LIABILITY OF LAWYERS AND ACCOUNTANTS TO NON-CLIENTS: NEGLIGENCE AND NEGLIGENT MISREPRESENTATION

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INTRODUCTION

Once lawyers and accountants were rarely if ever liable to non-clients for professional negligence. Today that is no longer the case; lawyers and accountants are potentially liable for failing to exercise reasonable care in a variety of settings.[1] The doctrines applied in these cases vary widely, and the approaches of the jurisdictions in the application of the doctrines vary even more. Questions posed in the earliest days of the doctrines have not been conclusively answered. This article does not provide conclusive answers, but it does reframe the questions in a way that can clarify and inform courts' analysis and lawyers' arguments.

The issues in this area were defined by two landmark opinions by Chief Judge Cardozo of the New York Court of Appeals.[2] Prior to these opinions, most courts, following the U.S. Supreme Court's opinion in *Savings Bank v. Ward*,[3] permitted an action for economic harm only by a party in privity with the defendant.

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1. The liability of lawyers and accountants to non-clients are instances of the broader trend in liability of professionals and businesses to third parties. *See generally* JAY M. FEINMAN, PROFESSIONAL LIABILITY TO THIRD PARTIES (3d ed. 2013) [hereinafter PROFESSIONAL LIABILITY].

2. For a historical background, see *id.* at 11–28.

3. 100 U.S. 195, 206 (1879).

In *Glanzer v. Shepard*,[4] the New York court imposed liability for economic harm caused to a purchaser of beans when a bean weigher hired by the seller certified an erroneous weight for the beans. Because the "end and aim" of the transaction was to provide a service to the buyer, the buyer had an action against the weigher not only as the third party beneficiary of the weigher's contract with the seller but also for the negligent performance of its service.[5]

In *Ultramares Corporation v. Touche*,[6] the defendants, Touche, Niven & Company, had prepared and certified a balance sheet for Fred Stern & Company ("Stern") and supplied Stern with thirty-two copies of the certified balance sheet, knowing that Stern would provide them to banks, creditors, and others in the ordinary course of its business. Ultramares, a factor, provided financing to Stern in reliance on the balance sheet prepared by Touche.[7] Because the principals of Stern had falsified the company's accounts receivable, the business collapsed, resulting in a loss to Ultramares.[8]

In *Ultramares*, the court recognized that "[t]he assault upon the citadel of privity is proceeding in these days apace"[9] in tort cases involving personal injury and in contract law through the widening of third party beneficiary liability. The court refused, however, to extend the foreseeability principle of its earlier landmark products liability case, *MacPherson v. Buick Motor Company*,[10] to economic losses caused by an accountant's neglect.[11]

The court in *Ultramares* interpreted *Glanzer* to be a case in which "[t]he bond [between the bean weigher and the third-party buyer] was so close as to approach that of privity, if not completely one with it."[12] Indeed, the same result would obtain in *Glanzer* through the application of third party beneficiary law as through the law of negligence. In *Ultramares*, however, unlike in *Glanzer*, the service rendered by the accountant was primarily for the benefit of its client, Stern, not the benefit of the non-client Ultramares.

Glanzer was a case in which the gravamen of the complaint was "the careless performance of a service—the act of weighing—which happens to

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4. 135 N.E. 275 (N.Y. 1922).
5. *Id.* at 277.
6. 174 N.E. 441, 442–43 (N.Y. 1931).
7. *Id.*
8. *Id.*
9. *Id.* at 445.
10. 111 N.E. 1050 (N.Y. 1916).
11. *Ultramares*, 174 N.E. at 447.
12. *Id.* at 446.

have found in the words of a certificate its culmination[;]"[13] the action in *Glanzer*, therefore, lay in negligence. The court characterized *Ultramares*, on the other hand, as a case involving a misrepresentation rather than a service.[14] Accordingly, the issue was what "liability attaches to the circulation of a thought or a release of the explosive power resident in words."[15] In Cardozo's immortal aphorism: "If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class."[16] Accordingly, only when there was privity or an equivalent relationship would an accountant be liable to a non-client who relied on its negligently-prepared report.

Glanzer and *Ultramares* pose the two essential questions for the law of liability to non-clients. Is there a difference between the negligence and negligent misrepresentation causes of action? Under either or both, in what cases should a court find a duty? The issues have currency in the case law, in recent statutory enactments, and in the *Restatement (Third) of Torts: Liability for Economic Harm*, currently being considered by The American Law Institute. This article describes the deeper approaches underlying the cases to suggest that the answers to the two questions are: "no" and "it depends."

Courts employ a variety of doctrines to determine whether a lawyer or accountant is liable to a non-client.[17] Negligence and negligent misrepresentation are the most common, and they are the subject of this Article. Only a few jurisdictions still apply the rule that predates *Glanzer*: that a lawyer or accountant is not liable to a third party with whom it is not in privity in the absence of fraud or another intentional tort.[18] A small number of jurisdictions allow an exception to the privity

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13. Glanzer v. Shepard, 135 N.E. 275, 276 (N.Y. 1922).

14. *Ultramares*, 174 N.E. at 445–46.

15. *Id.* at 445.

16. *Id.* at 444.

17. The discussion in this Article is limited to common law causes of action for failure to exercise reasonable care. It excludes discussion of intentional torts and actions under regulatory statutes and their accompanying administrative rules, such as the federal securities laws and state consumer protection statutes.

18. Virginia most clearly adheres to the privity rule. *See, e.g.*, Ward v. Ernst & Young, 435 S.E.2d 628 (Va. 1993); Waterside Capital Corp. v. Hales, Bradford & Allen, L.L.C., No. 2:05cv727, 2007 WL 2254661 (E.D. Va. Aug. 3, 2007) (applying Virginia law); Bank of Am. v. Musselman, 240 F. Supp. 2d 547 (E.D. Va. 2003) (applying Virginia law).

Alabama has consolidated all actions against attorneys in the Legal Services Liability Act, ALA. CODE § 6-5-570 (1975), but the act only applies to actions between a lawyer and one who receives legal services, which may exclude third parties. Line v. Ventura, 38 So. 3d 1 (Ala. 2011). The Alabama Supreme Court has held that no action is available to a third

rule only in cases in which the non-client is an intended beneficiary of the contract of representation between the lawyer or accountant and the client.[19] Other jurisdictions allow a third party beneficiary action in addition to a negligence or negligent misrepresentation action.[20] In a few cases, the liability of lawyers has been considered under theories that are variously called fiduciary duty, undertaking, or reliance.

Part I describes the application of the negligence cause of action in cases by non-clients against lawyers and accountants. In determining whether the professional owes a duty of care to the non-client, courts apply a variety of approaches: the balance of factors test originated in California that led to the expansion of negligence liability generally; the foreseeability approach that is the mainstream of actions for negligently-caused physical injury; approaches described as arising from a fiduciary duty, undertaking, or reliance; and an approach that finds a duty only when the primary purpose of the relationship with the client is to benefit the non-client. Part II describes the dominant approaches to the negligent misrepresentation action: the dual knowledge and intent requirement of *Restatement (Second) of Torts* § 552 and the near privity

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party "for whom the lawyer has not undertaken a duty, either by contract or gratuitously," Robinson v. Benton, 842 So. 2d 631, 637 (Ala. 2002), and that a third party may have an action against a lawyer in some circumstances. *Line*, 38 So. 3d at 12–13.

Arkansas has adopted the privity rule by statute, subject to exceptions where the primary intent was to benefit or influence the third party or where the third party was identified and notified in writing. ARK. CODE ANN. § 16-22-310(a) (2012). For applications, see Great Am. Ins. Co. v. Dover & Dixon, 402 F. Supp. 2d 1012 (E.D. Ark. 2005); Jackson v. Ivory, 120 S.W.3d 587 (Ark. 2003); Nielsen v. Berger-Nielsen, 69 S.W.3d 414 (Ark. 2002).

Several states apply a rule of privity to bar negligence actions but allow actions for negligent misrepresentation. *See* Lucas v. Lalime, 998 F. Supp. 263 (W.D.N.Y. 1998) (applying New York law); Barcelo v. Elliott, S.W.2d 575 (Tex. 1996).

In some of these jurisdictions, the courts recognize the possibility of a narrow exception to the rule. *See, e.g.*, Elam v. Hyatt Legal Servs., 541 N.E.2d 616 (Ohio 1989) (beneficiaries whose interest in estate had vested were in privity with lawyer who administered estate); Leroy v. Allen Yurasek & Merklin, 832 N.E.2d 1246 (Ohio Ct. App. 2005) (exception to privity where attorney for fiduciary owes duty to beneficiary of fiduciary relationship); Copenhaver v. Rogers, 384 S.E.2d 593 (Va. 1989) (possible for beneficiary of will to be intended beneficiary, but unlikely).

19. *See, e.g.*, McIntosh Cnty. Bank v. Dorsey & Whitney, L.L.P., 745 N.W.2d 538 (Minn. 2008) (using balance of factors test to determine third party beneficiary status); Credit Union Central Falls v. Groff, 966 A.2d 1262, 1271–72 (R.I. 2009) (third party beneficiary; no conclusion on foreseeability approach, which was not pleaded). A leading case for the third party beneficiary approach is *Guy v. Liederbach*, 459 A.2d 744 (Pa. 1983).

20. *See, e.g.*, Hewko v. Genovese, 739 So. 2d 1189 (Fla. Dist. Ct. App. 1999); Blair v. Ing, 21 P.3d 452 (Haw. 2001); *In re* Langdon, No. 07–21058–DK, 2009 WL 400592 (Bankr. D. Md. Feb. 11, 2009) (applying Maryland law); Beaty v. Hertzberg & Golden, P.C., 571 N.W.2d 716 (Mich. 1997); Great Plains Fed. Sav. & Loan Ass'n v. Dabney, 846 P.2d 1088 (Okla. 1993); Oxendine v. Overturf, 973 P.2d 417 (Utah 1999); Harrington v. Pailthorp, 841 P.2d 1258 (Wash. Ct. App. 1992).

approach of New York and other states. Part III raises the potential problem presented by the availability of both a negligence and negligent misrepresentation action. In cases in which either action may be available on the facts, the choice between them would matter greatly if a lawyer or accountant owed a duty under one cause of action but not the other. Part IV suggests that this problem reflects a deeper question: under either cause of action, in what cases should a court find a duty? The answer to this question is conceptual, not doctrinal, and the section describes how courts employ two approaches in answering the question. A contractual approach leans in the direction of limited liability by emphasizing the contractual origins of the relationships that give rise to the cases and the roles defined primarily by the parties' contracts. A relational approach builds more on extra-contractual elements of the parties' relationships and stresses the responsibility that arises from causing harm to another. The choice between these approaches determines how negligence, negligent misrepresentation, either, or both will be applied in a particular case and a class of cases.

I. THE DOCTRINE: NEGLIGENCE

The elements of a cause of action for negligence are the existence of a duty toward the plaintiff, a breach of that duty by the defendant, legally cognizable harm to the plaintiff within the scope of liability (traditionally called "proximate cause"), and a sufficient causal link between the defendant's negligent act and the harm.[21] The basic issue in third party cases is the duty question: whether the defendant owes the plaintiff a duty to exercise reasonable care.

Many lawyer liability cases do not involve communications and therefore use negligence as the appropriate doctrine with which to examine the issues. In accountant liability cases and lawyer liability cases involving an opinion, because the professional's negligence results in a misrepresentation, the plaintiff conceivably may bring its action either in negligence (for the improper performance of the service) or in negligent misrepresentation (for negligently communicating false information). Often these two causes of action are not distinguished, and the choice depends on the law of the jurisdiction or other factors; misrepresentation is used more often than negligence.

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21. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 6 (2010).

