

# **WEBB V. GITTLEN: ASSIGNABILITY OF PROFESSIONAL NEGLIGENCE CLAIMS AGAINST INSURANCE AGENTS**

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## **INTRODUCTION**

In *Webb v. Gittlen*, the Arizona Supreme Court unanimously held that claims against insurance agents for professional negligence are assignable to third parties.<sup>1</sup> The decision overturned *Premium Cigars International, Ltd. v. Farmer-Butler-Leavitt Insurance Agency*, in which the Arizona Court of Appeals held such assignments invalid as contrary to public policy.<sup>2</sup> Although the holding in *Webb* is deliberately narrow, the opinion hints at a number of other ramifications for insurance professionals and attorneys.

## **I. FACTS AND PROCEDURAL HISTORY**

In 2000, Neal and Gail Berliant purchased The Liquor Vault, a retail liquor store located in Scottsdale, Arizona.<sup>3</sup> With the assistance of Victoria Gittlen, a licensed insurance agent, they purchased a business liability policy and a liability umbrella policy for their new business from Hartford Casualty Insurance Company (“Hartford”).<sup>4</sup> The Berliants contend that Gittlen failed to inform them that they could also purchase separate liquor liability coverage.<sup>5</sup>

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1. 174 P.3d 275 (Ariz. 2008).

2. 96 P.3d 555, 564–65 (Ariz. Ct. App. 2004).

3. *Webb*, 174 P.3d at 276. This case was an appeal from a partial dismissal pursuant to Ariz. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be based. *Webb v. Hartford Cas. Ins. Co.*, No. CV2005-093597 (Maricopa County Super. Ct. Feb. 23, 2006) (order granting motion to dismiss Counts III and IV). The appellate courts, therefore, presume the facts alleged in the complaint are true. *Filer v. Tohono O’Odham Nation Gaming Enter.*, 129 P.3d 78, 80 (Ariz. Ct. App. 2006). Some of the facts discussed *infra* may be disputed by the parties.

4. *Webb v. Gittlen*, No. 1 CA-CV 06-0300, memo. decision at 2 (Ariz. Ct. App. Mar. 3, 2007). At the time, Gittlen worked for G & G Insurance Service, but later moved to CDS Insurance Agency. *Id.* at 2 n.1. Both companies are named as co-defendants in the suit.

5. *Id.* at 3.

In 2001, The Liquor Vault sold a keg of beer to a minor, who then gave it to D.N., another minor.<sup>6</sup> After consuming some of the beer, D.N. crashed his car into a cement barrier.<sup>7</sup> A third minor who was a passenger in the car, J.W., died in the accident.<sup>8</sup>

The passenger's father, D. Jere Webb, filed a complaint against Gail and Neal Berliant and their business for the wrongful death of his son.<sup>9</sup> The Berliants made a claim to Hartford, but the insurer refused to defend the suit because the Berliants had not purchased liquor liability coverage.<sup>10</sup>

The Berliants later settled with Webb, stipulating to the entry of a \$3 million judgment against them.<sup>11</sup> As part of the settlement, Webb agreed not to execute on the judgment; in exchange the Berliants assigned to him their right to sue the insurance agents for professional negligence.<sup>12</sup> Soon thereafter, Webb filed a complaint against Gittlen and her employers for failing to advise the Berliants to purchase separate liquor liability coverage, but the trial court dismissed the claims.<sup>13</sup> In reaching its decision, the trial court relied on *Premium Cigars*,<sup>14</sup> which held that claims for professional negligence against insurance agents are not assignable to third parties.<sup>15</sup> The court of appeals affirmed the dismissal in a memorandum decision, declining to overrule *Premium Cigars*.<sup>16</sup> The Arizona Supreme Court granted Webb's petition for review.<sup>17</sup>

## II. BACKGROUND: ASSIGNABILITY OF CLAIMS IN ARIZONA

In an opinion authored by Justice Bales, the court summarized the three principles that guide Arizona courts in determining whether an unliquidated claim may be assigned to a third party: "(1) claims generally are assignable except those involving personal injury; (2) the legislature may specify whether particular claims are assignable; and (3) absent legislative direction, public policy considerations should guide courts in determining whether to depart from the general rule."<sup>18</sup>

After detailing the history of the assignability of "choses in action,"<sup>19</sup> the court noted that current Arizona law prohibits assignment of personal injury claims based on public policy concerns about the potential proliferation of "vexatious

