THE INCREASING PLAINTIFF POOL: AN ATTORNEY'S LIABILITY TO THIRD PARTIES

I. INTRODUCTION

Liability to a third-party for negligence and breach of contract is far from a new concept in the law, outside the traditional "professional" fields. However, an emerging trend is attempting to hold attorneys liable to parties other than their clients when malpractice occurs. According to an American Bar Association survey, the percentage of all legal malpractice claims brought by nonclients has escalated from 8% in 1977 to 21% in 1985.\(^1\) Currently, lawsuits brought against attorneys account for more economic negligence cases than suits involving almost any other group of defendants.\(^2\)

Some states still have privity requirements, i.e., that connection or relationship which exists between two or more contracting parties.\(^3\) In those states, no one other than the actual client can maintain an action against an attorney for malpractice. However, the majority of the states to consider this issue, especially in the context of will drafting, have either abrogated or relaxed the privity requirement.\(^4\) This has led to what some call the most potentially explosive development in the field of legal malpractice.\(^5\) An example of the ramifications of legal malpractice liability to third parties is shown in the recent case of a large Philadelphia law firm that settled a civil suit brought by the Federal Savings and Loan Insurance Corporation for legal advice given to a failed savings and loan. The case reportedly settled for $50 million.\(^6\)

---

1. See Standing Comm. on Lawyer's Prof'l Responsibility, American Bar Association, Profile of Legal Malpractice 48 (1986).
4. "[T]he present state of the law governing attorney liability to nonclients is far from settled. Although some commentators suggest that the weight of the authority supports the strict privity rule, most nonetheless agree that the trend is against this requirement." Flaherty v. Weinberg, 492 A.2d 618 (Md. 1985).
II. THE DOWNFALL OF HISTORICAL STRICT PRIVITY REQUIREMENTS

Historically, strict privity was required for an action to be brought against an attorney for malpractice.\(^7\) The close tie between professional malpractice and privity is so strong that some states have reaffirmed the need for privity between the client and the attorney in order for a malpractice action to stand.\(^8\)

However, the areas of professional malpractice, which so long had been off limits to potential plaintiffs with no privity with the professional, began to be penetrated with *Ultramares Corp. v. Touche, Niven & Co.*\(^9\) The court in *Ultramares*, while declining to extend privity to the plaintiff, held that the defendant accountant could have been held liable for damages caused by reliance by a third party on negligent representations if the defendant knew of a specific, identifiable third party who would rely on those representations.\(^10\) The court still reflected a reluctance to extend privity, however, and held that privity would be more likely to fall if fraud were involved.\(^11\) Some argue that legal malpractice should be controlled by a similar rule: that absent proof of fraud or other bad faith, attorneys should be immune from liability to third parties.\(^12\) However, that is not the universal rule.

III. THE CURRENT TRENDS: BREACH OF CONTRACT VS. INTENDED THIRD-PARTY BENEFICIARY TESTS

Over twenty years after *Ultramares*, California became the forerunner in recognizing professional liability beyond the traditional privity requirement with its decision in *Biakanja v. Irving.*\(^13\) In *Biakanja*, a no-

---

10. See id. at 446.
11. See id. at 448.
tary public prepared a will for the plaintiff’s brother which designated the plaintiff as the sole beneficiary.\textsuperscript{14} Upon his death, it was discovered that the will was not properly attested. The plaintiff’s brother’s estate passed by intestate succession, resulting in the plaintiff only receiving a one-eighth share of the estate.\textsuperscript{15} The California court held that the sole beneficiary of a will negligently prepared by a notary public could recover from the notary for the negligent preparation of the will.\textsuperscript{16}

Less than three years later, this concept was broadened to include attorneys. In \textit{Lucas v. Hamm},\textsuperscript{17} the court applied the \textit{Biakanja} reasoning to allow various will beneficiaries to recover against an attorney who had negligently prepared a will which violated several sections of state law, including the rule against perpetuities. In \textit{Lucas v. Hamm}, the California court interpreted a number of factors originally set forth in \textit{Biakanja} with regard to their applicability to attorneys in legal malpractice cases. Known as the \textit{Lucas v. Hamm} factors, they are:

1. The extent to which the transaction was intended to affect the plaintiff;
2. The foreseeability of harm to the plaintiff;
3. The degree of certainty that the plaintiff suffered injury;
4. The closeness of the connection between the defendant’s conduct and the injury suffered;
5. The moral blame attached to the defendant’s conduct; and,
6. The policy of preventing future harm.\textsuperscript{18}