A. Balance of Factors Test

The original extension of liability beyond the narrow bounds of *Ultramares* came in the California sequence of cases beginning with *Biakanja v. Irving*,[22] involving a negligently-drafted will (although the defendant was a notary public, not a lawyer). The court formulated a general standard for determining when a duty would be owed in the absence of privity.

> The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.[23]

This test, known as the "balance of factors test," became a central feature of the law of negligence generally.

The *Biakanja* standard was first applied to lawyers in *Lucas v. Hamm*.[24] Elements of the test were applied to the lawyer negligently drafting a will: the main purpose of the will was to benefit the plaintiff beneficiaries; the harm to plaintiffs was foreseeable and certain; and because the testator had died, the policy of preventing future harm could be served only by giving the beneficiaries a cause of action.[25] Accordingly, a tort action would lie in the absence of privity.[26]

In *Heyer v. Flaig*,[27] the California court clarified the theory of recovery under *Biakanja v. Irving* and *Lucas v. Hamm*. In *Lucas*, the court had concluded that the balance of factors test entitled the plaintiffs to recover as third party beneficiaries or in negligence.[28] In *Heyer*, however, the court stated that the contract action was "conceptually superfluous[;]" because negligence was an essential element of the cause of action, the "crux of the action must lie in tort."[29]

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22. 320 P.2d 16 (Cal. 1958).
23. *Id.* at 19.
24. 364 P.2d 685 (Cal. 1961).
25. *Id.* at 688.
26. *Id.*
27. 449 P.2d 161 (Cal. 1969).
28. *Lucas*, 364 P.2d at 689.
29. *Heyer*, 449 P.2d at 164.

The negligence analysis pioneered in the California cases has been widely adopted. The test has been used extensively in California cases in a wide variety of settings,[30] but its application to non-client cases was limited in *Bily v. Arthur Young & Company*.[31] The test also has been discussed in many cases from other jurisdictions. Sometimes the test is adopted as the basis for determining whether a duty toward the non-client exists,[32] and sometimes the test is mentioned but is not the basis of the decision.[33]

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30. *See, e.g.*, Fox v. Pollack, 226 Cal Rptr. 532 (Cal. Ct. App. 1986) (real estate transaction); Norton v. Hines, 123 Cal. Rptr. 237 (Cal. Ct. App. 1975) (litigation); Donald v. Garry, 97 Cal. Rptr. 191 (Cal. Ct. App. 1971) (debtor-creditor).

31. Bily v. Arthur Young & Co., 834 P.2d 745 (Cal. 1992); *see also* B.L.M. v. Sabo & Deitsch, 64 Cal. Rptr. 2d 335 (Cal. Ct. App. 1997) (applying *Bily*). *But see* Moore v. Anderson Zeigler Disharoon Gallagher & Gray, 135 Cal. Rptr. 2d 888 (Cal. Ct. App. 2003) (applying balance of factors test without reference to *Bily*).

32. *See, e.g.*, Blair v. Ing, 21 P.3d 452 (Haw. 2001); Harrigfeld v. Hancock, 90 P.3d 884 (Idaho 2004); Pizel v. Zuspann, 795 P.2d 42 (Kan. 1990), *modified and reh'g denied by* 803 P.2d 205 (Kan. 1990); Perez v. Stern, 777 N.W.2d 545 (Neb. 2010); United Leasing Corp. v. Miller, 263 S.E.2d 313 (N.C. Ct. App. 1980); Bohn v. Cody, 832 P.2d 71 (Wash. 1992); Auric v. Continental Cas. Co., 331 N.W.2d 325 (Wis. 1983). In *Fickett v. Superior Court*, 558 P.2d 988 (Ariz. Ct. App. 1976), the Arizona Court of Appeals used the balance of factors test, but more recent cases have suggested that its application will be limited to situations in which the non-client is an intended beneficiary of the attorney-client relationship. *See* Capitol Indem. Corp. v. Fleming, 58 P.3d 965, 967 (Ariz. Ct. App. 2003) (citing Wetherill v. Basham, 3 P.3d 1118 (Ariz. Ct. App. 2000)); Gipson v. Kasey, 150 P.3d 228, 231 (Ariz. 2007). The Arizona cases may have been superseded by ARIZ. REV. STAT. ANN. § 14-5652(A) (2012). Several courts use the balance of factors test, but with a "threshold inquiry" of whether the plaintiff was an intended beneficiary of the transaction. *See* Francis v. Piper, 597 N.W.2d 922, 924 (Minn. Ct. App. 1999) (stating that intended beneficiary status is a "threshold requirement . . . ."); Trask v. Butler, 872 P.2d 1080 (Wash. 1994); *In re* Estate of Drwenski, 83 P.3d 457 (Wyo. 2004).

33. *See, e.g.*, Krawczyk v. Stingle, 543 A.2d 733, 735–36 (Conn. 1988). The Kansas Supreme Court used the test in *Pizel v. Zuspann*, 795 P.2d 42 (Kan. 1990), but later cases varied the analysis. In *Johnson v. Wiegers*, 46 P.3d 563 (Kan. Ct. App. 2002), the court summarized the Kansas law as follows:

> First, if the client of the attorney and the third party are adversaries, no duty arises under Nelson. Second, if the attorney and client never intended for the attorney's work to benefit the third party, then no duty arises . . . . Third, if it is possible to conclude that the attorney and client intended for the attorney's work to benefit the third party, then the reviewing court must strike the *Pizel* balance to determine whether a duty arose in the particular circumstances at hand.

Id. at 567.

B. Foreseeability

The dominant view in the law of negligence generally is that foreseeability determines duty: when the defendant's actions create a foreseeable risk of harm to the plaintiff, the defendant owes the plaintiff a duty of reasonable care.[34] The *Restatement (Third) of Torts* attempts to uncouple foreseeability from duty, but that move has not yet been widely adopted.

Many jurisdictions use a foreseeability approach in non-client cases.[35] A leading decision by the Supreme Court of New Jersey illustrates the foreseeability approach. In *Petrillo v. Bachenberg*, the court held that lawyers are liable to third parties in "situations in which the lawyer intended or should have foreseen that the third party would rely on the lawyer's work."[36] A lawyer provided a real estate broker with a document containing excerpts from percolation tests on a property that indicated the property had passed two out of seven tests; in fact, the property had passed only two of thirty tests.[37] The court held that the lawyer knew or should have known that the report would be given to a prospective purchaser and that the purchaser might assume the property had passed two of seven tests.[38]

Although accountant liability cases are most often framed as negligent misrepresentation cases, a few well-known cases favored a foreseeability approach to negligence. In *Citizens State Bank v. Timm, Schmidt & Company*,[39] the Supreme Court of Wisconsin concluded that accountant liability cases ought to be decided under the ordinary principles of negligence law. Under those principles, "a tortfeasor is fully liable for all foreseeable consequences of his act except as those

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34. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. j (2010); *see also* W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739 (2005) (describing uses and significance of foreseeability).

35. *See, e.g.*, Century 21 Deep South Props., Ltd. v. Corson, 612 So. 2d. 359 (Miss. 1992). *But see* Great Am. E & S Ins. Co. v. Quintairos, Prieto, Wood & Boyer, P.A., 100 So. 3d 420, 425–26 (Miss. 2012) (lawyer's absolute duty to client prevents liability for foreseeable harm to non-client). For a thorough discussion of the Massachusetts rule, described as "foreseeable reliance," see *One Nat'l Bank v. Antonellis*, 80 F.3d 606 (1st Cir. 1996).

36. Petrillo v. Bachenberg, 655 A.2d 1354, 1359 (N.J. 1995); *see also* Banco Popular N. Am. v. Gandi, 876 A.2d 253 (N.J. 2005); Wiebel v. Morris, Downing & Sherred, No. 07-3150, 2009 WL 1560254 (D.N.J. June 2, 2009).

37. *Petrillo*, 655 A.2d at 1355.

38. *Id.* at 1359–60.

39. 335 N.W.2d 361, 366 (Wis. 1983).

consequences are limited by policy factors."[40] The court rejected the elements of *Restatement (Second) of Torts* § 552 as too restrictive and instead noted the type of public policy factors that might limit the accountant's duty for foreseeable harm, including remoteness of the harm, disproportion between the culpability of the accountant and the injury, or a floodgates problem.[41]

In *Touche Ross & Company v. Commercial Union Insurance Company*,[42] the Mississippi Supreme Court also adopted a foreseeability rule. The court rejected the *Restatement* rule as arbitrarily preferring foreseen to foreseeable relying parties, when neither paid for the audit and neither was owed a greater duty of care.[43] Several elements of the relation made foreseeability the appropriate standard: the foreseeable reliance of third parties, the accountant's capacity to distribute the loss, the deterrent effect of imposing liability on the accountant, and the fairness of imposing liability on the accountant for failing to detect fraud when that is one of the specific functions for which it is employed. The court stated a traditional negligence rule as the basis of liability: "an independent auditor is liable to reasonably foreseeable users of the audit, who request and receive a financial statement from the audited entity for a proper business purpose, and who then detrimentally rely on the financial statement, suffering a loss, proximately caused by the auditor's negligence."[44]

C. Fiduciary Duty, Undertaking, or Reliance

Some courts define the lawyer's duty to a non-client in terms of a fiduciary duty or a duty that arises out of the lawyer's undertaking or the third party's reliance, rather than in one of the more familiar contract or tort causes of action. In concept, the doctrines are different. A fiduciary duty arises from a general relationship between the parties; some cases have held that a lawyer for a trustee owes a fiduciary duty to the beneficiary of the trust.[45] Undertaking or reliance involves a discrete act of responsibility by the lawyer; undertaking emphasizes the lawyer's assumption of obligation, and reliance emphasizes the non-client's dependence on the lawyer's representation that it has assumed an obligation. In practice, however, courts use any or all of the labels

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40. *Id.*
41. *Id.*
42. 514 So. 2d 315 (Miss. 1987).
43. *Id.* at 321.
44. *Id.* at 322.
45. *See, e.g.*, Pizel v. Zuspann, 795 P.2d 42 (Kan. 1990).

virtually indistinguishably and often merge this theory with a negligence approach.

The leading authority for these related approaches is a line of New Jersey cases beginning with *Stewart v. Sbarro*.[46] In *Stewart*, the sellers of all of the stock in a corporation brought an action against the lawyers who represented the buyers for failing to obtain signatures on a mortgage to secure the payment to the sellers (as they were required to do under the agreement of sale), subsequently failing to advise the sellers that they had not done so, and executing a second mortgage on the property in favor of the buyers to the detriment of the sellers.[47] Despite the general rule that a lawyer is not liable to a non-client, the court stated that a duty of reasonable care would arise in two settings. The first setting was: "where an attorney assumes a fiduciary obligation, it applies to all persons who, though not strictly clients, . . . [have] or should have reason to believe rely [sic] on him."[48] The second setting was: where "an attorney undertakes a duty to one other than his client, he may be liable for damage caused by a breach of that duty to a person intended to be benefitted by his performance."[49]

The approach of *Stewart v. Sbarro* has been followed in a variety of situations[50] and has received support in the *Restatement (Third) of the Law Governing Lawyers*. Section 51(2) emphasizes the undertaking and reliance elements, stating that a lawyer owes a duty of care to a third party when:

> (a) the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the non-client to rely on the lawyer's opinion or provision of other legal services, and the non-client so relies[;] and

46. Stewart v. Sbarro, 362 A.2d 581 (N.J. Super. Ct. App. Div. 1976); *see also* Petrillo v. Bachenberg, 655 A.2d 1354, 1357–58 (N.J. 1995) (citing *Stewart v. Sbarro* with approval).

47. *Stewart*, 362 A.2d at 583–84.

48. *Id.* at 588.