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- 6. *Id.* at 2.
  - 7. *Id.*
  - 8. *Id.*
  - 9. *Id.*
  - 10. *Id.*
  - 11. *Webb v. Gittlen*, 174 P.3d 275, 276 (Ariz. 2008).
  - 12. *Id.*
  - 13. *Id.*
  - 14. 96 P.3d 555 (Ariz. Ct. App. 2004).
  - 15. *Webb*, 174 P.3d at 276.
  - 16. *Webb v. Gittlen*, No. CA-CV 06-0300, memo. decision at 6 (Ariz. Ct. App. 2007).
  - 17. *Webb*, 174 P.3d at 276.
  - 18. *Id.* at 276, 278 (citing RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981)).
  - 19. *Id.* at 276–78.

litigation.”<sup>20</sup> If personal injury claims are assignable, there is a risk that “unscrupulous people would purchase causes of action and thereby traffic in law suits for pain and suffering.”<sup>21</sup>

Legal malpractice claims are also nonassignable in most jurisdictions,<sup>22</sup> although a handful of states do permit it.<sup>23</sup> In Arizona, the courts follow the majority rule,<sup>24</sup> refusing to permit assignment of legal malpractice claims out of “deference to the attorney–client relationship” rather than due to “fears about trafficking in lawsuits.”<sup>25</sup> In *Schroeder v. Hudgins*, the court of appeals reasoned that the attorney–client relationship is “uniquely personal” and should not be converted into a tradable commodity.<sup>26</sup> Another concern is that attorneys involved in negotiations where their clients are trading away the right to file a malpractice suit against them “would quickly realize that the interests of their clients were incompatible with their own self-interest.”<sup>27</sup> In *Webb*, the Arizona Supreme Court explicitly stated that it has not yet decided the issue of assignability of legal malpractice claims, and it declined to do so in this case.<sup>28</sup> The court did, however, assume nonassignability for “analytical purposes” to compare the attorney–client relationship to the insurance agent–client relationship.<sup>29</sup>

20. *Id.* at 277–78 (citing *Harleysville Mut. Ins. Co. v. Lea*, 410 P.2d 495, 498–99 (Ariz. 1966); *State Farm Fire & Cas. Co. v. Knapp*, 484 P.2d 180, 181 (Ariz. 1971)).

21. *Id.* at 277 (quoting *Harleysville*, 410 P.2d at 498).

22. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Estep*, 873 N.E.2d 1021, 1026 (Ind. 2007); *Bank IV Wichita v. Arn, Mullins, Unruh, Kuhn & Wilson*, 827 P.2d 758, 765 (Kan. 1992); *Earth Sci. Labs. v. Adkins & Wondra, P.C.*, 523 N.W.2d 254, 257 (Neb. 1994); *Can Do Pension & Profit Sharing Plan & Successor Plans v. Manier, Herod, Hollabaugh & Smith*, 922 S.W.2d 865, 869 (Tenn. 1996); *MNC Credit Corp. v. Sickels*, 497 S.E.2d 331, 333 (Va. 1998); *Kommavongsa v. Haskell*, 67 P.3d 1068, 1078 (Wash. 2003); *Del. CWC Liquidation Corp. v. Martin*, 584 S.E.2d 473, 477 (W. Va. 2003). For an overview of arguments in favor of nonassignability, see John M. Limbaugh, Note, *The Sacrificial Attorney: Assignment of Legal Malpractice Claims*, 65 MO. L. REV. 279 (2000).

23. *See, e.g.*, *N.H. Ins. Co. v. McCann*, 707 N.E.2d 332, 336 (Mass. 1999); *Thurston v. Cont’l Cas. Co.*, 567 A.2d 922, 923 (Me. 1989); *Hedlund Mfg. Co. v. Weiser, Stapler & Spivak*, 539 A.2d 357, 359 (Pa. 1988); *Cerberus Partners, L.P. v. Gadsby & Hannah*, 728 A.2d 1057, 1060 (R.I. 1999). For a broad argument favoring assignability, see Kevin Pennell, Note, *On the Assignment of Legal Malpractice Claims: A Contractual Solution to a Contractual Problem*, 82 TEX. L. REV. 481 (2003).

