramifications than do the interests protected by the attorney-client relationship.

Once attorneys receive information, they are also bound by stricter confidentiality duties than are insurance agents. Attorneys may disclose information only to prevent client crimes, *Ariz. R. Sup. Ct. 42*, ER 1.6(b), (d)(1), or in a few other limited circumstances, *id.* at (d)(3)-(4) (also allowing disclosure to secure legal advice about compliance with the rules and to defend against suits brought by the client). Insurance agents, by contrast, are statutorily allowed to disclose client information in seventeen different circumstances, including when an affiliate seeks the information for marketing purposes. *A.R.S. § 20-2113* (2002 & Supp. 2007) (also allowing disclosure connected with proposed sales of the insurance institution or requests for verification of benefits from hospitals or doctors).

> Considered together, these distinctions demonstrate that the relationship between insurance agents and their clients, while perhaps personal, is not "uniquely personal" in a sense comparable to an attorney-client relationship. The differences are substantial and the similarities do not justify holding that claims against agents cannot be assigned. (At pps. 367-368).

Thus, the sole authority from a foreign jurisdiction relied upon by the Trial Court has been expressly rejected by its own highest appellate court, the Arizona Supreme Court.

Essentially all foreign jurisdictions which have addressed this issue are supportive of Appellants' position.

Troost v. DeBoer, 155 Cal. App.3d 289 (1984) represents the more generally accepted distinction between an attorney/client relationship and other professional relationships which permits assignability of claims of an insured against his agent and broker;

> (4) DeBoer next contends that Troost's cause of action against the insurance agent is not assignable. DeBoer's reliance on *Goodley v. Wank & Wank, Inc.* (1976) 62 Cal.App.3d 389 [133 Cal.Rptr. 83], is misplaced. The Court there held a claim for damages for legal malpractice was not assignable because of '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. (*Id.*, at p. 397) The court recognized that legal malpractice was not necessarily a 'tort of a purely personal nature' on a par with those wrongs done to the person of the injured party or his reputation or feelings which fall with the exception to the general rule of assignability. (*Ibid.*) Nevertheless, the special nature of legal services called for the creation of an additional exception to the general rule assignability. Those unique factors are not present in the instant case.

See also Daugherty v. Blaase, 548 N.E.2d 130 (Ill. 1989) wherein the Illinois appellate court specifically distinguished claims against an insurance broker from claims against an attorney and held that claims against an insurance broker were assignable;

> "Illinois courts have outlined several considerations which render legal malpractice claims unassignable (*Clement v. Prestwich* (1983), 114 Ill.App.3d 479, 481, 70 Ill.Dec. 161, 163, 448 N.E.2d 1039, 1041; *Cristison v. Jones* (1980), 83 Ill.App.3d 334, 339, 39 Ill.Dec. 560, 563, 405 N.E.2d 8, 11.) The most important of these considerations are the confidentiality of the lawyer-client relationship, the personal nature of the relationship, the potential degradation of the legal profession, and the potential flood of litigation.
>
> [3] None of these considerations, however, is relevant to an action for insurance agent malpractice. No authority recognizes the confidentiality of the broker-insured relationship. Furthermore, an insurance broker shares a business relationship with his client, not a "personal" one. We believe the insurance industry will not be debased by this type of lawsuit. Instead, the public will benefit from the opportunity to redress "coverage gap" errors. Finally, we view the concern about a potential flood of litigation as groundless. Accordingly, we conclude that insurance broker malpractice claims are assignable and, thus, Daugherty's assignment to Rockford of his claim against Blaase is valid.

To the same effect, an identical result was reached by the Supreme Court of Florida in Forgione v. Dennis Pirtle Agency, Inc., 701 S.W.2d 557 (1997):

> "Attorneys and clients have a confidential relationship, which includes constraints upon information that can be disclosed to others. *See § 90.502,* Fla. Stat. (1995) (explaining parameters of the lawyer-client privilege recognized by Florida's Evidence Code); R. Regulating Fla. Bar 4-1.6 (imposing obligation that lawyer not reveal information relating to representation of client). The law does not impose similar constraints on communications between an insurance agent and an insured. The relationship between an attorney and client is a fiduciary relation of the very highest character, and the attorney owes a duty of undivided loyalty to the client. *See* R. Regulating Fla. Bar 4-1.7 (general rule regarding conflict of interest); 4-1.8 (prohibiting certain transactions which involve conflict of