49. *Id.*

50. *See, e.g.*, Rathblott v. Levin, 697 F. Supp. 817 (D.N.J. 1988); R.J. Longo Constr. Co. v. Schragger, 527 A.2d 480 (N.J. Super. Ct. App. Div. 1987); McEvoy v. Helikson, 527 A.2d 480 (N.J. Super. Ct. App. Div. 1987); Schwartz v. Greenfield, Stein & Weisinger, 396 N.Y.S.2d 582 (N.Y. Sup. Ct. 1977); Simmerson v. Blanks, 254 S.E.2d 716 (Ga. Ct. App. 1979); *In re* Infocure Sec. Litig., 210 F. Supp. 2d 1331 (N.D. Ga. 2002); Moore v. Harris, 372 S.E.2d 654 (Ga. Ct. App. 1988); Wasmann v. Seidenberg, 248 Cal. Rptr. 744 (Ct. App. 1988); Jones v. Runft, Leroy, Coffin & Matthews, Chartered, 873 P.2d 861 (Idaho 1994); Nelson v. Nationwide Mortg. Corp., 659 F. Supp. 611 (D.D.C. 1987) (applying Virginia law).

> (b) the non-client is not, under applicable tort law, too remote from the lawyer to be entitled to protection.[51]

To the extent that this approach rests on fiduciary elements of the lawyer-client relationship, it also receives support from §51(4):

> For purposes of liability under §48 a lawyer owes a duty to use care within the meaning of §52:
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> . . .
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> (4) to a non-client when and to the extent that:
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> (a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the non-client;
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> (b) circumstances known to the lawyer make it clear that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representations to prevent or rectify the breach of a fiduciary duty owed by the client to the non-client, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;
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> (c) the non-client is not reasonably able to protect its rights; and
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> (d) such a duty would not significantly impair the performance of the lawyer's duty to the client.[52]

There are, of course, situations in which there is neither a fiduciary duty nor a sufficient undertaking or reliance. Contrast with *Stewart v. Sbarro* the case of *Bergman v. New England Insurance Company*.[53] In the course of negotiating and drafting an agreement for the sale of apartment buildings, the buyer's lawyer "took the lead" in drafting the required documents and confirmed the buyer's assurance to the seller that appropriate corporate resolutions authorizing the execution of the instruments would be furnished.[54] Because the resolutions were never furnished, the sellers were required to undergo extra expense when they

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51. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(2) (2000).
52. *Id.* at § 51(4)
53. 872 F.2d 672 (5th Cir. 1989).
54. *Id.* at 673.

foreclosed on the notes following the buyer's default.[55] The sellers argued that the lawyer owed a duty to them because the lawyer had undertaken to prepare the documents required in the transaction; his secretary sent one document to the seller with return instructions; he promised to secure the corporate resolutions; and he shared in the fee paid by the sellers.[56] In the court's view, these actions did not constitute a sufficient undertaking to establish a duty of care.[57] It is not unusual for a lawyer for one party to prepare all the documents in a transaction. Although parties appropriately may take shortcuts and foster informalities; these actions do not create a duty.

D. Primary Purpose

The balance of factors test and foreseeability approach place non-client cases in the mainstream of negligence law. Some jurisdictions, however, use a version of negligence doctrine which is related to third party beneficiary contract law. Under this doctrine, the non-client has a cause of action against the lawyer only when the intent or a primary purpose of the lawyer-client relationship was to benefit the non-client third party.[58]

The prototypical intended beneficiary is the putative beneficiary of a will who does not take because of the lawyer's negligence in drafting or supervising the execution of the will. A duty is needed here because if the beneficiary is not allowed an action, the purpose of the relationship is frustrated. Yet, by allowing an action, the lawyer's potential liability is still limited, and no potential conflict is presented between the client's and the third party's interests.[59]

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55. *Id.* at 674.

56. *Id.* at 675. This argument about the lawyer's undertaking was couched in terms of creating a lawyer-client relationship.

57. *Id.* at 676.

58. *See, e.g.*, McIntosh Cnty. Bank v. Dorsey & Whitney, L.L.P., 745 N.W.2d 538 (Minn. 2008).

59. Schreiner v. Scoville, 410 N.W.2d 679, 682 (Iowa 1987); *see also* Friske v. Hogan, 698 N.W.2d 526 (S.D. 2005); Estate of Leonard *ex rel.* Palmer v. Swift, 656 N.W.2d 132, 145 (Iowa 2003) (citing RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 51 (2000) and stating test in third party beneficiary terms); Needham v. Hamilton, 459 A.2d 1060 (D.C. 1983); Angel, Cohen & Rogovin v. Oberon Inv., NV, 512 So. 2d 192 (Fla. 1987); Francis v. Piper, 597 N.W.2d 922, 924 (Minn. Ct. App. 1999) (intended beneficiary status is "threshold requirement").

In cases outside the will beneficiary context, however, the requisite intent has generally been found to be lacking.[60] Thus, the lawyer for a divorcing wife was held to owe the children of the marriage no duty to secure for them the benefits of the husband's life insurance policies, as the divorce decree provided;[61] the lawyer for a corporation was held to owe no duty to minority shareholders;[62] the lawyer in a class action was held to owe no duty to members of the class prior to certification;[63] the lawyer for one party to an escrow agreement was held to owe no duty to the other party;[64] and the lawyer for a borrower was held to owe no duty to the lender.[65]

II. THE DOCTRINE: NEGLIGENT MISREPRESENTATION

Negligent misrepresentation is the doctrine most commonly used in accountant liability cases. In lawyer liability cases, some courts permit a negligent misrepresentation action distinct from the negligence action, even beyond the otherwise narrow exceptions to privity,[66] and several other courts have rejected the possibility of an action by a non-client for negligent misrepresentation.[67] Most of the misrepresentation actions

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60. Rutkoski v. Hollis, 600 N.E.2d 1284, 1288 (Ill. App. Ct. 1992) (lawyer for executor of estate owes primary duty to executor; beneficiary has no action in negligence or as third party beneficiary).

61. Pelham v. Griesheimer, 440 N.E.2d 96, 101 (Ill. 1982).

62. Felty v. Hartweg, 523 N.E.2d 555, 557–58 (Ill. App. Ct. 1988).

63. Formento v. Joyce, 522 N.E.2d 312, 316 (Ill. App. Ct. 1988).

64. Orr v. Shepard, 524 N.E.2d 1105, 1108 (Ill. App. Ct. 1988), *aff'd*, 530 N.E.2d 250 (Ill. 1988).

65. First Nat'l Bank of Moline v. Califf, Harper, Fox & Dailey, 548 N.E.2d 1361, 1363 (Ill. App. Ct. 1989).

66. Home Budget Loans, Inc. v. Jacoby & Meyers Law Offices, 255 Cal. Rptr. 483 (Cal. Ct. App. 1989); Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 128 Cal. Rptr. 901 (Cal. Ct. App. 1976); Mehaffy, Rider, Windholz & Wilson v. Cent. Bank Denver, N.A., 892 P.2d 230 (Colo. 1995); Riggs Nat'l Bank v. Freeman, 682 F. Supp. 519 (S.D. Fla. 1988); McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787 (Tex. 1999); *but see* Moss v. Zafiris, Inc. 524 So. 2d 1010, 1011 (Fla. 1988); Trust Co. of La. v. N.N.P., Inc., 104 F.3d 1478, 1487–88 (5th Cir. 1997) (applying Louisiana law); Holland v. Lawless, 623 P.2d 1004 (N.M. Ct. App. 1981); Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer, & Wood, 605 N.E.2d 318 (N.Y. 1992); Citibank N.A. v. City of Burlington, No. 11-214, 2012 WL 2050730 (D. Vt. June 7, 2012) (applying Vermont law); Hedges v. Durrance, 834 A.2d 1 (Vt. 2003) (requires "relationship so close as to approach that of privity").

67. Moss v. Zafiris, 524 So. 2d 1010, 1011 (Fla. 1988); Schuler v. Meschke, 435 N.W.2d 156, 162 (Minn. Ct. App. 1989); Krawczyk v. Bank of Sun Prairie, 496 N.W.2d 218, 220 (Wis. Ct. App. 1993).

involve the issuance of a formal opinion either by an accountant in certifying an audit or by a lawyer.[68]

A. Restatement (Second) of Torts § 552

Most jurisdictions have adopted the test of *Restatement (Second) of Torts* §552 as the appropriate standard to measure the liability of accountants to third parties.[69] The relevant portion of §552 provides:

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68. For a case not involving an opinion, see *Kinney v. Williams*, 886 So. 2d 753 (Ala. 2003) (lawyer's representation that road was private in course of real estate sale); *see also* DeLuca v. Jordan, 781 N.E.2d 849 (Mass. App. Ct. 2003) (negligent misrepresentations in probate proceedings).

69. *See, e.g.*, Colonial Bank of Ala. v. Ridley & Schweigert, 551 So. 2d 390 (Ala. 1989); Standard Chartered P.L.C. v. Price Waterhouse, 945 P.2d 317 (Ariz. Ct. App. 1997); Bily v. Arthur Young & Co., 834 P.2d 745 (Cal. 1992); First Fla. Bank, N.A. v. Max Mitchell & Co., 558 So. 2d 9 (Fla. 1990); Badische Corp. v. Caylor, 356 S.E.2d 198 (Ga. Ct. App. 1987); Kohala Agric. v. Deloitte & Touche, 949 P.2d 141 (Haw. Ct. App. 1997); Pahre v. Auditor of State, 422 N.W.2d 178 (Iowa 1988) (citing Ryan v. Kanne, 170 N.W.2d 395, 403 (Iowa 1969)); Ingram Indus. Inc. v. Nowicki, 527 F. Supp. 683 (E.D. Ky. 1981) (applying Kentucky law); First Nat'l Bank of Commerce v. Monco Agency Inc., 911 F.2d 1053 (5th Cir. 1990) (applying Louisiana law); Bowers v. Allied Inv. Corp., 822 F. Supp. 835 (D. Me. 1993); Law Offices of Lawrence J. Stockler, P.C. v. Rose, 436 N.W.2d 70 (Mich. Ct. App. 1989); Bonhiver v. Graff, 248 N.W.2d 291 (Minn. 1976); Western Sec. Bank v. Eide Bailly L.L.P., 249 P.3d 35 (Mont. 2010); Spherex, Inc. v. Alexander Grant & Co., 451 A.2d 1308 (N.H. 1982); Vigil v. State Auditor's Office, 116 P.3d 854, 860 (N.M. Ct. App. 2005) (*Restatement* closest to New Mexico standard); Raritan River Steel Co. v. Cherry, Bekaert & Holland, 367 S.E.2d 609 (N.C. 1988); Bunge Corp. v. Eide, 372 F. Supp. 1058 (D.N.D. 1974) (discussing North Dakota law in dicta); Haddon View Inv. Co. v. Coopers & Lybrand, 436 N.E.2d 212 (Ohio 1982); Williams Controls, Inc. v. Parente, Randolph, Orlando, Carey & Assocs., 39 F. Supp. 2d 517 (M.D. Pa. 1999) (applying Pennsylvania law); Forcier v. Cardello, 173 B.R. 973 (D.R.I. 1994) (applying Rhode Island law); Rusch Factors, Inc. v. Levin, 284 F. Supp. 85 (D.R.I. 1968) (applying Rhode Island law); Bethlehem Steel Corp. v. Ernst & Whinney, 822 S.W.2d 592 (Tenn. 1991); Grant Thornton L.L.P. v. Prospect High Income Fund, 314 S.W.3d 913 (Tex. 2010); Milliner v. Elmer Fox & Co., 529 P.2d 806, 808 (Utah 1974) (test equivalent to § 552 adopted); Haberman v. Wa. Pub. Power Supply Sys., 744 P.2d 1032 (Wash. 1987); First Nat'l Bank of Bluefield v. Crawford, 386 S.E.2d 310 (W. Va. 1989).