24. *Capitol Indem. Corp. v. Fleming*, 58 P.3d 965, 969 (Ariz. Ct. App. 2002); *Botma v. Huser*, 39 P.3d 538, 541 (Ariz. Ct. App. 2002); *Kiley v. Jennings, Strouss & Salmon*, 927 P.2d 796, 800 (Ariz. Ct. App. 1996); *Schroeder v. Hudgins*, 690 P.2d 114, 118 (Ariz. Ct. App. 1984).

25. *Webb*, 174 P.3d at 277. Of course, the legislature could change the rule if it wishes. *See supra* note 18 and accompanying text.

26. *Schroeder*, 690 P.2d at 118 (citing *Goodley v. Wank & Wank, Inc.*, 62 Cal. App. 3d 389, 395 (1976)).

27. *Botma*, 39 P.3d at 541 (quoting *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 343 (Ind. 1991)).

28. *Webb*, 174 P.3d at 278.

29. *Id.*

### III. PROFESSIONAL NEGLIGENCE OF INSURANCE AGENTS—THE *PREMIUM CIGARS* RULE

In *Premium Cigars*, the Arizona Court of Appeals adopted a view contrary to the majority of jurisdictions<sup>30</sup> and held that claims for professional negligence against insurance agents were not assignable to third parties.<sup>31</sup> The court based its decision on the similarity between the attorney–client relationship and the insurance agent–client relationship, and held that negligence claims against insurance agents should not be assignable for the same reasons malpractice claims against attorneys are not assignable.<sup>32</sup> The court declared the attorney–client and insurance agent–client relationships similar in three important ways.

First, the relationship between an insurance agent and a client is personal because “[a]n insurance agent performs a personal service for his client, in advising him about the kinds and extent of desired coverage and in choosing the appropriate insurance contract for the insured.”<sup>33</sup> The court reasoned that because insurance agents have no duty to non-clients,<sup>34</sup> the transaction is for the sole benefit of the client and therefore cannot be considered “simply a commercial transaction.”<sup>35</sup> Moreover, insurance agents have “specific duties of non-disclosure” that protect private communications between the agent and client, similar to the attorney’s duty of confidentiality.<sup>36</sup>

Second, the court of appeals noted that Arizona insurance agents owe a duty to their clients similar to the duty owed by attorneys: “to exercise reasonable care, skill and diligence” in procuring insurance for clients.<sup>37</sup> Arizona is one of a minority of jurisdictions that holds insurance agents to this professional standard of care rather than to the ordinary “reasonably prudent person under the

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30. See, e.g., *Troost v. Estate of DeBoer*, 202 Cal. Rptr. 47, 52 (Ct. App. 1984); *Forgione v. Dennis Pirtle Agency, Inc.*, 701 So. 2d 557, 560 (Fla. 1997); *McLellan v. Atchison Ins. Agency Inc.*, 912 P.2d 559, 565 (Haw. 1996); *Garcia v. Associated Ins. Serv., Inc.*, No. 2006-CA-001737-MR, 2007 WL 4355198, at \*3 (Ky. Ct. App. 2007); *Campione v. Wilson*, 661 N.E.2d 658, 662 (Mass. 1996); *Wangler v. Lerol*, 670 N.W.2d 830, 837–38 (N.D. 2003); *Kobbeman v. Oleson*, 574 N.W.2d 633, 636 (S.D. 1998); *Tip’s Package Store, Inc. v. Commercial Ins. Managers, Inc.*, 86 S.W.3d 543, 553–55 (Tenn. Ct. App. 2001); *Steinmetz v. Hall-Conway-Jackson, Inc.*, 741 P.2d 1054, 1056–57 (Wash. 1987). *But see* *Or. Mut. Ins. Co. v. Gibson*, 746 P.2d 245, 247 (Or. Ct. App. 1987).

31. *Premium Cigars Int’l, Ltd. v. Farmer-Butler-Leavitt Ins. Agency*, 96 P.3d 555, 565 (Ariz. Ct. App. 2004).

32. *Id.* at 564 (comparing the insurance agent–client relationship to the attorney–client relationship at least six separate times).

33. *Id.* at 563–64 (quoting *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 402 (Ariz. 1984)).

34. *Id.* (citing *Napier v. Bertram*, 954 P.2d 1389, 1395 (Ariz. 1998)).

35. *Id.* at 564.

36. *Id.* (citing ARIZ. REV. STAT. ANN. § 20-2113 (2002 & Supp. 2003)).