> interest); 4-1.9 (explaining conflict of interest as to former client). While an insurance agent is required to use reasonable skill and diligence in obtaining coverage for an insured, the agent also owes the insurance company, which is his or her principal, an obligation of high fidelity. *See* 30 Fla. Jur.2d *Insurance §§ 759-783, §§ 786-801 (1995).* The relationship between an attorney and a client is also a personal one. An attorney may not substitute another attorney in his or her place without the client's permission. In contrast, insurance agents are often substituted without prior notification to the insured.
>
> Based upon these substantial differences between the attorney-client relationship and the insurance agent-insured relationship, we conclude that public policy considerations do not preclude the assignment of an insured's claim for negligence against an insurance agent. Accordingly, we answer the question posed in the affirmative and return this case to the United States Court of Appeals for the Eleventh Circuit.

See also Peterson v. Brown, 457 N.W.2d 745 (Mn. 1990) wherein the Minnesota Court of Appeals also held that an insured's claims in "tort" against his insurance agent for failing to obtain insurance were assignable.

The Trial Court's determination that the Star's claims against its agent and broker could not be assigned because those claims sound in "tort" and thus require proof (1) That the agent and broker owed the Star a duty, (2) That the agent and broker breached that duty, and (3) Through expert testimony that such a breach caused the Star injury is immaterial to the issue as to whether those claims are assignable. Such elements of proof are required in other causes of action which are clearly recognized as assignable claims by Kentucky's highest courts. For example, an insured can assign his claims against his claim representative and his insurance company in both a first party and third party situation to a third party claimant. Those cases clearly sound in "tort" and require the above-mentioned three (3) elements of proof.

The determinative factor is not whether a cause of action sounds in tort but whether the underlying relationship between them also sounds in "contract". The general rule in Kentucky is that such causes of action are assignable except in the limited situation involving an attorney-client relationship due to the unique relationship between the attorney and his client.

The Trial Court's conclusion that public policy is served by disallowing the assignment of claims by an insured against his agent and broker, is simply erroneous. To the contrary, to hold otherwise would require a third party claimant to unnecessarily pursue claims against an insured who has been wrongfully deprived of protective coverage.

The obvious benefit to the general public and the judicial system in permitting liberal assignment of claims in order to avoid unnecessary litigation has been recognized;

> "...we believe that permitting assignments between an insured and an insurance company both encourages the early settlement of lawsuits and relieves our overburdened court system. Accordingly, Daugherty's assignment to Rockford does not fail because a judgment had not been entered against Daugherty prior to the assignment." Daugherty, supra.

The assignability of such claims is clearly in the best interest of the general public as it avoids unnecessary circuitous litigation and permits direct litigation against the party whose wrongful conduct created the situation which precluded prompt compensation to the injured victim.

In sum, the Trial Court's determination that an insured could not assign his negligence claims against his insurance agent or broker was erroneous. The Court of Appeals currently over-turned that ruling and its Opinion accurately reflects controlling

and long-standing Kentucky case law. The Star's claims against Associated and AON were properly assignable.

II. THE RESOLUTION OF DR. AND MRS. GARCIA'S CLAIMS AGAINST THE STAR OF LOUISVILLE THROUGH ARBITRATION WAS A VALID AND APPROPRIATE MEANS OF LIQUIDATING THEIR DAMAGES.

In its original Opinion granting Appellants' motion for summary judgment, the Trial Court's sole basis for its ruling was its determination that an insured's claims against his insurance agent or broker were not assignable. (T.R., pps. 730-736). However, in its subsequent Opinion denying Appellees' motion to alter, amend or vacate, the Trial Court further held that a summary judgment should be granted since neither the insurance agent nor the broker were parties to the arbitration proceeding between Dr. and Mrs. Garcia and the Star of Louisville:

> "Even if the Court were convinced that vacating its prior Order was proper in light of the Garcias' instant motion, it would nevertheless find that the defendants are correct in arguing that summary judgment is proper on the grounds that, as non-parties to the arbitration agreement at issue, they are not bound by the arbitration's results. . ." (T.R., pps. 779)

It is respectfully submitted that the Trial Court's determination in this regard was erroneous under the facts and circumstances presented and that the Trial Court's granting of summary judgment on this additional issue was ill-founded.