The Missouri courts have used their own four-factor version of the California six-factor test to adopt a standard similar to § 552. *See, e.g.*, Aluma Kraft Mfg. Co. v. Elmer Fox & Co., 493 S.W.2d 378, 382–83 (Mo. Ct. App. 1973); Lindner Fund v. Abney, 770 S.W.2d 437, 438 (Mo. Ct. App. 1989). Because of its use of the four-factor test, *Aluma Kraft* is sometimes cited as representing a fourth approach to accountant liability, distinguishable from the near privity test, § 552, and the foreseeability standard. *See Raritan River Steel Co.*, 367 S.E.2d at 214. Even though the court's methodology was distinctive, however, the liability rule it adopted by using that methodology is akin to the *Restatemen*t rule. Midamerican Bank & Trust Co. v. Harrison, 851 S.W.2d 563 (Mo. Ct. App. 1993). The Missouri Supreme Court has modified the application of this test in an attorney liability case. *See* Donahue v. Shughart, Thomson & Kilroy, P.C., 900 S.W.2d 624, 626 (Mo. 1995).

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.[70]

The *Restatement* rule aims to provide a middle-of-the-road approach to liability. The North Carolina Supreme Court expressed this view in its oft-cited opinion in *Raritan River Steel Co. v. Cherry, Bekaert & Holland*:

> [Section 552] recognizes that liability should extend not only to those with whom the accountant is in privity or near privity, but also to those persons, or classes of persons, whom he knows and intends will rely on his opinion, or whom he knows his client intends will so rely. On the other hand, as the commentary makes clear, it prevents extension of liability in situations where the accountant "merely knows of the ever-present possibility of repetition to anyone, and the possibility of action in reliance upon [the audited financial statements], on the part of anyone to whom it may be repeated." As such it balances, more so than the other standards, the need to hold accountants to a standard that accounts for their contemporary role in the financial world with the need to protect them

70. RESTATEMENT (SECOND) OF TORTS § 552 (1977). The *Restatement (Third) of Torts: Liability for Economic Harm* §5 similarly adopts the standards of §552 with minor changes in language. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM §5 (2012).

> from liability that unreasonably exceed the bounds of their real undertaking.[71]

The section defines the scope of liability as to the person for whose benefit the information is supplied (§552(2)(a)) and as to the transaction for which it is supplied (§552(b)). The non-client must be a person or within the group for whom the defendant intends to supply the information or knows that the recipient of the information intends to supply it, and the non-client must rely on the information in a transaction that the defendant intends to influence or knows that the recipient of the information intends to influence, or in a substantially similar transaction.

The application of §552 varies greatly among the jurisdictions, particularly as to the intent and knowledge requirements about the relying party and the affected transaction. The strictest view practically equates the knowledge requirement with the intended beneficiary requirement of contract law. In its adoption of §552 in *Bily v. Arthur Young & Company*, the California Supreme Court applied a very restrictive, intent-focused interpretation:[72]

> The "intent to benefit" language of the *Restatement [(Second)] of Torts* thus creates an objective standard that looks to the specific circumstances (e.g., supplier-client engagement and the supplier's communications with the third party) to ascertain whether a supplier has undertaken to inform and guide a third party with respect to an identified transaction or type of transaction.[73]

The court also suggested appropriate jury instructions for negligent misrepresentation cases that emphasize the requirement of knowledge and intent.

> The representation must have been made with the intent to induce plaintiff, or a particular class of persons to which plaintiff belongs, to act

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71. Raritan River Steel Co. v. Cherry, Bekaert & Holland, 367 S.E.2d 609, 617 (N.C. 1988) (internal citation omitted); *see also* Kohala Agric. v. Deloitte & Touche, 949 P.2d 141 (Haw. Ct. App. 1997).

72. *See Bily*, 834 P.2d at 775 (Kennard, J., dissenting, stating majority test is restrictive). *But see id*. at 768 (majority opinion discussing intent); Giacometti v. Aulla, L.L.C., 114 Cal. Rptr. 3d 724 (Cal. Ct. App. 2010) (applying *Bily* majority approach); Murphy v. BDO Seidman, 6 Cal. Rptr. 3d 770 (Cal. Ct. App. 2003) (also applying *Bily* majority approach).

73. *Bily*, 834 P.2d at 769 (emphasis removed).

> in reliance upon the representation in a specific transaction, or a specific type of transaction, that defendant intended to influence. Defendant is deemed to have intended to influence [its client's] transaction with plaintiff whenever defendant knows with substantial certainty that plaintiff, or the particular class of persons to which plaintiff belongs, will rely on the representation in the course of the transaction. If others become aware of the representation and act upon it, there is no liability even though defendant should reasonably have foreseen such a possibility.[74]

Other courts require knowledge but do not focus to such a great extent on intent and direct undertaking of responsibility. As one Louisiana federal district court noted in *Bank of New Orleans and Trust Company v. Monco Agency*, the *Restatement* distinguishes among the concepts "know," "reason to know," and "should know."[75] By using the specific term "know" in §552, the *Restatement* drafters required actual knowledge but not intent.[76]

Some courts do not require that the knowledge be specific or that it arise from any particular transmittal of information from the client:

> To allow liability to turn on the fortuitous occurrence that the accountant's client specifically mentions a class of persons who are to receive the reports, when the accountant may have the same knowledge as a matter of business practice, is too tenuous a distinction for us to adopt as a rule of law. Instead, we hold that if, under current business practices and the circumstances of that case, an accountant preparing audited financial statements knows or should know that such statements

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74. *Id.* at 772–73. The "substantial certainty" concept is drawn from the standard for intentional torts. *See* RESTATEMENT (SECOND) OF TORTS § 8A (1965).

75. Bank of New Orleans and Trust Co. v. Monco Agency, 719 F. Supp. 1328, 1331 n.4 (E.D. La. 1989).

76. *See, e.g.*, *Kohala*, 949 P.2d 141 (Haw. Ct. App. 1997); Nycal Corp. v. KPMG Peat Marwick L.L.P., 688 N.E.2d 1368 (Mass. 1998); Compass Bank v. King, Griffin & Adamson, 388 F.3d 504 (5th Cir. 2004) (applying Texas law); Nationsbank v. KPMG Peat Marwick, L.L.P., 813 So. 2d 964 (Fla. Dist. Ct. App. 2002); First Fla. Bank v. Max Mitchell & Co., 558 So. 2d 9 (Fla. 1990); First Nat'l Bank of Bluefield v. Crawford, 386 S.E.2d 310 (W. Va. 1989). *But see* Reisman v. KPMG Peat Marwick, L.L.P., 787 N.E.2d 1060 (Mass. App. Ct. 2003) (consent to use of audited statements in filing of registration statement with down-to-date process enough to meet *Nycal* intent standard, but filing with 10-Q, when no signature or down-to-date, not enough); Bonhiver v. Graff, 248 N.W.2d 291, 303 (Minn. 1976) (stating actual knowledge suffices for liability but refusing to define contours of the rule); TCF Banking & Sav. v. Arthur Young & Co., 706 F. Supp. 1408, 1419 (D. Minn. 1988) (relying on *Bonhiver* and holding a plaintiff need not prove actual knowledge of his reliance).

> will be relied upon by a limited class of persons, the accountant may be liable for injuries to members of that class relying on his certification of the audited reports.[77]

In this broader application of the knowledge requirement, these courts and others approach a foreseeability standard.[78]

B. Near Privity

A number of jurisdictions apply a much narrower "near privity" standard to lawyer and accountant negligent misrepresentation cases. This standard had its origin in *Ultramares Corporation v. Touche*.[79] Because of a concern for indeterminate liability, only where there was privity or an equivalent relationship would an accountant be liable to a third party who relied on its negligently-prepared report.

New York has remained the leading jurisdiction to espouse the view of liability limited to privity or a similar relationship. In a series of cases the New York Court of Appeals has explained and modified the *Ultramares* doctrine in ways that have been influential in other jurisdictions as well.

In *Credit Alliance Corporation v. Arthur Andersen & Company*, the court established a three-part test for determining whether there was a sufficient relationship between the accountant and the third party to substitute for privity:

> (1) the accountant must have been aware that the financial reports were to be used for a particular purpose or purposes;
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> (2) in the furtherance of which a known party or parties was intended to rely; and

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77. Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co., 715 S.W.2d 408, 412 (Tex. Ct. App. 1986) (emphasis removed), *cited with approval* in Raritan River Steel Co. v. Cherry, Bekeart & Holland, 367 S.E.2d 609 (N.C. 1988), and Bethlehem Steel Corp. v. Ernst & Whinney, 822 S.W.2d 592 (Tenn. 1991).

78. Norman v. Brown, Todd & Heyburn, 693 F. Supp. 1259 (D. Mass. 1988); *see also* Eisenberg v. Gagnon, 766 F.2d 770 (3d Cir. 1985); Employers Ins. of Wausau v. Musick, Peeler, & Garrett, 871 F. Supp. 381 (S.D. Cal. 1994); Bradford Secs. Processing Servs., Inc. v. Plaza Bank & Trust, 653 P.2d 188 (Okla. 1982); Atl. Paradise Assocs. v. Perskie, Nehmad & Zeltner, 666 A.2d 211, 214–15 (N.J. Super. Ct. App. Div. 1995) (attorney who prepared public offering statement for condominium may be liable to purchasers of units).

79. Ultramares Corp. v. Touche, 174 N.E. 441 (N.Y. 1931).

> (3) there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance.[80]

The two cases that were consolidated for appeal in *Credit Alliance* illustrate the application of the rule. In *Credit Alliance*, an accountant was held not liable to a non-client who had loaned money to the accountant's client in reliance on the accountant's erroneous audit, a report of which had been provided to it by the client. Even though the accountant was alleged to have actual or constructive knowledge that the client showed the report to the lender to induce the loan, there was no allegation that the audit was prepared for that particular purpose or that the accountant had any direct dealings with the plaintiff.[81] Thus, arguably all three elements of the test were lacking, especially the linking conduct required by the third element.

In *European American Bank and Trust Company v. Strauhs & Kaye*,[82] by contrast, the plaintiff alleged that the accountant was aware that the lender was relying on the accountant's work in valuing the collateral of its loans and otherwise assessing the financial status of the accountant's client, the borrower.[83] Further, the accountant and the lender were in contact with respect to the borrower's affairs over a substantial period of time; they met for the purpose of discussing the borrower's financial condition and the lender's reliance on the accountant's evaluation; and the accountant made repeated representations in person about the value of the borrower's assets. On these facts, the court held that the relationship between the parties was the practical equivalent of privity under the three *Credit Alliance* criteria.[84]

In *Prudential Insurance Company of America v. Dewey, Ballantine, Bushby, Palmer & Wood*, the court held that the *Credit Alliance* test applies generally to economic injuries caused by professionals and

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80. Credit Alliance Corp. v. Arthur Andersen & Co., 483 N.E.2d 110, 118 (N.Y. 1985); *see also* Westpac Banking Corp. v. Deschamps, 484 N.E.2d 1351, 1352 (N.Y. 1985) (The criteria require a third party claiming harm to demonstrate a relationship or bond with the accountants "sufficiently approaching privity" based on "some conduct on the part of the accountants.").

81. *Credit Alliance*, 483 N.E.2d at 111–13.

82. European Am. Bank & Trust Co. v. Straughs & Kaye, 477 N.Y.S.2d 146 (N.Y. App. Div. 1984).

83. *Id.* at 146–47.