37. *Id.* at 564 (quoting *Darner*, 682 P.2d at 402); *see also* *Sw. Auto Painting & Body Repair, Inc. v. Binsfeld*, 904 P.2d 1268, 1271–72 (Ariz. Ct. App. 1995) (employing the same “reasonable care, skill and diligence” duty for insurance agents).

circumstances” standard applied to salespeople.<sup>38</sup> According to the Arizona Supreme Court, when an insurance agent “holds himself out to the public as possessing special knowledge, skill or expertise [he] must perform his activities according to the standard of his profession.”<sup>39</sup> For the *Premium Cigars* court, this higher standard justified treating insurance agents and attorneys similarly in claims for failing to perform to the standards of their respective professions.<sup>40</sup>

Finally, the court of appeals reasoned that permitting assignment of professional negligence claims against insurance agents carried many of the same risks as permitting assignment of attorney malpractice claims and thus implicated the same public policy considerations favoring nonassignability.<sup>41</sup> Specifically, the court worried that such claims would become commercialized and used as “bargaining chips” in settlement negotiations.<sup>42</sup> The court also suggested that when an insurance carrier refused to defend a claim, insureds would negotiate settlements with third parties, which could include assignments of professional negligence claims against insurance agents.<sup>43</sup> This would force insurance carriers to defend against “claims brought by strangers” without the ability to discover the full factual basis for the cause of action, thus implicating the “dangers of maintenance and champerty.”<sup>44</sup>

When Webb appealed the dismissal of his claims against Gittlen and her employers, he did not attempt to challenge the applicability of the *Premium Cigars* rule or to distinguish the facts of his own case; rather, Webb stated forthrightly that *Premium Cigars* was wrongly decided and urged the court of appeals to reverse its decision from three years earlier.<sup>45</sup> Noting that Webb raised arguments “substantially identical” to those considered in *Premium Cigars*, the court of appeals reiterated its agreement with the decision and affirmed the trial court’s dismissal.<sup>46</sup>

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38. *Sw. Auto Painting*, 904 P.2d at 1272. In most jurisdictions, insurance agents are not held to a professional standard of care unless some “special circumstances” exist, such as when a client makes payments beyond the amount of the premiums in exchange for advice. For a comprehensive treatment of the standard of care for insurance agents, see Daniel Gregory Sakall, Note, *Can The Public Really Count On Insurance Agents To Advise Them? A Critique of the “Special Circumstances” Test*, 42 ARIZ. L. REV. 991 (2000).

39. *Darner*, 682 P.2d at 403; see also *Sw. Auto Painting*, 904 P.2d at 1272 (reiterating the higher professional standard of care for insurance agents).

40. *Premium Cigars*, 96 P.3d at 564.

41. *Id.*

42. *Id.*

43. *Id.* at 564–65.

44. *Id.* (quoting *Karp v. Speizer*, 647 P.2d 1197, 1199 (Ariz. Ct. App. 1982)).

45. *Webb v. Gittlen*, No. 1 CA-CV 06-0300, memo. decision at 4 (Ariz. Ct. App. Mar. 3, 2007).

46. *Id.* at 4, 6.

#### IV. PERSONAL VS. UNIQUELY PERSONAL—*WEBB* ROLLS BACK *PREMIUM CIGARS*

In reversing the court of appeals' decision, the Arizona Supreme Court explicitly "reject[ed] the *Premium Cigars* rationale."<sup>47</sup> Assignability of professional negligence claims against insurance agents cannot be determined by analogy to legal malpractice claims, the court held, because "[t]he relationship between an insurance agent and client, while certainly important, differs from that between an attorney and client in several critical respects."<sup>48</sup> The court characterized the attorney–client relationship as "uniquely personal," whereas the insurance agent–client relationship is merely "personal" and therefore lacking justification to prohibit assignment of professional negligence claims.<sup>49</sup>

One critical difference is the duty owed by members of each profession to their clients. Relying on the same cases cited in *Premium Cigars*,<sup>50</sup> the court rejected the idea that both attorneys and insurance agents are subject to the same professional standard of care. Attorneys owe "duties of loyalty, care, and obedience, whose relationship with the client must be one of 'utmost trust.'"<sup>51</sup> Insurance agents, on the other hand, "owe *only* a duty of 'reasonable care, skill, and diligence' . . . ."<sup>52</sup> The court recognized the same professional duty owed by insurance agents as *Premium Cigars* did, but rejected the equivalency asserted by the court of appeals and minimized the professional duty in comparison to an attorney's duty.<sup>53</sup> The court also noted that attorneys have a fiduciary relationship with their clients, whereas insurance agents generally do not.<sup>54</sup>

