LIABILITY OF ATTORNEYS TO NON-CLIENTS: WHEN DOES A DUTY TO NON-CLIENTS ARISE?

I. INTRODUCTION

Traditionally, American courts have held that, absent fraud or collusion, an attorney owed a duty of care only to his or her client.\(^1\) Thus, attorneys were not liable to damaged third parties in negligence actions, where the third party was not in privity of contract with the attorney.\(^2\) This "privity barrier" was first discussed in the English case of *Winterbottom v. Wright*.\(^3\) In *Winterbottom*, the court expressed concern that attorney liability, if allowed to extend outside the attorney-client relationship, could stretch to "absurd and outrageous consequences."\(^4\) Likewise, in 1879, the United States Supreme Court first adopted the spirit of the *Winterbottom* decision in holding that an attorney owed no duty of care to non-clients.\(^5\) Thereafter, the requirement of a privity relationship for attorney liability to non-clients became firmly rooted in the United States. However, beginning in the early twentieth century, a number of state court opinions began relaxing the privity requirement, resulting in the extension of a duty to non-clients in certain legal areas.

One of the first assaults upon the strict privity requirement occurred in an area outside of professional negligence in *Glanzer v. Shepard*.\(^6\) In its opinion, the New York Court of Appeals held that a public weigher who contracted with a seller to weigh his beans and furnish a certificate of weight to the buyer could be held liable to the buyer for misweighing the beans.\(^7\) Although not in privity of contract, the weigher could be held liable because he was aware that the buyer would rely on the accuracy of

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2. Privity of contract is defined as "[t]hat connection or relationship which exists between two or more contracting parties." BLACK'S LAW DICTIONARY 1199 (6th ed. 1990).
4. Id. at 405.
7. Id.
the measurement in inducing payment. Thus, the weigher owed a duty to the buyer. Yet, in Ultramares Corporation v. Touche, nine years after the Glanzer decision, the same court refused to extend a duty to third parties in the area of professional malpractice. Specifically, the case involved a group of public accountants who negligently certified the balance sheet of a corporation. Relying on this certification, the plaintiff loaned money to the corporation, which was actually insolvent. As stated, the court refused to allow recovery against the accountants due to the fact that the accountants did not know a specific, identifiable third party was going to rely on their representations. Unlike the defendant in Glanzer, the accountants did not know the plaintiffs were going to rely on their certification.

While the Ultramares court was not ready to expand a duty to non-parties in professional malpractice, other courts have faced this question and reached different conclusions. While some jurisdictions still adhere to the privity requirement, other jurisdictions have attempted to expand the liability to non-clients in malpractice cases. Generally, the jurisdictions that have abandoned or abrogated the strict privity requirement and extended a duty to non-clients have done so by adopting one of three routes. Those routes include: (1) the balancing-of-factors test, (2) the third party beneficiary approach, and (3) the foreseeable reliance approach.

II. EXTENDING THE DUTY

A. Balancing of Factors

California was the first state to step to the forefront in recognizing that a professional duty can extend beyond the attorney-client relationship to include third persons. The California Supreme Court, in Biakanja v. Irving, held that a notary public who negligently prepared a will was liable to the testator's intended beneficiary although no privity existed

8. Id. at 276.
10. Id.
11. Id. at 446.
between the two.\textsuperscript{14} The court noted that recovery in the absence of privi-

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ty should be allowed on the basis of public policy, including the "balancing of various factors."\textsuperscript{15} These factors include: (1) the extent to which
the transaction was intended to affect the plaintiff, (2) the foreseeability
of harm to him, (3) the degree of certainty that the plaintiff suffered inju-
ry, (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 the injury suffered, (5) the moral blame attached to the
defendant's conduct, and (6) the policy of preventing future harm.\textsuperscript{16}

The balancing-of-factors test was applied three years later to extend
to the duty of attorneys in \emph{Lucas v. Hamm.}\textsuperscript{17} In \emph{Lucas}, the court dropped
the "moral blame" factor and added a consideration of "whether the rec-
ognition of liability to beneficiaries of wills negligently drawn by attor-
neys would impose an undue burden on the profession."\textsuperscript{18} The court
held that "the extension of [the attorney's] liability to beneficiaries in-
jured by a negligently drawn will does not place an undue burden on the
profession, particularly when we take into consideration that a contrary

Since its inception in California, other jurisdictions have adopted the
balancing-of-factors test as a means to determine whether a duty toward a
non-client exists.\textsuperscript{20}