84. *Id.* at 148; *see also* Abramo v. Teak, Becker & Chiaramonte, CPA's, Inc., 713 F. Supp. 2d 96 (N.D.N.Y. 2010); Seaview Mezzanine Fund, L.P. v. Ramson, 909 N.Y.S.2d 72 (N.Y. App. Div. 2010).

applied the test in a lawyer liability setting.[85] In *Prudential Insurance*, the court held that the issuance of an opinion letter by the debtor's lawyer to the creditor in connection with a refinancing clearly met the *Credit Alliance* criteria. The lawyer was aware that the letter was to be used in a debt restructuring; the creditor relied on the letter in agreeing to the restructuring.[86] By addressing and sending the letter to the creditor, the lawyer clearly linked itself to the creditor and its reliance.[87] Therefore, the lawyer owed a duty to the plaintiff.[88]

The courts have made clear that the near privity test is a rigid one, requiring firm proof that the defendant was retained to further a particular purpose in which the non-client was involved,[89] that the relying non-client was known to the defendant,[90] and especially that there was an adequate nexus or linking conduct between the professional and the non-client.[91] Although the *Credit Alliance* court did not explain what precisely was meant by "some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance,"[92] other courts have interpreted it to require "showing of some communication or contacts demonstrating the accountant's awareness of the third party's reliance."[93]

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85. Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood, 605 N.E.2d 318 (N.Y. 1992); *see also* Thomas H. Lee Equity Fund V, L.P. v. Mayer Brown, Rowe & Maw L.L.P., 612 F. Supp. 2d 267 (S.D.N.Y. 2009); Good Old Days Tavern, Inc. v. Zwirn, 686 N.Y.S.2d 414 (N.Y. App. Div. 1999).

86. *Prudential Insurance*, 605 N.E.2d at 322.

87. *Id.* at 323.

88. *Prudential Insurance*, 605 N.E.2d at 320 (N.Y. 1992). On the facts, however, the defendant had not breached the duty. The opinion letter stated that the lawyer had relied on certain documents and provided only general assurances concerning the validity of the loan obligations; the procedural representations and the general assurances were not false, so the lawyer had not violated its duty. *Id.* at 323.

89. *See* DaPuzzo v. Reznick Fedder & Silverman, 788 N.Y.S.2d 69 (N.Y. App. Div. 2005) (knowledge based on past investments insufficient).

90. Stephenson v. PricewaterhouseCoopers, L.L.P., 482 F. App'x 618, 621–22 (2d. Cir. 2012).

91. For example, courts have divided on the application of the *Credit Alliance* test in actions by investors against accountants of feeder funds in the Bernard Madoff scandal. *Compare* CRT Invs., Ltd. v. Merkin, 925 N.Y.S.2d 439 (N.Y. App. Div. 2011), *and* Saltz v. First Frontier, L.P., 782 F. Supp. 2d 61, 83 (S.D.N.Y. 2010) (misrepresentation actions dismissed), *with* Anwar v. Fairfield Greenwich Ltd., 728 F. Supp. 2d 372, 453–57 (S.D.N.Y. 2010) (denying motions to dismiss negligence and misrepresentation actions).

92. Ahmed v. Turpin, 809 F. Supp. 1100, 1105 (S.D.N.Y. 1993).

93. Sec. Pac. Bus. Credit, Inc. v. Peat Marwick Main & Co., 597 N.E.2d 1080, 1091 (N.Y. 1992) (Hancock, J., dissenting); *see also* Sec. Investor Protection Corp. v. BDO Seidman, L.L.P., 746 N.E.2d 1042 (N.Y. 2001); *Ahmed*, 809 F. Supp. at 1104–05; CMNY Capital, L.P. v. Deloitte & Touche, 821 F. Supp. 152 (S.D.N.Y. 1993); Hammond v. Marks

Of the jurisdictions that have adopted the requirement that there be a relationship approaching privity, most have done so by using the *Credit Alliance* test as an appropriate standard.[94] A few states have adopted the rule of privity or a near substitute by statute. The *American Institute of Certified Public Accountants* has promoted legislation of this type in a model statute that closely resembles the *Credit Alliance* test.[95] Four states have adopted versions of this statute.[96] Four others have adopted statutes of similar effect which provide that an accountant is liable in

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Shron & Co., 671 N.Y.S.2d 106 (N.Y. App. Div. 1998) (limited partner not in near privity with accountant retained by company through general partner); Barrett v. Freifeld, 883 N.Y.S.2d 305 (N.Y. App. Div. 2009). *But see In re* JWP Inc. Sec. Litig., 928 F. Supp. 1239, 1253–54 (S.D.N.Y. 1996) (absence of direct communication between accountant and third party not fatal to plaintiff's claim where certificate issued by accountant states it is for use of third party).

94. Twin Mfg. Co. v. Blum, Shapiro and Co., 602 A.2d 1079 (Conn. Super. Ct. 1991); Ret. Prog. for Employees of the Town of Fairfield v. NEPC, L.L.C., No. X08 1 CV 09 5013326S, 2011 WL 6934794 (Conn. Super. Ct. Dec. 8, 2011); Idaho Bank & Trust Co. v. First Bancorp, 772 P.2d 720, 722 (Idaho 1989); Walpert, Smullian & Blumenthal, P.A. v. Katz, 762 A.2d 582 (Md. 2000); Select Exp., L.L.C. v. American Trade Bindery, Inc., 943 A.2d 90, 94 (Md. Spec. App. 2008) (for nexus requirement, focus is on defendant's knowledge); Thayer v. Hicks, 793 P.2d 784, 789 (Mont. 1990) (no need to adopt a standard more liberal than the *Credit Alliance* test because liability would be imposed even under that strict test).

95. The relevant portion of the model statute prohibits actions by parties not in privity unless:

> The defendant licensee or firm: (1) was aware at the time the engagement was undertaken that the financial statements or other information were to be made available for use in connection with a specified transaction by the plaintiff who was specifically identified to the defendant accountant, (2) was aware that the plaintiff intended to rely upon such financial statements or other information in connection with the specified transaction, and (3) had direct contact and communication with the plaintiff and expressed by words or conduct the defendant accountant's understanding of the reliance on such financial statements or other information.

AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, UNIFORM ACCOUNTANCY ACT AND UNIFORM ACCOUNTANCY ACT RULES § 20(c)(2) (5th ed. 2007).

96. KAN. STAT. ANN. § 1-402 (2012); LA. REV. STAT. ANN. § 37:91 (2012); N.J. STAT. ANN. § 2A:53A-25 (2013); WYO. STAT. ANN. § 33-3-201 (2006); *see* Monarch Normandy Square Partners v. Normandy Square Assocs. Ltd. P'ship., 817 F. Supp. 896 (D. Kan. 1993); Cast Art Indus., L.L.C. v. KPMG L.L.P., 36 A.3d 1049 (N.J. 2012); *see also* Gillespie v. Seymour, 796 P.2d 1060 (Kan. Ct. App. 1990) (upholding the Kansas statute under the state constitution), *aff'd in part, rev'd in part*, 823 P.2d 782 (1991). *But see* Battenfeld of Am. Holding Co. v. Baird, Kurtz & Dobson, 60 F. Supp. 2d 1189, 1198 (D. Kan. 1999) (finding that purchaser of corporation met requirements of Kansas statute); First St. Bank v. Daniel and Assocs., 518 F. 2upp. 2d 1157 (D. Kan. 2007) (Kansas statute only applied to registered accountants; Restatement § 552 applies in other cases); Solow v. Heard McElroy & Vestal, L.L.P., 7 So.3d 1269 (La. Ct. App. 2009); E. Dickerson & Son, Inc. v. Ernst & Young, 846 A.2d 1237, 1239 (N.J. 2004).

negligence to a party in the absence of privity only if the accountant was aware that the benefit to a third party was a primary purpose of the client, or if the accountant identifies the third party who is intended to rely on it.[97]

III. NEGLIGENCE AND NEGLIGENT MISREPRESENTATION: IS THERE A DIFFERENCE?

Cases that potentially impose liability on lawyers and accountants for actions injuring non-clients arise out of two types of factual settings. In one setting the lawyer's or accountant's negligence injures the non-client, but the act of negligence does not involve a communication that is relied on by the non-client.[98] When the putative beneficiary of a will loses a bequest because the will is improperly executed under the supervision of a lawyer, for example, the breach of duty is the lawyer's failure to exercise reasonable professional care to effectuate the wishes of the testator. A lawyer also may fail to properly prepare[99] or file[100] documents for a business transaction. Actions not involving communication are less common for accountants, but they do exist; for example, an accountant may negligently fail to examine transactions of general partners, so the

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97. ARK. CODE ANN. § 16-114-302 (2012); 225 ILL. COMP. STAT. ANN. 450/30.1 (2012); MICH. COMP. LAWS § 600.2962 (2012); UTAH CODE ANN. § 58-26a-602 (West 2012).

For applications of the statutes, see, e.g., Swink v. Ernst & Young, 908 S.W.2d 660 (Ark. 1995); Riley v. Ameritech Corp., 147 F. Supp. 2d 762, 773–74 (E.D. Mich. 2001) (citing Ohio Farmers Ins. Co. v. Shamie, 597 N.W.2d 553 (Mich. Ct. App. 1999)) (holding that Act requires that accountant and client give written notice regarding identified third parties and intended use); Yadlosky v. Grant Thornton, L.L.P., 120 F. Supp. 2d 622, 634 (E.D. Mich. 2000); Tricontinental Ind., Ltd. v. PricewaterhouseCoopers, L.L.P., 475 F.3d 824 (7th Cir. 2007) (applying Illinois law; failure to provide independent verification of primary intent to benefit third party); Bank of Am., N.A., v. Knight, 875 F. Supp. 2d 837 (N.D. Ill. 2012) (applying Illinois law; knowledge that audited statements would be distributed to lender insufficient to show primary intent to benefit).

98. In most of these cases there is no communication at all. A notable exception is *South Carolina State Ports Authority v. Booz-Allen & Hamilton, Incorporated*, 346 S.E.2d 324 (S.C. 1986); *see also* South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc., 676 F. Supp. 346 (D.D.C. 1987) (expansion of negligence liability under South Carolina law does not violate First Amendment).

99. *See, e.g.*, Adams v. Chenowith, 349 So. 2d 230 (Fla. Ct. App. 1977); *see also* Keybank Nat'l Ass'n. v. Shipley, 846 N.E.2d 290 (Ind. Ct. App. 2006) (lawyer for receiver owed no duty to creditor); Speleos v. BAC Home Loans Servicing, L.L.P., 824 F.Supp. 2d 226 (D. Mass. 2011) (lawyer for loan servicer owed no duty to mortgagor).

100. *See, e.g.*, *In re* Langdon, No. 07–21058–DK, 2009 WL 400592 (Bankr. D. Md. Feb. 11, 2009) (applying Maryland law).

resulting report to limited partners contains no misrepresentation but is incomplete.[101]

In the other setting, either there is an act of negligence that results in a false statement to the non-client on which the non-client relies to its detriment, or there is an act of negligence in communicating information itself. In these cases, the non-client is injured by its reliance on the communication, whether the communication is made directly to the non-client or is made in the course of performance to the contracting party and is subsequently relied on by the non-client. The paradigmatic instance of cases involving communication is the issuance of a formal opinion. An accountant audits the financial statements of a company and issues an opinion stating that the accountant followed *Generally Accepted Auditing Standards* and that the financial statements fairly present the financial condition of the company in accordance with *Generally Accepted Accounting Principles*. A lawyer for the seller of all the shares of stock in a company issues an opinion to the buyer stating that the sales agreement is enforceable according to its terms.[102] Communication on which non-clients rely also may be less formal. A lawyer for the seller of a property may negligently misrepresent to a potential buyer that a prior transaction had fallen through.[103] An accountant may mark financial statements "unaudited" but still verify that it has performed a review.[104]

At the level of doctrinal classification, the first group of cases is unproblematic. Only a negligence cause of action is available, not negligent misrepresentation, because there is no communication on which the non-client can rely. In these cases, the performance has no communicative content to it, so the only available action is for breach of the duty of reasonable care.