When addressing the issue of legal malpractice again in 1969, the court used these factors to rest the area of legal malpractice squarely in tort law.\textsuperscript{19} In \textit{Heyer v. Flaig},\textsuperscript{20} the plaintiffs contended that the defendant attorney negligently drafted the testator’s will. The defendant attorney argued that the statute of limitations had expired because of the length of time between the drafting of the will and the time the testator died. The court held that an action for negligent drafting of a will does not accrue until the testator dies, because the attorney’s negligence is continuing and incomplete until that time.\textsuperscript{21}

\begin{itemize}
\item[14.] See \textit{id.} at 17.
\item[15.] See \textit{id.}
\item[16.] See \textit{id.}
\item[17.] 364 P.2d 685 (Cal. 1961).
\item[18.] See \textit{id.} at 687.
\item[20.] \textit{Id.}
\item[21.] See \textit{id.} at 168.
\end{itemize}
Interestingly, all of the early California cases brought by third parties for legal malpractice involved negligently drafted wills. In Goodman v. Kennedy, the plaintiffs were stockholders in a corporation and brought an action against an attorney who had negligently informed certain corporate officers that they could sell stock to the plaintiffs without jeopardizing the corporation’s exemption from federal securities law registration requirements. That advice was untrue and the plaintiffs’ stock decreased in value. However, the court refused to extend legal liability to the attorney because it concluded that the plaintiffs were not intended beneficiaries. The court further held that the attorney had “no relationship” with the plaintiffs that would give rise to a duty of care, citing lack of evidence that the misinformation was relayed to the plaintiffs.

Other states, when addressing the issue of legal liability to third parties, have traditionally based their decisions on either a negligence theory, a third-party beneficiary theory, or a combination of the two. The third-party beneficiary theory was used, successfully, in Louisiana in Speedee Oil Change No. 2, Inc. v. National Union Fire Ins. Co. In Speedee, a potential corporation was trying to purchase a lease agreement from an already-existing business. The promoter of the corporation sought the advice of an attorney with regard to the terms of the lease and the time when the corporation needed to exercise its renewal option. The attorney told the promoter that the corporation had thirty days after the expiration of the lease to renew it when, in fact, the last day to renew the lease was the last day of the lease. In reliance upon the attorney’s advice to the promoter, the corporation failed to renew a lease option prior to its expiration. Relying on the theory that the corporation was the intended third-party beneficiary of the attorney-client relationship between the promoter and the attorney, the Louisiana court allowed the

---

22. 556 P.2d 737 (Cal. 1976).
23. See id. at 741.
24. See id. at 743.
25. See id.
27. 444 So. 2d 1304 (La. 1984).
28. See id. at 1307.
29. See id. at 1306.
corporation’s action for legal malpractice.30

Similarly, Maryland also adopted the “intended third-party beneficiar-y” theory in Prescott v. Coppage.31 Prescott involved an attorney who was appointed as “special counsel” to aid a receiver in his duties.32 The court found that the creditors of the bank in receivership were third-party beneficiaries to the relationship between Prescott, as the attorney assisting the receiver, and the bank.33 The court held that Prescott knew or should have known about a continuing obligation to a preferred creditor but allowed distribution to be made to creditors of a lower priority.34 Therefore, even though there was no attorney-client relationship between Prescott and the creditor, the court allowed liability for legal malpractice.

However, not all courts have followed this example. The Colorado Supreme Court recently reaffirmed its decision not to allow third parties to sue attorneys for malpractice.35 In Methaffy, Rider, Windholz & Wilson v. Central Bank of Denver,36 the attorneys issued an opinion letter stating that a lawsuit against their client was without merit.37 Central Bank relied on the opinion letter in issuing over $5 million in bonds to the attorneys’ client.38 The court in the underlying action then granted partial summary judgment against the attorneys’ client, effectively invalidating the bonds issued by Central Bank.39 The bank sued the attorneys for negligent misrepresentation and legal malpractice. The court affirmed its previous holding that a party must prove the existence of an attorney-client relationship between the complaining party and the lawyer in order to prevail on a claim for legal malpractice.40 However, the court did let an action proceed against the law firm under the tort of negligent misrepresentation in dealings between the attorneys and Central Bank.41

30. See id. at 1307.
31. 296 A.2d 150 (Md. 1972).
32. See id. at 156.
33. See id.
34. See id. at 157.
36. Id.
37. See id. at 233.
38. See id. at 234.
39. See id.
40. See Methaffy, 892 P.2d at 239.
41. See id.
IV. INSURANCE COMPANIES SUING ATTORNEYS REPRESENTING THEIR INSURED: WHERE DOES THE ATTORNEY’S DUTY LIE?