The Trial Court's reliance upon Nationwide Mutual Insurance Co. v. Home Insurance Co., 330 F3d 843 (6th Cir. 2003), was misplaced. In the present action, the arbitration proceeding in no way determined nor attempted to determine the rights or obligations of the insurance agent and broker (Associated and AON) to its insured (the Star of Louisville). That arbitration proceeding merely adjudicated the tort claims of Dr.

and Mrs. Garcia against the Star of Louisville. The Star's insurance agent and broker were neither necessary parties to that arbitration proceeding nor permissible parties, even though they were invited to participate.

The fallacy of Appellants' contention in this regard is evident. If Dr. and Mrs. Garcia and the Star of Louisville elected to resolve their dispute through a jury trial rather than arbitration, there could be no question that neither the Star's insurance agent or broker would be an appropriate party to that proceeding. The choice of Dr. and Mrs. Garcia and the Star of Louisville to resolve their dispute through arbitration rather than a jury trial was merely their choice as to the selection of an appropriate forum particularly in view of the limited nature of their disagreement.

Although the agent and broker were not necessary parties to the arbitration between Dr. and Mrs. Garcia and the Star of Louisville, both Associated and AON were invited to participate in those arbitration proceedings and both declined.

It is further significant to note that the arbitration proceeding was presided over by Honorable Ken Corey, a former member of the Jefferson Circuit Court, whom both Dr. and Mrs. Garcia and the Star of Louisville found acceptable. At the arbitration, evidence was presented in an adversarial manner following which Judge Corey rendered a reasonable award.[13] There is no evidence or even any suggestion that there was any fraud or collusion in the arbitration proceeding. To the contrary, the arbitration proceeding was a fair and efficient manner of adjudicating the claims of Dr. and Mrs. Garcia and the Star of Louisville which was acceptable to both parties.

[13] The reasonableness of Judge Corey's award is further demonstrated by the fact that the award fell within the high/low parameters agreed upon by the parties prior to the arbitration. Those high/low parameters, of course, were unknown to Judge Corey during his consideration of this matter.

It is further submitted that the Trial Court's holding in this regard is contrary to the law and policy of this Commonwealth.

(A) ARBITRATION IS RECOGNIZED AND FAVORED IN KENTUCKY.

Alternative dispute resolution methods including arbitration are not only favored but encouraged in Kentucky as a means of avoiding unnecessary expense, time and judicial resources. In the present case the Star of Louisville and Dr. Garcia and his wife, had little, if any, dispute regarding any material issue of fact. Liability for the occurrence of Dr. Garcia and his wife's injuries clearly rested with the Star of Louisville and the injuries sustained by them were serious and significant. The only material dispute which existed was the assessment of those damages to a specific monetary amount. A resolution of this issue either through trial or settlement was complicated by the insolvency of the Star of Louisville's liability insurance carrier, HIH Insurance Company, during the course of these proceedings.

Under those circumstances, submission of the issue of the specific amount of Dr. and Mrs. Garcia's monetary damages to an impartial arbitrator selected by the parties was not only a permissible means of resolving that issue between them but the most logical means of accomplishing that purpose while simultaneously minimizing unnecessary expense, time and judicial resources. Appellants cite no case under identical facts as those presented in this case which would preclude the agreed arbitration of that issue between the Star of Louisville and Dr. Garcia and his wife.

(B) THE ARBITRATION AWARD REPRESENTED FAIR AND REASONABLE COMPENSATION FOR PLAINTIFFS' INJURIES AND WAS NOT THE RESULT OF COLLUSION.

It was agreed between counsel for the Star of Louisville and counsel for Dr. Garcia and his wife that Honorable Ken Corey, former Judge of the Jefferson Circuit Court, would be selected as an arbitrator in this case. Judge Corey, of course, is a highly respected jurist in this community and no one would honestly suggest that he would be a party to any act of collusion. As evidenced by Judge Corey's findings and award, he considered all relevant and material evidence submitted to him for his consideration by both parties and gave same serious and detailed consideration. His detailed findings clearly reflect a well-reasoned assessment of that evidence and his assessment of fair and reasonable sums in damages are undisputably supported by those findings.[14]

Clearly the undisputed facts regarding the occurrence of the accident involving Dr. Garcia and his wife aboard the Star of Louisville and the undisputed serious and significant injuries sustained by them in that accident and the participation of a highly respected jurist in this community as the arbitrator defies any contention or suggestion of "collusion". Judge Corey's assessment of the damages sustained by Dr. Garcia and his wife in their accident aboard the Star of Louisville was clearly fair and reasonable and amply supported by the evidence and record in these proceedings.