In the second group of cases, however, the gravamen of the complaint is twofold: the defendant negligently performed a service, and it communicated the results of that performance to the third party; and because the service was negligently performed, the information communicated was incorrect. Therefore, both the elements of the cause of action for negligence and the elements of the cause of action for negligent misrepresentation conceivably could be satisfied. This possibility

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101. *See, e.g.*, White v. Guarente, 372 N.E.2d 315 (N.Y. 1977).

102. *See, e.g.*, Geaslen v. Berkson, Gorov & Levin, Ltd. 581 N.E.2d 138 (Ill. App. Ct. 1991), *aff'd. in part, rev'd. in part*, 613 N.E.2d 702 (Ill. 1993).

103. Green Spring Farms v. Kersten, 401 N.W.2d 816 (Wis. 1987). Many of the lawyer cases involve a failure to disclose information. *See, e.g.*, Wright v. Pennamped, 657 N.E.2d 1223 (Ind. Ct. App. 1995); Burket v. Hyman Lippitt, P.C., 560 F. Supp. 2d 571 (E.D. Mich. 2008), *vacated in part*, Nos. 05–72110, 05–72171, 05–72221, 2008 WL 2478308 (E.D. Mich. June 17, 2008); Heliotis v. Schuman, 226 Cal. Rptr. 509 (Cal. Ct. App. 1986).

104. *See, e.g.*, Ryan v. Kanne, 170 N.W.2d 395 (Iowa 1969).

presents a classificatory issue: two causes of action potentially apply to the same set of facts. Does it matter which cause of action is available, or if both are available? It would matter if liability would be available under one cause of action that would not be available under the other on the same set of facts.[105] Therefore, the first recurrent question in this area is: is there a difference between the negligence and negligent misrepresentation causes of action?

Courts generally adopt one of two views on this issue. Some courts conclude that the choice between negligence and negligent misrepresentation matters a great deal, because the conceptual underpinnings of negligent misrepresentation are markedly different than those of negligence in economic loss cases. In particular, they suggest, the potential scope of liability for misrepresentation is dangerously greater than for non-communicative negligence because of the concern expressed by Cardozo in *Ultramares* for the "release of the explosive power resident in words"[106] that could lead to "liability in an indeterminate amount for an indeterminate time to an indeterminate class."[107] Therefore, the misrepresentation action needs to be confined in ways that the negligence action does not. In *Raritan River Steel Company v. Cherry, Bekaert & Holland*,[108] the North Carolina Supreme Court emphasized the difference between the foreseeability standard which defines the scope of duty in negligence and the more limited class of plaintiffs permitted under §552.[109]

> [Section 552] prevents extension of liability in situations where the accountant "merely knows of the ever-present possibility of . . . action in reliance upon [the audited financial statements], on the part of anyone to whom it may be repeated." As such it balances, more so than the other standards, the need to hold accountants to a standard that accounts for their contemporary role in the financial world with the need to protect

105. This is not an uncommon situation. In a variety of cases, for example, there is a potential overlap between a contract cause of action and a tort cause of action. The conflict is variously resolved by different courts, but as a generalization, the economic loss rule states that there are some cases that fall exclusively within the domain of contract law and others in which tort law also may play a role. *See* Jay M. Feinman, *The Economic Loss Rule and Private Ordering*, 48 ARIZ. L. REV. 813, 813–14 (2006) [hereinafter *The Economic Loss Rule*].

106. Ultramares Corp. v. Touche, 174 N.E. 441, 445 (N.Y. 1931).

107. *Id.* at 444.

108. 367 S.E.2d 609 (N.C. 1988).

109. *Id.* at 617.

> them from liability that unreasonably exceeds the bounds of their real undertaking.[110]

The California Supreme Court in *Bily v. Arthur Young & Company*,[111] stressed even more the practical implications of distinguishing the two actions. Chief among these implications is the effect on the jury of the instructions in each case; the misrepresentation instructions emphasize, in a way the negligence instructions do not, the necessity of reliance by the plaintiff on the auditor's report.

> By allowing recovery for negligent misrepresentation (as opposed to mere negligence), we emphasize the indispensability of justifiable reliance on the statements contained in the report. As the jury instructions in this case illustrate, a general negligence charge directs attention to defendant's level of care and compliance with professional standards established by expert testimony, as opposed to plaintiff's reliance on a materially false statement made by defendant. The reliance element in such an instruction is only implicit—it must be argued and considered by the jury as part of its evaluation of the causal relationship between defendant's conduct and plaintiff's injury. In contrast, an instruction based on the elements of negligent misrepresentation necessarily and properly focuses the jury's attention on the truth or falsity of the audit report's representations and plaintiff's actual and justifiable reliance on them. Because the audit report, not the audit itself, is the foundation of the third person's claim, negligent misrepresentation more precisely captures the gravamen of the cause of action and more clearly conveys the elements essential to a recovery.[112]

Other courts view the conceptual underpinnings of negligence and misrepresentation as much closer and conclude that when the causes of action are properly understood, there is no meaningful distinction between them. In *Greycas, Incorporated v. Proud*, Judge Richard Posner suggested the virtual identity of negligence and negligent misrepresentation in a case in which the negligence results in a communication, stating: "we have great difficulty both in holding them

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110. *Id.* (internal citation omitted); *see also* Standard Chartered P.L.C. v. Price Waterhouse, 945 P.2d 317 (Ariz. Ct. App. 1996); W. Sec. Bank v. Eide Bailly L.L.P., 249 P.3d 35 (Mont. 2010).

111. Bily v. Arthur Young & Co., 834 P.2d 745 (Cal. 1992).

112. *Id.* at 772 (footnote omitted).

apart in our minds and in understanding why the parties are quarreling over the exact characterization."[113] The similarity of negligence and misrepresentation makes it possible for a court to easily transport elements or policies from one doctrine to the other. In *Greycas, Incorporated v. Proud*, for example, Judge Posner suggested that an economic approach to the problem of indeterminate loss in cases involving negligent communications is decisive without regard to the doctrinal category in which the action is brought.[114] In *Barrie v. V.P. Exterminators, Incorporated*, the Louisiana Supreme Court noted that the approach of its courts in "negligent misinformation cases has been to integrate the tort doctrine into the duty/risk analysis" of negligence in general:

> [F]or the cause of action to arise—whether plaintiff is a third party or a party to the contract or transaction—there must be a legal duty on the part of the defendant to supply correct information, there must be a breach of that duty, and the breach must have caused plaintiff damage.[115]

The Restatement (Third) of Torts: Liability for Economic Harm adopts the latter view. The drafters of the *Restatemen*t state that the purposes underlying each cause of action are the same; Section 5 on negligent misrepresentation and Section 6 on negligence are intended to be "complementary."[116] Although "[r]eliance on statements and on services can give rise to different complications,"[117] the drafters state that "[n]othing should depend on [the] characterization, or on a plaintiff's choice to proceed under" negligence or misrepresentation.[118]

The *Restatement's* innovation is to make the elements of the causes of action the same by adding reliance as an element of the cause of action for negligence for the most common cases of negligence causing economic harm. In that respect, both Section 5 and Section 6 are instances of "invited reliance," one of the established exceptions to the *Restatement's* rule of no general duty.[119] But the *Restatement* also makes clear that liability may attach in negligence and possibly negligent

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113. Greycas, Inc. v. Proud, 826 F.2d 1560, 1563 (7th Cir. 1987).

114. *Id.* at 1564.

115. Barrie v. V.P. Exterminators, Inc., 625 So. 2d 1007, 1015 (La. 1993).

116. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 6 cmt. a (Tentative Draft No. 1, 2012).

117. *Id.* at § 5 cmt. a.

118. *Id.* at § 6 cmt. a.

119. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 1 cmt. d (Tentative Draft No. 1, 2012).

misrepresentation even in the absence of reliance;[120] in such cases, reliance may serve as a causal factor but is not a required element of the duty.[121] The most obvious case is the paradigmatic case of a will beneficiary. In a typical case, the beneficiary does not know of the will or the attorney's service in drafting it or supervising its execution until after the testator has died, so the beneficiary does not meet the requirements of Section 6 that the loss is caused by the beneficiary's "pecuniary loss caused to them by their reliance upon the service . . . through reliance upon it in a transaction the actor intends to influence."[122] Nevertheless, the law is nearly uniform that a will beneficiary may recover for the lawyer's failure to exercise reasonable care,[123] and the *Restatement (Third) of the Law Governing Lawyers* reaches the same result.[124]

More broadly, Sections 5 and 6 of the *Restatement* on economic harm only address "the principal duties thus far recognized,"[125] "the most commonly recurring types of claims."[126] Section 1(a) states that "[a]n actor has no general duty to avoid the unintentional infliction of economic loss on another," and Section 1(b) states that specific duties are recognized in the following sections, including Sections 5 and 6.[127] The comments make clear what is implicit in the black letter: the specification of some duties in Sections 5 and 6 does not preclude the recognition of a duty in other cases. What the *Restatement* calls "residual duties"[128] are recognized when appropriate under the general principles for the determination of a duty, taking into account the distinctive features of economic harm cases.[129]

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120. *Id.* at cmt. e.

121. The action for negligent misrepresentation arose out of the action for deceit—intentional fraud—by an extension of the scienter element from intent to recklessness to negligence. The action for deceit included the plaintiff's reliance on the defendant's misrepresentation as an element to establish a causal link between the wrongful action and the harm. The action for negligently-inflicted economic harm, by contrast, arose out of the ordinary action for negligence. That action does not require reliance because the paradigmatic negligence case is between strangers and does not have a communicative element—A hits B with a stick (*as in the venerable* Brown v. Kendall, 60 Mass. 292 (1850)), or, more typically today, A injures B in an auto accident.

122. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 6(2)(b) (Tentative Draft No. 1, 2012).

123. *See infra* note 132 and corresponding text.

124. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(3) (2000).

125. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 1 cmt. a (Tentative Draft No. 1, 2012).

126. *Id.* at § 1 cmt. e

127. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 1 (Tentative Draft No. 1, 2012).

128. *Id.* at § 1 cmt. e.

129. *Id.* at §1 cmt. c.

The varying views about the relationship between negligence and negligent misrepresentation pose a question: are cases involving communication meaningfully distinct from cases that involve performing a service in the absence of communication? Some courts say yes and subject misrepresentation actions to special, narrow requirements. Other courts and the *Restatement* say no, imposing similar liability rules on each action.

IV. THE UNDERLYING QUESTION: WHEN IS THERE A DUTY?

As described in Parts I and II, courts take varying approaches to each of the negligence and negligent misrepresentation causes of action. That variation suggests that the classification problem posed by the potential conflict between negligence and negligent misrepresentation cannot be solved on its own terms. The choice between negligence and negligent misrepresentation is not a choice between well-defined alternatives. Instead, within each doctrine there are a range of approaches to duty, and the approaches overlap within a doctrine and across the two doctrines. Therefore, there is a deeper question, which is the second recurrent question in this area: under either cause of action, in what cases should a court find a duty?