The court also described the difference in the quantity and nature of private information generally shared with insurance agents and attorneys, both of whom are under confidentiality requirements. People will share information about their health, finances, and personal habits with an insurance agent, but they share much more sensitive information with their attorneys—including information that could expose them to civil or criminal liability.<sup>55</sup> Thus, attorney–client confidentiality serves the vital societal goals of ensuring effective counsel and

47. *Webb v. Gittlen*, 174 P.3d 275, 279 (Ariz. 2008).

48. *Id.*

49. *Id.* at 280.

50. *See supra* notes 37–40 and accompanying text.

51. *Webb*, 174 P.3d at 279 (citing *In re Piatt*, 951 P.2d 889, 891 (Ariz. 1997)).

52. *Id.* (emphasis added) (citing *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 402 (Ariz. 1984); *Sw. Auto Painting & Body Repair, Inc. v. Binsfeld*, 904 P.2d 1268, 1272 (Ariz. Ct. App. 1995)).

53. *Id.*; *see also supra* notes 37–40 and accompanying text.

54. *Webb*, 174 P.3d at 279. The significance of the fiduciary relationship is unclear. The nonfiduciary nature of the insurance agent–client relationship did not stop the court of appeals from declaring that agents and attorneys have similar duties in *Premium Cigars*, and the *Webb* court concedes that the fiduciary relationships of auditors and trustees do not earn nonassignability for those professions. *Id.* (citing *Standard Chartered PLC v. Price Waterhouse*, 945 P.2d 317, 328 (Ariz. Ct. App. 1996) (auditors); *Forest Guardians v. Wells*, 34 P.3d 364, 369 (Ariz. 2001) (trustees)). Under either court's view, it seems that the existence of a fiduciary relationship is a poor predictor of assignability.

55. *Id.*

accessing legal advice without fear of retribution, whereas insurance agent–client confidentiality protects the significant but lesser goal of personal privacy.<sup>56</sup> The court illustrated the relative importance of these goals by noting that attorneys may disclose client secrets only under extremely limited circumstances, such as attempting to prevent a crime,<sup>57</sup> while insurance agents have seventeen different statutory exemptions under which they may disclose their client’s information, including disclosure to affiliates for marketing purposes.<sup>58</sup>

Ultimately, the court drew the assignability line between the “personal” nature of the insurance agent–client relationship and the “uniquely personal” nature of the attorney–client relationship.<sup>59</sup> In doing so, the court reestablished the “uniquely personal relationship” standard for nonassignability articulated in *Schroeder v. Hudgins*.<sup>60</sup>

## V. ANSWERING THE POLICY ARGUMENTS AGAINST ASSIGNABILITY

The court also briefly addressed a number of policy arguments raised by Gittlen. First, the court dismissed as unpersuasive the contention that assignments of professional negligence claims would become bargaining chips in settlement negotiations and thus commercialize the personal relationship between agent and client.<sup>61</sup> Calling it “odd” to suggest that a relationship born of a commercial transaction should not be commercialized, the court noted that clients should be free to decide if they would rather maintain their personal relationships with their agents or bargain away their rights to sue their agents.<sup>62</sup>

Second, Gittlen argued that permitting a stranger to the agent–client relationship to bring suit allows the non-client to benefit from that relationship in violation of *Napier v. Bertram*,<sup>63</sup> which held that insurance agents do not have a duty to non-clients.<sup>64</sup> The court dismissed the argument as misconstruing *Napier*, since an assignee is not a stranger filing suit but rather a representative of the client and thus is standing in for someone who had been part of the relationship.<sup>65</sup> Further, the court stated that assignment does not expand the number of beneficiaries in the agent–client relationship because although the agent has no

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56. *Id.* at 279–80.

57. *Id.* at 279 (citing ARIZ. R. SUP. CT. 42; ER 1.6(b), (d)(1), (d)(3)–(4)).

58. *Id.* (citing ARIZ. REV. STAT. ANN. § 20-2113 (2002 & Supp. 2007)).

59. *Id.* at 280.

60. 690 P.2d 114, 118 (Ariz. Ct. App. 1984). Significantly, *Premium Cigars* did not characterize the insurance agent–client relationship as “uniquely personal.” *Premium Cigars Int’l, Ltd. v. Farmer-Butler-Leavitt Ins. Agency*, 96 P.3d 555 (Ariz. Ct. App. 2004).