In sum, there is no evidence of collusion between the Star and Dr. and Mrs. Garcia which would render the arbitration proceeding between them null as contrary to public policy.

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[14] As previously stated, the Trial Court did not find that Appellees' contention that the Agreement between the Star and Dr. and Mrs. Garcia prior to the arbitration rendered the proceedings void as against public policy warranted a summary judgment. "...the premise is that public policy abhors improper collusion between claimants and insureds. The Court finds this contention less convincing than the Premium Cigars and non-party-to-arbitration arguments, but the result must remain." (T.R., pps. 779).

(C) AN INSURANCE AGENT AND BROKER ARE NOT NECESSARY PARTIES TO AN ARBITRATION OF AN INJURED CLAIMANT'S CLAIMS AGAINST AN INSURED/TORTFEASOR.

Appellants' contention that Judge Corey's arbitration award is not enforceable against them is erroneous.

At the outset, it should be noted that these proceedings are not an attempt to enforce an award against a necessary party to an arbitration proceeding. For example, if a dispute arose between a Plaintiff and a Defendant as to the amount of a debt under a contract between them, then it would be necessary for both parties to be participants in an arbitration proceeding deciding that factual issue for it to be binding upon both of them.

In the present case, however, the arbitrator was not called upon to resolve any issue between the Star of Louisville and its agent (Associated) and Broker (AON). The arbitrator merely assessed the amount of the monetary damages owed by the Star of Louisville to Dr. Garcia and his wife, as a result of the accident and injuries which Dr. Garcia and his wife sustained while aboard the Star of Louisville. The Star of Louisville's insurance agent and broker were simply not necessary parties to an adjudication of that claim. If that issue had been submitted to a jury, it would be absurd for Associated and AON to argue that they would have been entitled to participate in that jury trial.

In spite of their participation in the arbitration proceeding not being mandatory, both Associated and AON were invited to participate in those proceedings and both declined.

In addition, even if we were to assume arguendo that the Trial Court was correct in its ruling on this issue, such a determination would not be grounds for a summary

judgment. At best, such a ruling would merely require Dr. and Mrs. Garcia at trial to prove not only the negligence of Associated and AON but to also present evidence in support of their damage claim. In other words, it would merely result in the re-adjudication of an additional issue of fact at trial, i.e., the amount of Dr. and Mrs. Garcia's damages incurred as a result of the Star's negligence.

In sum, it is respectfully submitted that the Trial Court erred in concluding that the Star's insurance agent and broker were necessary parties to the arbitration proceeding between Dr. and Mrs. Garcia and the Star of Louisville.

In its Opinion, the Kentucky Court of Appeals recognized that claims which have been resolved in a non-adversarial manner such as a settlement has been held valid, enforceable and assignable contrary to Appellants' contention that such resolutions are "illusory";

> "Most courts have held that a settlement, where a tort victim agrees not to execute against the insured tortfeasor in exchange for an assignment of the insured's claims against his insurer or insurance agent, is not illusory. *Stateline Steel Erectors, Inc. v. Shields*, 837 A.2d 285 (N.H. 2003); *Campione v. Wilson*, 661 N.E.2d 658 (Mass. 1996); *Gray v. Grain Dealers Mutual Insurance Company*, 871 F.2d 1128 (D.C. Cir. 1989). As the Supreme Court of New Hampshire observed in *Stateline Steel Electors, Inc. v. Shields*, there is a substantial risk that a negligent agent will escape liability. Although no Kentucky appellate court has addressed this precise issue, our highest Court has upheld the assignment of an insured's claims against his insurer. And in *O'Bannon v. Aetna Casualty & Surety Company*, 678 S.W.2d 390 (Ky. 1984), our Supreme Court refused to invalidate the sort of agreement at issue here, whereby an insured assigned claims against his insurer in exchange for a release from personal liability, notwithstanding the asserted risk of collusion between the settling parties. Because of our highest Court's repeated validation of an insured's assignment of claims against his insurer, we believe that the majority position upholding assignments of claims against insurers and insurance agents, even when coupled with agreements insulating the assignor

from execution, is not only more persuasive but is more consistent with Kentucky law.[15]

In its Opinion, the Kentucky Court of Appeals however recognized the potential for a risk of collusive settlements and held that on remand that Dr. and Mrs. Garcia must prove their injuries. While Appellees believe that Judge Corey's assessment of those injuries should be affirmed under existing Kentucky case law and the majority of foreign jurisdictions which have addressed this issue, the Court of Appeals' Opinion clearly rejected Appellants' contention that the resolution of Dr. and Mrs. Garcia's claims against the Star was inappropriate and illusory. To that extent, therefore, the Kentucky Court of Appeals' Opinion should be affirmed.