The answer to this question is necessarily conceptual rather than doctrinal. Courts employ principles and concepts to determine in which case a duty is appropriate and in which case it is not. In the first instance, the principles and concepts respond to the distinctive features of negligently-inflicted economic harm cases (including those involving negligent communications). Every non-client economic harm case arises out of a contractual setting in which the client retains the lawyer or accountant. But, a non-client case differs from an ordinary contract case because the harm to the non-client potentially implicates the policies of tort law. The harm to the non-client arises because the professional failed to exercise reasonable care in performing its contract, thereby causing injury to the plaintiff's economic interests. A non-client case is different than a traditional tort case, however, in that it involves purely economic loss, not physical injury. That raises the specter of indeterminate liability. Because the non-client's loss is not bounded by either a direct relationship with the professional (as in a contract case) or physical causation (as in a personal injury case), liability for economic loss to a non-client has the potential of creating indeterminate liability on the defendant. The consequences of a physical act can be catastrophic, but they tend to be limited in time and space to the immediate victims. The economic consequences of a negligent act, on the other hand, can extend along chains of causation to many persons far removed in time and

contact from the defendant. In short, a key problem in these cases is not simply the scope of liability but the uncertainty of liability—the indeterminacy problem.

What drives the choice about the different versions of the duty question—choices between the doctrines and among the various approaches to the doctrines—are deeper approaches to non-client cases. At the most general level, these approaches reflect general approaches to the construction of private law in general and the interaction between contract law and tort law in particular.[130]

One approach—the contractual approach—leans in the direction of limited liability by emphasizing the contractual origins of the relationships that give rise to the cases and the roles defined primarily by the parties' contracts. Parties allocate the costs, benefits, and risks of their interaction through the contracting process. The law supports the parties' private ordering primarily by using contract law to fulfill the parties' expectations by enforcing the contracts as the parties have made them. Tort law is better suited to the redress of accidental physical harm than to the regulation of consensual economic relationships, so courts ought to be chary in their use in cases of negligently-inflicted economic harm. When the courts impose liability beyond the contract, it upsets the parties' own allocation of rights and duties, diminishes their ability to regulate their own affairs, introduces inefficiencies into the process, and raises the threat of indeterminate liability.

Another approach—the relational approach—builds more on extra-contractual elements of the parties' relationships and stresses the responsibility that arises from causing harm to another. From this expanded perspective, the law supplements the express terms of contracts by factors from the context and by concern for policies not adequately captured in the concept of enforcing the parties' contracts. The law has important values to serve in addition to effectuating the parties' explicit planning—particularly the values of incentives, compensation, and fairness expressed in tort policies. Accordingly, tort liability often is an appropriate supplement to liability on the contract.

As applied in lawyer and accountant liability cases, the contractual and relational approaches ultimately focus on two issues, the resolution of which control a court's general approach to the issue and its decision on particular facts. One issue is the appropriate definition of the lawyer's or accountant's role. The other issue is the recurring problem in non-client cases, the concern for indeterminate liability.

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130. *See* Feinman, *The Economic Loss Rule*, *supra* note 105, at 817–23; *see also* Jay M. Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661, 664–665 (1989).

A. The Contractual Approach

The contractual approach suggests that the lawyer's or accountant's role is client focused and therefore limited with respect to non-clients. The client contracts for professional services to advance its own interests, and those interests largely define the scope of the professional's liability.

The lawyer in a lawyer-client relationship is devoted entirely to advancing the client's interests and is largely unlimited by external constraints in doing so. The lawyer-client relationship is primary, in that it defines what it means to be a lawyer, and the total devotion to the client that the lawyer-client relationship entails dictates the lack of obligation owed to anyone else. The lawyer's relationship with the non-client is the exact opposite of the lawyer-client relationship. In dealing with non-clients, the lawyer only has to observe the requirements of law that are applicable to any person and to observe the minimum standards of professional conduct. Accordingly, the lawyer's liability should be limited to situations in which liability to the non-client actually serves the client's objectives in obtaining the representation.

Likewise, in accountant liability cases, the accountant's primary responsibility is to its client and its essential role is to provide accounting services to the client—in an audit, for example, assurance that financial statements fairly represent the client's position. Non-clients also may use the financial statements, but they do not have the same relation to the accountant as the client does. A non-client contemplating a transaction with the accountant's client might rely on the accountant's work, but that work will and should only be one among many factors that provides the non-client with the assurance that it needs to proceed. The non-client can ascertain other data about the client and its principals that provide information about the financial state of the client and its prospects; it can obtain more information from the client or from others; and it can bargain with the client to reduce its risks.

Departing from this limited view of the lawyer's or accountant's role threatens indeterminate liability that would undermine the relationship. If a lawyer owed a duty of reasonable care to non-clients, the lawyer must be concerned about the effect on others of his or her actions in representing the client. The concern would be particularly great when the scope of potential liability is uncertain. This concern would endanger the unique status of the lawyer and the unique relationship between lawyer and client.

This threat is even more significant in many accountant cases. In the typical case of an audit report, for example, liability could expand to an uncertain number of parties as the class of potential plaintiffs expands from those specifically known to the accountant, to those known only as

members of a class, to those who are only foreseeable. Moreover, the extent of liability would be uncertain because the losses of each plaintiff depend on facts not within the knowledge or control of the accountant. Therefore the accountant would be unable to determine the appropriate level of care required to protect non-clients or to insure against the risk of error.

B. The Relational Approach

The relational approach in both settings criticizes the rigidity of the definition of the professional/client versus professional/non-client roles; that rigidity makes it difficult to deal with situations with more complex facts. Relational obligations are defined in shades of gray rather than the black and white categories that are used under the contractual argument.

In terms of role, the relational argument recognizes the importance of the lawyer-client relationship but also stresses the varying degrees of dependence and obligation that arise in the situations in which lawyers practice. One element in many relations is the extent of the non-client's dependence on the actions taken by the lawyer in the course of representing the client; the greater the dependence, the greater the obligation. A second element is the extent to which the lawyer's responsibilities in the relationship are clearly defined, as a matter of practice and as a matter of law; liability can be more appropriately imposed without fear of undermining the lawyer-client relationship when the element is more clearly defined. A third element is the extent to which the interests of the client and the third party are consistent with each other; the lawyer is subject to a greater role conflict where the interests are inconsistent and a lesser role conflict where they are more consistent, and the degree of role conflict influences the scope of liability.

In accountant cases, particularly audit cases, the accountant has a dual role, responsible not only to the client but potentially to non-clients and the public as well. The audit has long had dual purposes, but its use by persons other than the company's management has become increasingly important, to the extent that in many cases now it is the dominant purpose of the audit. Non-clients are differently situated to anticipate and deal with the risk of audit failure and with the more fundamental risk of error or fraud by the client in supplying financial information to the non-client. Particularly when the non-client is relatively unsophisticated or inexperienced in the kind of transaction, the presence of a clean audit report accompanying ordinary-looking financial statements reasonably may be taken to represent a "seal of approval" that nothing is materially amiss in the financial condition of the

company. Such a non-client may have no access to other information other than the accountant's report.

The essential issue in the indeterminacy argument is the unpredictability of the loss, not its size; that a loss may be very large is not as important as is the professional's ability to predict and therefore accommodate the loss in advance. Because most lawyer liability cases involve a relatively discrete transaction, indeterminacy is seldom a problem. In most accountant liability cases, the reasonable accountant will be able to predict the kinds of parties who may rely on its work and the kinds of transactions in which they may do so, even though it may not know their identity. There is even a natural limit in most cases on the potential scope of liability that arises from the size of the firm being audited and the nature of its activities. Nearly all cases arise from the extension of credit to the firm or equity investments in it. The capacity of a firm to absorb additional debt or equity is generally predictable within an order of magnitude based on its current size and the scope of its current business, which are of course known to the accountant.

C. The Approaches Applied

The two approaches provide access to the answers to the essential question in non-client cases: under either negligence or negligent misrepresentation, in what cases should courts find a duty? Some cases are clear cases of duty or no duty under either approach. Other cases are contested, with the approaches leading in different directions.

1. Clear cases

In lawyer liability cases, there are two polar cases defined by a lawyer's role in the attorney-client relationship. A lawyer clearly owes a duty to a named, putative will beneficiary who does not take under the

will because of the lawyer's negligence.[131] A lawyer clearly does not owe a duty of reasonable care to an adversary in litigation.[132]

In a will beneficiary case, the lawyer's professional services are engaged by the client to a significant degree for the purpose of advancing the beneficiary's interest in receiving an effective bequest. The lawyer's performance also may have a variety of other effects, such as reducing the tax burden on the testator's estate or providing economic or emotional security for the testator, so the performance inevitably will have direct consequences for the third party. The beneficiary is not the lawyer's client, but the beneficiary is a third party whose interests are sought to be advanced by the lawyer-client relationship and whose interests will be injured by the lawyer's failure to perform with reasonable care. Accordingly, an "end and aim" of the attorney-client relationship, to use the language of *Glanzer v. Shepard*, is to advance the beneficiary's

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131. *See, e.g.*, Lucas v. Hamm, 364 P.2d 685, 687 (Cal. 1961); Stowe v. Smith, 441 A.2d 81, 82 (Conn. 1981); Teasdale v. Allen, 520 A.2d 295 (D.C. 1987); Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A., 467 So. 2d 315 (Fla. Dist. Ct. App. 1985); Harrigfeld, 90 P.3d at 888 (Idaho 2004); McLane v. Russell, 546 N.E.2d 499, 503 (Ill. 1989); Walker v. Lawson, 526 N.E.2d 968 (Ind. 1988); Schreiner v. Scoville, 410 N.W.2d 679, 683 (Iowa 1987); Simpson v. Calivas, 650 A.2d 318, 321 (N.H. 1994); Rathblott v. Levin, 697 F. Supp. 817, 820 (D.N.J. 1988); Hesser v. Cent. Nat'l Bank & Trust Co. of Enid, 956 P.2d 864, 867 (Okla. 1998); Hale v. Groce, 744 P.2d 1289, 1292 (Or. 1987); Guy v. Liederbach, 459 A.2d 744, 752–53 (Pa. 1983); Friske v. Hogan, 698 N.W.2d 526, 531 (S.D. 2005); Calvert v. Scharf, 619 S.E.2d 197 (W. Va. 2005); Auric v. Continental Cas. Co., 331 N.W.2d 325, 329 (Wis. 1983).

132. Nielsen v. Berger-Nielsen, 69 S.W.3d 414, 420 (Ark. 2002) (applying statute); Rubin v. Green, 847 P.2d 1044, 1052–53 (Cal. 1993) (communications with potential clients held within statutory litigation privilege); Norton v. Hines, 123 Cal. Rptr. 237, 240 (Cal. Ct. App. 1975); Allied Fin. Servs. v. Easley, 676 F.2d 422 (10th Cir. 1982) (applying Colorado law; lawyer not liable for improperly serving writs of garnishment); Weigel v. Hardesty, 549 P.2d 1335, 1337 (Colo. Ct. App. 1976); Field v. Kearns, 682 A.2d 148, 154–55 (Conn. App. Ct. 1996) (successor attorney owed no duty to predecessor attorney in preparing malpractice complaint); Morowitz v. Marvel, 423 A.2d 196, 199 (D.C. 1980); Smith v. Hurd, 699 F. Supp. 1433, 1437 (D. Haw. 1988), *aff'd.*, 985 F.2d 574 (9th Cir. 1993) (applying Hawaii law); Schechter v. Blank, 627 N.E.2d 106, 109 (Ill. App. Ct. 1993) (attorney for trustee in bankruptcy owes no duty to creditors); Pantone v. Demos, 375 N.E.2d 480, 485 (Ill. App. Ct. 1978); Nelson v. Miller, 607 P.2d 438, 451 (Kan. 1980); Hill v. Willmott, 561 S.W.2d 331, 335 (Ky. Ct. App. 1978); Friedman v. Dozorc, 312 N.W.2d 585, 588 (Mich. 1981); L & H Airco, Inc. v. Rapistan Corp., 446 N.W.2d 372 (Minn. 1989) (misrepresentation claim arising out of arbitration proceeding); Wild v. Trans World Airlines, Inc., 14 S.W.3d 166 (Mo. Ct. App. 2000); Bates v. Law Firm of Dysart, Taylor, Penner, Lay & Lewandowski, 844 S.W.2d 1 (Mo. Ct. App. 1992); Rashidi v. Albright, 818 F. Supp. 1354, 1358 (D. Nev. 1993); Mayfield Smithson Enter. v. Com-Quip, Inc., 896 P.2d 1156, 1160 (N.M. 1995) (adverse parties in bankruptcy proceeding); Aglira v. Julien & Schlesinger, P.C., 631 N.Y.S.2d 816, 819 (N.Y. App. Div. 1995); Drago v. Buonagurio, 386 N.E.2d 821, 822 (N.Y. 1978); Smith v. Griffiths, 476 A.2d 22, 26 (Pa. Super. Ct. 1984); Toles v. Toles, 113 S.W.3d 899, 918 (Tex. App. Ct. 2003).

interest; the beneficiary is the person who will suffer the single loss of the value of the bequest if the lawyer fails to perform properly.