\textbf{B. Third Party Beneficiary}

Not every jurisdiction has been eager to accept California's balanc-
ing-of-factors test, however. Instead, some have adopted a test in negli-
gence that is based on third-party beneficiary contract law.\textsuperscript{21} This "Intent
to Benefit" analysis makes an attorney liable to a non-client if the prima-

\begin{itemize}
  \item 14. \textit{Id.}
  \item 15. \textit{Id.}
  \item 16. \textit{Id.} at 19.
  \item 17. 364 P.2d 685 (Cal. 1961).
  \item 18. \textit{Id.} at 688.
  \item 19. \textit{Id.}
  \item 20. See, e.g., Fickett v. Superior Court, 558 P.2d 988 (Ariz. Ct. App. 1976);
Krawczyk v. Stingle, 543 A.2d 733 (Conn. 1988); Marker v. Greenberg, 313 N.W.2d
4 (Minn. 1981); United Leasing Corp. v. Miller, 263 S.E.2d 313 (N.C. Ct. App.
  \item 21. See, e.g., Schreiner v. Scoville, 410 N.W.2d 679 (Iowa 1987); Ogle v.
\end{itemize}
ry purpose behind the establishment of the attorney-client relationship is to benefit the non-client. For example, in *Pelham v. Griesheimer*, the children of a divorced mother brought suit against the mother’s attorney for failing to maintain the children as the prime beneficiaries of the father’s life insurance policies. The Supreme Court of Illinois concluded that “for a non-client to succeed in a negligence action against an attorney, [the non-client] must prove that the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party.” However, the court found the primary purpose of the attorney-client relationship in this case was to obtain a divorce, not to benefit the children. Thus, the court refused to extend the duty in this case. The court noted that where an action is adversarial in nature, it would seem difficult to prove that the primary purpose of the attorney-client relationship is to benefit a third party. The extension of a duty to a non-client could potentially create a conflict of interest which might interfere with the attorney’s loyalty to his or her client. Therefore, in these jurisdictions, there must be a clear indication of one’s intent to benefit a third party in order to create such a duty in adversarial proceedings.

Like the previous analysis, some jurisdictions have adopted a similar test to extend an attorney’s duty which focuses on the intent of the client to benefit a third party. This test, however, rests upon contract law. The Pennsylvania Supreme Court adopted this approach in *Guy v. Liederbach*. The case involved an action brought by the beneficiary of a will against the attorney who improperly directed her to witness the will. As a result of the attorney’s direction, the plaintiff was barred by statute from taking her portion under the will. Thus, the court had to determine whether an attorney could be liable to a non-client. The court began its opinion by rejecting the California balancing-of-factors approach, noting that other courts found it had “proved unworkable, and has

22. 440 N.E.2d 96 (Ill. 1982).
23. Id. at 97.
24. Id. at 100.
25. Id. at 101.
26. Id. at 100.
27. 440 N.E.2d at 100.
30. Id. at 747.
31. Id.
led to *ad hoc* determinations and inconsistent results . . . ."\(^{32}\) Therefore, Pennsylvania would continue to require strict privity between attorneys and clients for malpractice suits on a negligence theory.\(^{33}\) However, the court considered an exception to the privity rule which would allow third party beneficiaries to recover under contract law. Recovery could be had if the parties contracted with the client's intent to engage the attorney's services for the benefit of a third party.\(^{34}\) The court adopted the Restatement (Second) of Contracts § 302 as the test for expressing which third party beneficiaries would be permitted a cause of action.\(^{35}\) Applicable to this case, section 302 states that a third party beneficiary will be considered an intended beneficiary if "recognition of a right to performance is appropriate to effectuate the intention of the parties" and "the circumstances indicate that the promisee [testator] intends to give the beneficiary the benefit of the promised performance."\(^{36}\) Thus, those beneficiaries clearly named in the will shall meet these requirements and recover under this approach.

**C. Foreseeable Reliance**

As an alternative to traditional actions in contract or tort, some jurisdictions extend a duty to non-clients who foreseeably rely on an attorney's representation.\(^{37}\) This is known as the foreseeable reliance approach. In a recent New Jersey opinion based on the foreseeable reliance approach, the court held than an attorney who provided a non-client a copy of a misleading percolation-test report, which induced the non-client to purchase real estate, owed a duty of care to the non-client who would reasonably rely on the information.\(^{38}\)

Foreseeable reliance works to extend a duty in estate planning cases as well. In *Williams v. Ely*,\(^{39}\) the holders of contingent remainder interests in two testamentary trusts brought suit against the law firm whose

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32. *Id.* at 749.
33. *Id.* at 750.
34. 459 A.2d at 752.
35. *Id.* at 751.
incorrect advice resulted in adverse gift tax consequences for the plaintiffs. The defendants claimed that only one of the plaintiffs actually sought and contacted the firm for its services. Thus, the defendants argued that the siblings of this client who also followed the advice were not clients to whom they owed a duty of care. The court noted that an attorney may owe a duty of care to those non-clients “who the attorney knows will rely on the services rendered.”\textsuperscript{41} The court stated that the defendants reasonably could have inferred that the plaintiffs were relying on their advice. Regardless of this fact, the firm’s involvement in the filing of the plaintiff’s disclaimers and subsequently billing the siblings for the services led to an affirmanse of the lower court’s finding of an attorney-client relationship.\textsuperscript{42}

III. ESTATE PLANNING

An area which has seen the extension of a duty to non-clients is estate planning. Because estate planning is generally non-adversarial, the conflicts expounded on above are not as much of a concern in estate planning. Nearly all the states have relaxed the privity barrier in the estate planning context. However, a few states, including Ohio, Nebraska, Texas and New York, have refused to drop the strict privity requirement and do not extend a duty of care to non-clients names as beneficiaries under a will or trust.\textsuperscript{43}