Other trends are emerging in legal malpractice, taking the gravamen of the legal malpractice field away from will drafting toward more ambiguous cases of malpractice. The most alarming new area of legal malpractice for defense attorneys is suits by primary insurance carriers against defense counsel based on direct duty notions, as well as equitable subrogation principles. With the increase of in-house counsel for insurance companies, as well as the emphasis on cost, efficiency, and the bottom line, insurers are less hesitant to pursue a legal malpractice action against an attorney whom the insurance company has hired to represent the insured. Although some courts that have addressed this issue refuse to allow such claims by an insurance company against an attorney, the growing trend seems to be to allow such actions. For example, in New York, the court adhered to the privity requirement and did not allow the insurance company to sue the insured’s attorney.

However, Illinois and Michigan courts have decided the issue by holding the other way. In *Smiley v. Manchester Ins. & Indem. Co.*, the attorney for the insured/defendant failed to respond to an offer by the plaintiff to settle a case for the insurance policy limits. When the insurance company was later required to pay in excess of the insurance policy limits, it sued the insured’s attorney. The court allowed the action to stand, even though the attorney’s true client (the insured) was not a party. Similarly, the Michigan court allowed an insurance company to maintain a cause of action against an attorney that represented the insured. In *Atlanta Int’l Ins. Co. v. Bell*, the attorney representing the insured failed to raise an affirmative defense. The insurance company sued the defense counsel and the court allowed the action to stand. The court

---

43. *See id.*
45. 375 N.E.2d 118 (Ill. 1978).
47. *Id.*
recognized a "tripartite" relationship among the insured, insurer, and defense counsel. Although it recognized this situation as delicate, it also found that the allowance of legal malpractice actions would benefit the relationship, reasoning that there is no reason to make the insured and the insurance company suffer for the negligent acts of the attorneys.48 Illinois again addressed this issue in *Mid-America Bank & Trust Co. v. Commercial Union Ins. Co.*49 There, the insured requested the attorney to settle the case within the policy limits of the insurance policy. The insurer refused, as did the attorney representing the insured. A judgment was rendered against the defendant in the underlying case of $850,000 more than the policy limits. The insured sued and the court allowed the action to stand.50

V. OTHER THIRD PARTY ACTIONS

A. IS AN ATTORNEY LIABLE TO HIS OR HER CLIENT'S ADVERSARY?

Although quite uncommon, some nonclients have been allowed to bring malpractice actions against attorneys representing their adversaries. The general rule is that an attorney is not liable to an adversary for professional negligence.51 However, this rule has not been held applicable if the attorney's malpractice during the course of the litigation directly damages the opponent. Most of the examples of an attorney being held liable to the opponent is when the attorney commits a procedural error or oversight during the course of the case, causing the opponent's attorneys and/or the opponent to incur economic injury.

For example, in *Sommer v. Fucci*,52 the plaintiff's attorney caused a default to be entered in the case against the defendant. After the plaintiff obtained new counsel, the plaintiff's former attorney was ordered to pay $100 to the defendant. The court held that it was proper to impose a penalty upon the plaintiff's former attorney personally for his neglect in causing the default. The defendant's attorneys were ordered to pay a

48. See id.
50. See id.
51. See Joan Teshima, Attorney's Liability, To One Other than Immediate Client, for Negligence in Connection with Legal Duties, 61 A.L.R. 4TH 615 (1994).
penalty to the plaintiff in *Kahn v. Stamp*\(^{53}\) after they overlooked the existence of an outstanding preclusion order. Similarly, in *Gottlieb v. Edelstein*,\(^{54}\) the defendant's attorney failed to inform the court that his client was deceased. The court granted the plaintiff and her attorney $1,500 in damages to be paid by the defendant's attorney.

Similarly, in *McEvoy v. Helikson*,\(^{55}\) the court allowed the plaintiff's action against the attorney who had previously represented his wife. In that case, the attorney acted as an escrow agent during the divorce proceedings between the plaintiff and his wife. The attorney was also representing the wife. Although the court did not allow an action for legal malpractice, per se, it did allow the plaintiff to bring an action for negligence with regard to the attorney's actions as an escrow agent.

**B. Liability of Attorneys in Actions Brought by Other Attorneys**

Even more peculiar than actions against attorneys by adversaries of their clients are actions against attorneys by other attorneys. Although these generally have not been very successful, it is of interest to note what type of claims are being filed. In *Held v. Arant*,\(^{56}\) the court dismissed an action by a previously-retained attorney against the subsequently-retained attorney on the same action. In that case, the client sued the first attorney who had represented him in a patent matter. The first attorney filed a cross-claim against the attorney subsequently hired by the client. The first attorney claimed that the subsequent attorney had settled claims which were defensible, thus causing the first attorney to be subject to malpractice and harm to his reputation. In dismissing the cross-claim, the court held that liability for negligence of an attorney, like that of all other persons, is limited by the concept of duty. The court seemed to think that his case would impinge too much on the sanctity of the attorney-client relationship and the ability of the attorney to do what is in the best interests of his or her client.\(^{57}\)