III. THE ADDITIONAL ARGUMENTS ADVANCED BY APPELLANTS DO NOT SUPPORT A REVERSAL OF THE KENTUCKY COURT OF APPEALS' OPINION.

The fundamental principle with respect to assignments in Kentucky is that claims for personal injury are not assignable but essentially all other claims sounding in "contract" are assignable even though they may also sound in "tort". There is no dispute that the underlying claims of the Star against AON and Associated arise out of their contractual obligation to exercise ordinary care in placing the Star's liability coverage with an appropriate carrier. AON and Associated were well-compensated by the Star for that contractual service. In addition, AON and Associated continued to be compensated after the policy was issued for services including monitoring the financial stability of the carrier with whom that coverage was placed. Although discovery had not yet been

[15] The Court of Appeals' Opinion P.9.

concluded[16], discovery clearly indicated that the carrier with whom AON and Associated placed the Star's coverage became insolvent and that its financial difficulties were well-known within the insurance industry during the time period when AON and Associated had responsibility for the Star's coverage. There is additional evidence to suggest that AON placed and maintained the Star's coverage with that carrier in spite of its financial difficulties because of other contractual arrangements between AON and that carrier. There is no dispute that an insurance agent and broker under such circumstances owes a duty in this regard to the Star. In sum, the Star's cause of action against AON and Associated is clearly assignable under Kentucky law.

Appellants' arguments are circuitous. On one hand they argue that until a monetary judgment is obtained against the Star, there can be no assignment. In contradiction to that argument, however, they argue that there can be no judgment enforced against them since they were not parties to the underlying dispute between Dr. and Mrs. Garcia and the Star. The ultimate result of such circuitous reasoning is that there could never be an assignable claim against an insurance agent or broker since neither would ever be an actual party to the underlying dispute between the insured and the claimant.[17]

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[16] As previously noted, Appellees' expert witnesses had not even been identified at the time the Trial Court ruled as a matter of law that an insured's assignment of his claims against an agent and broker could not be assigned under Coffey. Appellants' motion for summary judgment and the Court's ruling on same was not based on any determination that the evidence precluded any factual issue in this regard. Such a motion would clearly have been premature. Therefore, for the Appellants to know suggest inadequacy of evidence regarding Appellees' violations of their duties is inappropriate.

[17] In this regard assigned claims against a liability insurance carrier for a excess judgments differ since the insurance company is directly involved in both the defense and indemnification of the tort claims against its insured or affirmatively elects not to defend its insured. Strahin v. Sullivan and Farmers & Mechanics Mutual Ins. Co., 647 S.E.2d 765 (W.Va. 2007) and Doser v. Middlesects Mutual Ins. Co., 162 Cal.Rptr. 115 (Ca. 1980) cited by Appellants are not pertinent to our analysis in this case.

The issue thus becomes not a question as to whether the Star's claims against its insurance agent and broker can be assigned but in what manner the actual damages sustained by the insured as a result of the negligence of his insurance agent or broker should be ascertained whether before or after the actual assignment has been executed. The concern in this regard, of course, is the desire of the Courts to avoid potential collusive judgments.

In this regard, it should be noted that there is no evidence of any collusiveness in the manner in which the amount of damages owed by the Star to Dr. and Mrs. Garcia was obtained. Dr. and Mrs. Garcia and the Star agreed that Honorable Ken Corey, former Judge of the Jefferson Circuit Court, would act as arbitrator. To suggest that the underlying arbitration proceeding was collusive would be an unjustified and unsubstantiated negative comment about a former judge who is well-respected throughout the legal community. The impartiality and objectivity of Judge Corey's actions as an arbitrator is clearly evidenced by the fact that his award fell within the high/low perimeters agreed upon by the parties prior to the arbitration.

In fact, neither the Trial Court nor the Court of Appeals concluded that there was any evidence of collusion. The Court of Appeals, however, acknowledged that such situations can present a "risk of collusion" and felt that an arbitrator's opinion was not an adequate substitute for a normal adversarial resolution. The Court of Appeals therefore ordered that on remand that Dr. and Mrs. Garcia would need to prove the damages from the assigned claims.