Texas has recently reaffirmed its stance in the estate planning area. In Barcelo v. Elliott,\textsuperscript{44} the intended remainder beneficiaries under a trust brought suit against the attorney who drafted the trust agreement for their grandmother stating that the attorney’s negligence in drafting the trust caused it to be declared invalid.\textsuperscript{45} The plaintiffs argued for the recognition of an exception to Texas’ strict privity requirement in the area of estate planning when an attorney’s negligence injures specific, intended

\textsuperscript{40} Id. at 802.
\textsuperscript{41} Id. at 805.
\textsuperscript{42} Id.
\textsuperscript{44} 923 S.W.2d 575 (Tex. 1996).
\textsuperscript{45} Id. at 576.
beneficiaries of the estate plan.\textsuperscript{46} The court, however, rejected the argument and continued to uphold the privity requirement in the estate planning context.\textsuperscript{47} The court conceded that the majority of states now recognize such an exception in estate planning,\textsuperscript{48} but it was still concerned with the potential conflicts of interest that might arise if such a cause of action was allowed.\textsuperscript{49} The court agreed with the other courts which have rejected the privity exception because:

such a cause of action would subject attorneys to suits by heirs who simply did not receive what they believed to be their due share under the will or trust. This potential tort liability to third parties would create a conflict during the estate planning process, dividing the attorney’s loyalty between his or her client and the third-party beneficiaries.\textsuperscript{50}

For example, the court noted that perhaps the “alleged deficiencies” complained of by the plaintiffs were actually executed pursuant to the testator’s instructions, which were formed upon the advice the attorney believed to be in the testator’s best interest.\textsuperscript{51} Making the attorney liable to third-party beneficiaries would hinder the attorney’s ability to confidently advise his or her client. In sum, the court decided that no “bright-line” could be drawn which would permit a non-client to bring a suit against an attorney for the negligence in causing a will or trust to fail that “casts no real doubt on the testator’s intentions while prohibiting actions in other situations.”\textsuperscript{52} Instead, the better rule would be to adhere to the privity requirement which would deny all beneficiaries a cause of action, thus enabling the attorneys to “zealously represent their clients without the threat of suit from third parties compromising that representation.”\textsuperscript{53}

Likewise, New York has recently upheld the strict privity requirement in the estate planning context. In \textit{Conti v. Polizzo},\textsuperscript{54} plaintiffs brought a legal malpractice suit against the attorneys who drafted their

\begin{itemize}
\item \textsuperscript{46} \textit{Id.} at 577.
\item \textsuperscript{47} \textit{Id.}
\item \textsuperscript{48} \textit{Id.}
\item \textsuperscript{49} 923 S.W.2d at 577.
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} \textit{Id.}
\item \textsuperscript{52} \textit{Id.}
\item \textsuperscript{53} \textit{Id.} at 578-79.
\item \textsuperscript{54} 646 N.Y.S.2d 259 (1996).
\end{itemize}
aunt's will.\textsuperscript{55} The plaintiffs had hired the attorneys to draft a will that would devise real property to the testatrix's husband for his lifetime.\textsuperscript{56} Upon his death, the property would pass to the plaintiffs.\textsuperscript{57} After the probate of the testatrix's will, it was held that only two-thirds of the property passed to the plaintiffs, while one-third of the property devised to the husband's estate.\textsuperscript{58} The plaintiffs argued that an attorney-client relationship existed because it was the plaintiffs who hired and paid the attorneys to draft the will.\textsuperscript{59} The attorneys countered that the plaintiffs were merely beneficiaries under the will and thus were not in privity with the attorneys.\textsuperscript{60} The court stated that under New York law, attorneys are not liable to third parties not in privity for alleged harm due to negligence absent fraud, collus  
on, or other malicious acts.\textsuperscript{61} Moreover, regardless of the fact that the plaintiffs paid for the services, the will represented the intention of the aunt to dispose of her property.\textsuperscript{62} Thus, the plaintiffs were simply beneficiaries of the aunt's will and not a party for whom the attorneys drafted the instrument.

IV. CONCLUSION

As the previous discussion has illustrated, many courts have already begun to move away from the traditional strict privity requirement and expand attorney liability to non-clients. Three prominent tests to expand attorney liability are: the balancing of facts test, the third party beneficiary approach and the foreseeable reliance approach. By adopting these tests, courts are recognizing actions in tort, in contract and under principles of foreseeable reliance to accomplish this goal. Although almost all of the states have now dropped the privity requirement in the area of estate planning, a few states continue to resist the expansion in this area. Thus, the extent of the departure will continue to be litigated as many jurisdictions wrestle with these issues and various approaches. Concerns for a balance between the attorney's potential conflicts of duties and the

\textsuperscript{55} Id. at 260.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} 646 N.Y.S.2d at 259.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
need for a remedy for injured third parties, continue to be raised. However, attorneys need to take note of this trend. As the courts gradually continue to expand an attorney's duty of care, greater liability to non-clients will certainly follow.

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