61. *Webb*, 174 P.3d at 279. This concern is slightly different from the one expressed in *Premium Cigars*, where the court worried about commercialization of the negligence claims themselves, rather than the personal relationship between agent and client. See *Premium Cigars*, 96 P.3d at 564.

62. *Webb*, 174 P.3d at 280. It might also be noted that any personal relationship between agent and client could suffer if the client sues the agent for professional negligence directly rather than assigning the claim to a third party.

63. 954 P.2d 1389, 1394 (Ariz. 1998).

64. *Webb*, 174 P.3d at 280.

65. *Id.*

duty to non-clients, *Napier* acknowledged that the duties of insurance agents “are discharged for the benefit of the non-client.”<sup>66</sup>

Third, the court addressed the contention that allowing assignment of professional negligence claims would bind insurance agents to stipulated judgments, collusively inflated by settling plaintiffs and clients, with no chance to contest the settlement.<sup>67</sup> The court dismissed this as a misunderstanding of *Morris*<sup>68</sup> and *Damron*<sup>69</sup> agreements. Under these agreements, the insured admits liability and stipulates to a judgment, then assigns to the plaintiff the insured’s rights and claims against the insurer in exchange for the plaintiff’s agreement not to execute the judgment against the insured.<sup>70</sup> Such agreements, however, are binding only against the insurer and are only permitted to protect the insured from a potential judgment in excess of the policy limits.<sup>71</sup> Moreover, the insurer is protected from collusive agreements and (at least in *Morris* situations) from unreasonable and imprudent settlements.<sup>72</sup> Because insurance agents merely sell insurance policies and do not defend or indemnify their clients, they cannot be bound by *Morris* or *Damron* agreements.<sup>73</sup>

Finally, Gittlen suggested that the use of *Morris* and *Damron* agreements would lead to an increase in meritless professional negligence claims against agents when insurers refuse to defend their clients. As Gittlen put it, “[i]f the insured is already planning on assigning its rights against its insurance company to the claimants, why not also assign any potential agent malpractice claim (no matter how thin) to sweeten the deal?”<sup>74</sup> The court suggested that an increase in professional negligence claims “is not necessarily a bad result” if the claims are meritorious; such claims would increase compensation to victims and deter future negligence.<sup>75</sup> Non-meritorious claims are better handled by other rules, such as

66. *Id.* (citing *Napier*, 954 P.2d at 1394). The court gives this quote a surprisingly broad meaning, since *Napier* did not say that *all* duties of an insurance agent are discharged for the benefit of the non-client. The quoted passage referred to uninsured motorist coverage purchased by a taxicab owner to cover passengers who might be injured by negligent third-party drivers. *Napier*, 954 P.2d at 1394. In such a situation, the agent selling the coverage truly is acting for the benefit of a non-client. For policies where only the insured stands to recover a loss, the insurance agent benefits non-clients only in the sense that risk sharing is a benefit to society.

67. *Webb*, 174 P.3d at 280.

68. *See* *United Servs. Auto. Ass’n v. Morris*, 741 P.2d 246 (Ariz. 1987).

69. *See* *Damron v. Sledge*, 460 P.2d 997 (Ariz. 1969).

70. *Webb*, 174 P.3d at 280.

71. *Id.* at 280–81.

72. *Id.* at 281 (citing *Morris*, 741 P.2d at 253).

73. *Id.* The court also notes that the requirements for issue preclusion would prevent an agent from being bound by a settlement to which she was never a party. *Id.* (citing *Maricopa-Stanfield Irrigation & Drainage Dist. v. Robertson*, 123 P.3d 1122, 1128–29 (Ariz. 2005)).

74. Appellees’ Supplemental Brief at 11, *Webb*, 174 P.3d 275 (No. CV-07-0127-PR).

75. *Webb*, 174 P.3d at 281.



Rule 11 of the Arizona Rules of Civil Procedure, than by an outright ban on assignments.<sup>76</sup>

## VI. IMPLICATIONS BEYOND ASSIGNABILITY

The central holding in *Webb* is fairly straightforward: professional negligence claims against insurance agents may be assigned to third parties, and thus the *Premium Cigars* rule to the contrary is overturned. The language of the opinion, however, suggests a number of implications beyond this narrow holding.