In Ayers v. C&D General Contractors, 269 F.Supp.2d 911 (W.D.Ky. 2003), cited by Appellants, the Court noted that "Kentucky courts look favorably upon consent

judgments coupled with covenants not to execute as fair outcomes in some cases". The Court noted that the issue was not whether such agreements are enforceable but who should bear the primary burden of proof;

> "Although Courts agree that consent judgments coupled with covenants not to execute are enforceable, they have taken diverse approaches to determining reasonableness or collusion. Essentially, the issue is who should bear the primary burden of proof." (At p. 916)

The Court thereupon discussed three separate approaches utilized by Courts in other jurisdictions, (1) that Courts need not to look behind consent judgments to determine if they are reasonable, (2) that an insured only has the initial burden of producing evidence that the settlement is "prima facie reasonable in amount and untainted by bad faith" and (3) that Plaintiff has the burden of showing by a preponderance of the evidence that the judgment amount was reasonable and prudent.

After discussing the three available approaches, U.S. District Court Judge John G. Heyburn, II predicted that the Kentucky Supreme Court would follow the second approach;

> "After considering the relevant Kentucky decisions and those in other jurisdictions, this Court predicts that Kentucky's highest court would follow the second approach. The Kentucky decisions discussed above reflect a public policy that strikes a balance between placing the burden on the insurer to pay whatever judgment is rendered against it when it falsely denies a defense. *Vance*, 730 S.W.2d at 522, and ensuring that such judgments are reasonable.
>
> Kentucky courts would not follow the first approach because it opens the way to fraud and collusion. Kentucky courts would not accept such settlements blindly. To follow the third approach and place the entire burden of reasonableness on the shoulders of the insured alone would subvert the state's strong interest in requiring insurers to defend, even if under a reservation of rights. On the other hand, the second approach

> more evenly divides the responsibility between both parties. It ensures that the Plaintiff provides some evidence that the amount was reasonable and therefore arguably negotiated at an arms length, but preserves the insurer's opportunity to challenge the outcome. *See also Griggs*, 443 A.2d at 174 (noting that this rule discourages "collusive at the same time [is] conducive toward encouraging settlement and protecting an insured in its efforts amicably to resolve a claim against it after having been abandoned by its carrier").
>
> Following the second approach, the Court holds that it will only approve the consent judgment if it finds: (1) Plaintiff has made a prima facie showing of reasonableness, and (2) Defendant American is unable to show by a preponderance of evidence that the amount is unreasonable or the agreement is the product of collusion or bad faith." (At p. 916)

Following the second approach adopted by Judge Heyburn, Appellees have clearly made a prima facie showing of reasonableness and Appellants have been unable to show by a preponderance of the evidence that the amount of damages assessed by Judge Corey was unreasonable or that the agreement between the Star and Dr. and Mrs. Garcia was the product of collusion or bad faith.

Appellants' final contention that permitting such agreements would cause increased litigation is neither accurate nor would it warrant the preclusion of such assignments even if substantiated. Contrary to Appellants' contentions in this regard, such assignments do not increase litigation but rather minimize and expedite the ultimate resolution of such cases. Through the assignment process, the harmed individual is able to assert claims directly against the party against whom ultimately liability should rest. To disallow such assignments would achieve the opposite result of unnecessary and protracted litigation.

In addition, as noted by the Supreme Court of Arizona in Webb v. Victoria Gittlen, supra, even if the allowance of assignments would result in some increased litigation, that is not a sufficient basis to deny an innocent victim an appropriate remedy;

> "Finally, Gittlen argues that allowing assignment would flood courts with unwarranted litigation. We think this unlikely. Although allowing assignment may lead to an increase in the number of professional negligence claims that are actually pursued, this is not necessarily a bad result. Insofar as the claims as meritorious, they will serve the goals of affording compensation for the clients who are victims of professional negligence (who benefit from the consideration they receive for assigning their claims), increasing the likelihood that the victims of the underlying tort are compensated (insofar as they can recover on the assigned claim against the agent), and deterring negligence on the part of insurance agents. *See* Michael Abramowicz, *On the Alienability of Legal Claims*,114 Yale L.J. 697, 741 (2005). The extend that allowing assignment might foster non-meritorious claims, we believe they will be better deterred by specifically targeted rules, such as *Arizona Rule of Civil Procedure 11*, rather than an absolute bar on assignment. *Cf. Guerrero, 210 Ariz, at 15 P 35, 106 P.3d at 1030* (discussing deterrents to the filing of frivolous claims).
>
> In short, the policy concerns identified by Gittlen do not support a rule generally barring the assignment of professional negligence claims against insurance agents." (At p. 389)