There have been other attempts by attorneys to hold subsequent and/or previous attorneys liable for their actions, to no avail.\(^{58}\) There

\(^{54}\) 375 N.Y.S.2d 532 (N.Y. 1975).
\(^{55}\) 563 P.2d 540 (Cal. 1977).
\(^{57}\) See id.
\(^{58}\) See Gibson, Dunn & Crutcher v. Superior Court of L.A. County, 156 Cal.
have been similar attempts to have a cause of action recognized for legal malpractice of co-counsel\textsuperscript{59} and for case referrals,\textsuperscript{60} similarly to no avail. However, in \textit{Vale v. Heitner},\textsuperscript{61} the court found that trial counsel, who had taken over a personal injury case after the original attorney suffered a heart attack, could be held liable for damages to the original attorney for breach of the implied duty to conduct the case with due care. In \textit{Vale}, the original counsel and the trial counsel had a written agreement providing that they would split the attorney's fees equally. The trial counsel failed to comply with court practice rules, causing the underlying case to be dismissed. The client in the underlying case brought a malpractice claim against both the original attorney and the trial counsel. The original counsel settled with the client and cross-claimed against the trial counsel. The court upheld the attorney's right to bring the action.\textsuperscript{62}

\textbf{C. Does the Attorney's Duty Extend to the Children of a Marriage or to a Subsequent Spouse?}

Another potential area where third-party malpractice claims are brought into play is family law. In this area, malpractice claims by non-clients arise from divorce, child support, custody, and other related matters by clients' former spouses or children.\textsuperscript{63} Most courts, in evaluating these cases, have used the same "intended beneficiary" reasoning as in other areas of non-client malpractice. The California court, in \textit{Burger v. Pond},\textsuperscript{64} applied the \textit{Lucas v. Hamm} factors in determining whether a duty existed on the part of the attorney. In that case, the husband and wife sued the attorney who represented the husband in a prior divorce, stating that his negligence in the divorce action had caused the prior

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{61} 396 N.Y.S.2d 602 (N.Y. Civ. Ct. 1977).
\item \textsuperscript{62} See id.
\item \textsuperscript{63} See Kathleen M. Ewins, \textit{Malpractice Liability to Non-Clients in Family Law Matters}, 4 LEGAL MALPRACTICE REP. 9 (1993).
\item \textsuperscript{64} 273 Cal. Rptr. 709 (Cal. Ct. App. 1990).
\end{itemize}
\end{footnotesize}
divorce to be set aside after the husband married his current wife and had a child with her. The plaintiffs contended that the attorney knew at the time he represented the husband that the husband and his new wife intended to marry and have children as soon as possible. The court, in finding that the attorney did not owe a duty to the new wife, held that foreseeability did not equal duty and that the benefit or effect to the third party must be both intended and an objective of the particular service the attorney was retained to perform in order for liability to arise.65

Duties to third-parties in the family law area has also been addressed by the Kansas court. In Wilson-Cunningham v. Meyer,66 the spouses were represented by separate counsel. The attorneys did not timely file the divorce decree and the husband died hours before the divorce decree was filed. The court found the divorce decree was ineffective to terminate the marriage because it was filed after the husband’s death, and the wife claimed her “spousal share” of the estate. The children from a previous marriage sued the attorneys, claiming damages in the form of the loss of assets they would have received if the wife had not received her “spousal share.” The court there, using California’s Lucas v. Hamm criteria, determined that the attorneys did not owe the children a duty since the children were not third-party beneficiaries to a contract between the husband and the attorneys. The court also found that a divorce is not intended to affect the children of divorcing parties and the attorneys do not, therefore, have a duty to the children.67 However, if an attorney assumes a fiduciary relationship or obligation with both parties to a divorce, such as distribution of the marital assets, the attorney can be held liable to the non-client spouse.68

VI. CONCLUSION

With the “plaintiff pool” ever growing, legal malpractice actions by non-clients are likely to continue and, increasingly, succeed. Where the intended beneficiary is clear, such as in the case of negligently prepared wills or trusts, the duty to the third party is evident and the attorney should be mindful of this duty when preparing the instrument in question.

65. See id. at 715.
67. See id.
Similarly, a duty has arisen in some cases between the insured's attorney and the insurer when the insurance company is paying for the services rendered and/or the judgment rendered in the case against the insured. In any event, this area of the law should be closely monitored for invasions into the attorney/client relationship while at the same time care should be taken by the attorney to examine just whom is affected by the actions taken on behalf of the client and to insure that the services rendered are in compliance with the wishes of the client.

Christina D. Crow