Despite the court's protestations that it has not ruled on the assignability of malpractice claims against attorneys,<sup>77</sup> the tone of the opinion strongly suggests that the court has no desire to disturb the decisions from the court of appeals on that issue. The court of appeals has held repeatedly that malpractice claims against attorneys are nonassignable.<sup>78</sup> While the court's language may have been influenced by the fact that it was assuming nonassignability of malpractice claims,<sup>79</sup> the opinion does not criticize either the decisions or reasoning of the court of appeals on the issue. The court already found reason to decline one opportunity to review the issue,<sup>80</sup> and it seems unlikely that the court will be receptive to arguments for assignability of attorney malpractice claims should it ever face the issue squarely.

Nor does the court seem receptive to arguments that insurance agents owe a fiduciary duty to their clients. The emphasis the court placed on this point was not strictly necessary for the issue of assignability of professional negligence claims,<sup>81</sup> so it is possible to read the opinion as a direct rejection of the assertion that insurance agents are fiduciaries.<sup>82</sup> To the extent that it had been unresolved, the court's opinion brought additional clarity to the question.<sup>83</sup>

The opinion also further clarifies that insurance agents do not have an identifiable "duty to advise" their clients as a matter of law.<sup>84</sup> The court cited approvingly an earlier holding that an insurance agent's responsibility to advise clients of necessary and available coverages is a question of breach rather than

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76. *Id.* (citing ARIZ. R. CIV. P. 11 requiring attorneys or parties to make a reasonable inquiry into the facts and certify that pleadings and motions are made in good faith and not for an improper purpose such as harassment).

77. *Id.* at 278 ("[T]his court has not yet decided this issue. . . . We need not decide today whether legal malpractice claims are assignable . . .").

78. *See supra* notes 22–27 and accompanying text.

79. *See supra* note 28–29 and accompanying text.

80. *Botma v. Huser*, 39 P.3d 538 (Ariz. Ct. App. 2002), *review denied*, No. CV-02-0119-PR (Ariz. June 25, 2002).

81. *See supra* note 54.

82. *See, e.g.*, Brief of Amicus Curiae Independent Insurance Agents and Brokers of Arizona at 13, *Webb*, 174 P.3d 275 (No. CV-07-0127-PR) ("There is no meaningful distinction between the client relationships of attorneys and [agents]. Both owe fiduciary duties . . .").

83. *Webb v. Gittlen*, 174 P.3d 275, 279 (Ariz. 2008) ("[I]nsurance agents generally are not fiduciaries . . ."); *see also supra* note 54 and accompanying text.

84. *See Webb*, 174 P.3d at 279 (citing with approval the analysis from *Sw. Auto Painting & Body Repair, Inc. v. Binsfeld*, 904 P.2d 1268, 1272 (Ariz. Ct. App. 1995)).

duty.<sup>85</sup> Whether an insurance agent's failure to advise of certain coverages violates the duty of reasonable care, skill, and diligence is a question of fact to be decided in light of expert testimony about industry practices.<sup>86</sup>

Perhaps most significantly, the court suggests by its holding and by its eloquent language that attorneys truly stand alone among professionals in the weighty duty owed to their clients.<sup>87</sup> The court used the duty owed by attorneys to clients as a dividing line and lumped insurance agents with other professionals on the "lesser duty" side of the line.<sup>88</sup> This leaves attorneys standing pretty much alone on their side of the line, and makes it more difficult to argue that attorneys should be expected to act no differently than other professionals in their dealings with clients. While the court may never take up the issue of assignability, this opinion may well have an impact in future attorney malpractice cases.

### CONCLUSION

After *Webb v. Gittlen*, Arizona joins the majority of jurisdictions that permit assignment of professional negligence claims against insurance agents. The relationship between insurance agents and their clients is personal, but it is not uniquely personal like the relationship between attorneys and their clients. Absent this uniquely personal relationship, the Arizona Supreme Court found no compelling justifications for maintaining the nonassignability rule that prevailed in Arizona for more than five years.

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85. *Id.*

86. *See Sw. Auto Painting*, 904 P.2d at 1272 n.3 (disapproving a trial court's summary rejection of an expert witness who was presented to assist the trier of fact in determining the professional standard of care includes a responsibility to advise clients of available coverages).

87. *See supra* notes 48–60 and accompanying text.

88. *See supra* notes 59–60 and accompanying text.