CONCLUSION

In sum, the Star of Louisville was placed in an untenable position. It had paid valuable commissions to its agent (Associated) and its broker (AON) to procure necessary liability insurance for its operation as a common carrier on its vessel. At the time the coverage was purchased, its agent and broker either knew or should have known

of the financial difficulty which HIH Insurance Company was experiencing and should not have placed the Star's coverage with that company.

In addition, Associated and AON's duties and responsibilities owed to the Star did not terminate upon the issuance of HIH"s policy of insurance. To the contrary, both continued to receive significant commissions on the Star's substantial premium payments on that coverage for which they were obligated to continue to ensure that the Star's insurance interests were being fully protected. That continued duty and obligation included the duty to monitor the financial condition of insurance companies with whom they had placed large commercial liability insurance policies. Both AON and Associated are uniquely situated and able to be aware of changes in the insurance market as they occur and changes in the financial situation of insurance companies with whom they place their clients' commercial liability insurance coverage. This is particularly true in the case of AON which has had an intimate and longstanding insurance program with HIH Insurance Company. AON has placed numerous clients' coverages with that particular carrier and had received substantial insurance premium commission by virtue of that ongoing relationship. Both AON and Associated failed in that continuing obligation and duty which they owed to the Star of Louisville and the citizens of our community, including Dr. and Mrs. Garcia, who have been damaged by virtue of AON and Associated's violation of their duties owed to the Star in failing to place and maintain the Star's commercial liability insurance coverage with a financially stable insurance company able to satisfy the compulsory insurance requirements of the City of Louisville.

Thereafter, the Star was presented with a significant claim for injuries sustained by Dr. Garcia and his wife to which there was essentially no defense on either the issue of

liability or damages. The Star of Louisville was therefore faced with the dilemma of an impending judgment which would result in its own bankruptcy and inability to continue doing business. Dr. Garcia and his wife were not desirous of putting the Star of Louisville out of business and were willing to forego pursuing the Star of Louisville for enforcement of any judgment in exchange for an assignment of the Star's claims against its agent and broker.

The proceedings elected to liquidate the Star's financial obligation to Dr. Garcia and his wife was an arbitration proceeding before an impartial and highly regarded jurist in this community. The damages assessed by Judge Corey following that arbitration were fair and reasonable and within the high/low parameters agreed upon by the parties prior to the mediation. It is likely that a jury may well have assessed substantially higher damages under the facts and circumstances presented in this case. In addition, although not necessary parties to that arbitration proceeding, both Associated and AON were invited to participate in those proceedings and both declined.

In conclusion, contrary to the Trial Court's ruling in this matter, the negligence claims of the Star of Louisville against its agent (Associated) and broker (AON) were assignable under existing Kentucky case law. In addition, Kentucky's public policy recognizes the assignability of causes of action as a valid and laudable means of minimizing litigation and permitting immediate and direct involvement of the primary responsible parties.

The Trial Court further erred in concluding that the agent (Associated) and broker (AON) were necessary parties to the arbitration proceeding between the Star of Louisville and Dr. and Mrs. Garcia to which they agreed as an acceptable and efficient forum for

resolving the limited factual dispute which existed between them. The Trial Court's holding on this additional issue is also contrary to Kentucky case law. Medical Protective Company of Fort Wayne Indiana v. Davis, 581 S.W.2d 25 (Ky. App. 1979).

On appeal, the Kentucky Court of Appeals correctly concluded that under controlling and long-standing Kentucky case law, assignments by an insured of its claims against its insurance agent, broker or insurance company are properly assignable and that the manner in which Dr. and Mrs. Garcia and the Star agreed upon to resolve their underlying dispute was not "illusory" but appropriate under the circumstances.

It is therefore respectfully submitted that the Kentucky Supreme Court should render an Opinion reversing the judgment of the Trial Court which granted Appellants, Associated and AON, a summary judgment and remanding this case to the Jefferson Circuit Court for further adjudication of the merits of Appellees' claims against Associated and AON.

Respectfully Submitted,

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