No indeterminacy problem arises in the will beneficiary case because the lawyer's liability is limited to a loss which can occur only once to a single party and is of a relatively determinate amount. Only an intended beneficiary of the estate can recover, and the total recovery of all beneficiaries is limited to the value of the estate. This can be a very large amount, and it may not be fixed at the time the will is made, but it is an amount the magnitude of which the lawyer should be aware in the course of preparing and executing the will. Moreover, the beneficiary is the only person in a position to bring an action for the lawyer's negligence, which will ensure that the purposes of that relationship are effectuated as originally planned. The testator obviously is unavailable to do so, and the estate may have no interest in doing so and, as a matter of law, no means of doing so. Due to the lawyer's neglect, the beneficiary suffers a loss of a different order than does the estate; while the beneficiary is entitled to the amount of the lost bequest as damages, the estate is entitled only to a return of the fee paid to the lawyer.

In litigation, by contrast, the lawyer's role is to be a zealous advocate for the client, and the lawyer's zeal should not be diminished by concern that an error in judgment will result in liability to an adversary. In litigation the parties have adverse interests and the obligations owed are clearly defined and severely limited. The lawyer owes to the client loyalty, judgment, and aggressive advocacy. The lawyer's advocacy is constrained by prohibitions against fraud to the adversary or the court, concealment or destruction of evidence, maintaining spurious claims or arguments, and other similarly egregious acts. Within those constraints, however, the duty to the client is primary to the point of being exclusive.[133] And, because each party is represented by its own lawyer, one party has no reason to rely on the other party's lawyer.

Recognizing a duty of care to the adversary would undermine the lawyer's role as advocate for the client. A duty of reasonable care requires that one person take account of the interests of another person. In considering taking an action that affects the adversary's interests, the lawyer would be under a duty to weigh the costs and benefits to the client and the costs and benefits to the adversary. That decision process is antithetical to the lawyer's role as advocate. The lawyer's role conflict would be exacerbated by the necessary indeterminacy of the rule; how far the lawyer could go in serving the primary function of zealous advocate

133. *See, e.g.*, Friedman v. Dozorc, 312 N.W.2d 585, 592 (Mich. 1981); Bowman v. John Doe Two, 704 P.2d 140, 144 (Wash. 1985).

could always be contested in subsequent litigation and, indeed, become a threat and bargaining tool in the instant litigation.

In accountant cases, both the contractual and relational approaches agree on the treatment of two paradigm cases. When the accountant conducts an audit for a specific, identified purpose, knowing that the audit report will be relied on by a particular non-client, and furnishes a copy of the audit report to the non-client, it is clear that the accountant owes to the non-client a duty of reasonable care in performing the audit and reporting its results.[134] In performing the audit, the accountant has a dual role as a professional independent of its client to provide information to the non-client—the accountant serves as "an independent check upon management's accounting of its stewardship"[135]—as well as to its client. As a professional, the accountant must be competent and must perform the audit with due care. As an independent professional, the accountant must be impartial in fact and in appearance as between the interests of the client and the interests of those persons who will rely on the financial statements.

In the case of an audit prepared for a known party in a particular transaction, the liability that will result from the negligent performance of the audit is relatively predictable. The accountant knows both who will rely on the audit and the extent of the non-client's reliance. When the audit is prepared for a potential lender to the audited company, for example, the accountant knows the size of the loan and can predict the loss that the lender will incur if the audit negligently fails to reveal that the company is not creditworthy. Accordingly, the potential loss is not indeterminate, so the accountant can take precautions to prevent the loss or insure against it. The potential liability provides an incentive for an accountant to act with reasonable care, and is properly borne by the negligent accountant rather than the innocent non-client.[136]

But, when the accountant performs a routine audit which is relied on by the public at large, often indirectly through the transmission of information about the report through various sources such as investment advisors, it is clear that there is no liability.[137] In these cases, too, the

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134. *See, e.g.*, Credit Alliance Corp. v. Arthur Andersen & Co., 483 N.E.2d 110, 118 (N.Y. 1985); Westpac Banking Corp. v. Deschamps, 484 N.E.2d 1351, 1352 (N.Y. 1985).

135. H. Rosenblum, Inc. v. Adler, 461 A.2d 138, 149 (N.J. 1983) (citing *In re* Kerlin, SEC ACCOUNTING RELEASE 105 (1966)).

136. Rusch Factors, Inc. v. Levin, 284 F. Supp. 85, 91 (D.R.I. 1968).

137. White v. BDO Seidman L.L.P., 549 S.E.2d 490, 494 (Ga. Ct. App. 2001); Eldred v. McGladrey, Hendrickson & Pullen, 468 N.W.2d 218, 220 (Iowa 1991); KPMG Peat Marwick v. Asher, 689 N.E.2d 1283, 1289 (Ind. Ct. App. 1998) (applying Missouri law); Raritan River Steel Co. v. Cherry, Bekaert & Holland, 407 S.E.2d 178, 182–83 (N.C. 1991);

accountant has a dual role as providing information to management and to others. But the non-clients who might rely on the audit report are unknown to the accountant; indeed, they are unknowable. The information can be transmitted to many potential lenders, investors, and others; and the accountant has no way to assess the extent of their reliance and therefore of its potential liability. The threat of indeterminate liability is immense, and the accountant can neither effectively insure against the loss nor capture the value of the service he or she provides to non-clients at large.

2. Contested cases

Inevitably, there are intermediate cases. For example, there are cases in which the beneficiary argues that the testator's actual intention differs from the intention stated on the face of the will.[138] The jurisdictions divide over the possibility of liability in this situation. Some jurisdictions adhere to a "four-corners" rule, under which a beneficiary may recover only when the testator's intent as expressed in the will is frustrated.[139] This rule is designed to protect "the integrity and solemnity of an individual's testamentary instruments as well as the testator's express

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Grant Thornton L.L.P. v. Prospect High Income Fund, 314 S.W.3d 913, 929–30 (Tex. 2010); Hendricks v. Thornton, 973 S.W.2d 348, 362–63 (Tex. Ct. App. 1998).

138. For other types of cases involving lawyers, see FEINMAN, PROFESSIONAL LIABILITY, *supra* note 1, at 77–99.

139. *See, e.g.*, Hall v. Kalfayan, 118 Cal. Rptr. 3d 629, 634 (Cal. Ct. App. 2010); Kinney v. Shinholser, 663 So. 2d 643, 645 (Fla. Dist. Ct. App. 1995); Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner, 612 So. 2d 1378, 1380 (Fla. 1993); Schreiner v. Scoville, 410 N.W.2d 679 (Iowa 1987); Mieras v. DeBona, 550 N.W.2d 202, 214–15 (Mich. 1996); Charfoos v. Schultz, No. 283155, 2009 WL 3683314, at *2 (Mich. Ct. App. Nov. 5, 2009) (extrinsic evidence may not be used to establish incapacity); Sorkowitz v. Lakritz, Wissbrun & Assocs., P.C., 706 N.W.2d 9 (Mich. 2005); Harrison v. Lovas, 234 P.3d 76, 78 (Mont. 2010) (trust documents); Bullis v. Downes, 612 N.W.2d 435, 438–39 (Mich. Ct. App. 2000) (rule also applies to estate planning documents other than a will). *But see* Karam v. Law Offices of Ralph J. Kliber, 655 N.W.2d 614, 622 (Mich. App. 2002) (where estate planning documents are internally inconsistent, extrinsic evidence may be introduced to determine testator's intent); Harrison v. Lovas, 234 P.3d 76 (Mont. 2010); Leff v. Fulbright & Jaworski, L.L.P., 911 N.Y.S.2d 320, 321 (N.Y. App. Div. 2010); Henkel v. Winn, 550 S.E.2d 577, 579 (S.C. Ct. App. 2001); Beauchamp v. Kemmeter, 625 N.W.2d 297, 302 (Wis. 2000). *See also* Boranian v. Clark, 20 Cal. Rptr. 3d 405, 410 (Cal. Ct. App. 2004) ("But liability to a third party will not be imposed where there is a substantial question about whether the third party was in fact the decedent's *intended* beneficiary, or where it appears that a rule imposing liability might interfere with the attorney's ethical duties to his client or impose an undue burden on the profession."); Stept v. Paoli, 701 So. 2d 1228, 1229 (Fla. Dist. Ct. App. 1997) (intent to minimize taxes not expressed in trust); Beckom v. Quigley, 824 N.E.2d 420 (Ind. App. 2005) (intent to designate beneficiaries must be known to lawyer).

intent."[140] Other jurisdictions attempt to effectuate the testator's actual intent, which may be proved by evidence extrinsic to the will.[141] When the plaintiff can prove that the will does not accurately reflect the testator's intent, denying the plaintiff a cause of action allows the lawyer's negligence to frustrate that intent. Because there is no other avenue for relief, only the action against the lawyer permits the wrong to be remedied, and it does so without disrupting the administration of the estate.[142]

From a relational perspective, the beneficiary's interest is thwarted in the situation in which the beneficiary is excluded from the will due to the lawyer's neglect just as clearly as when the interest fails because of an error in execution of the will or administration of the estate. The lawyer's responsibility is to ensure that the testator's choices are effectuated, which carries with it the responsibility to document those choices. The beneficiary faces a significant burden of proof in demonstrating that the testator intended to confer a benefit in the absence of proof in the will, but the process of proof should not be precluded by a blanket "four-corners" rule.

The contractual approach would not find a duty in these cases because of the vagueness created by claims of beneficiaries who are not named in the will. The difficulties of proof in those cases may be significant, and the threat of such complex litigation may affect the attorney-client relationship by inducing the attorney to an excess of caution at the client's expense. Finding a duty also would raise a conflict with the formality policy underlying the wills act; the purpose of the formal requirements of wills would be undermined if beneficiaries not named in the will could use the action against the lawyer as a back door to recovery.

The principal variation on the action brought by an adversary in litigation occurs when the plaintiff is not an adversary of the lawyer's

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140. *Schreiner*, 410 N.W.2d at 683.

141. *See, e.g.*, Osornio v. Weingarten, 21 Cal. Rptr. 3d 246 (Cal. Ct. App. 2004) (where failure is to effectuate testator's intent expressed in will, but failure is formal, as where failed to comply with statute requiring independent review to overcome presumptive disqualification of care custodian as beneficiary); Stowe v. Smith, 441 A.2d 81, 82 (Conn. 1981); Teasdale v. Allen, 520 A.2d 295 (D.C. 1987); Ogle v. Fuiten, 466 N.E.2d 224, 227 (Ill. 1984); Karam v. Law Offices of Ralph J. Kliber, 655 N.W.2d 614, 622 (Mich. Ct. App. 2002); Pivnick v. Beck, 741 A.2d 655 (N.J. Super. Ct. App. Div. 1999), *aff'd*, 762 A.2d 653 (N.J. 2000) (clear and convincing evidence required); *see also* Blair v. Ing, 21 P.3d 452, 467–68 (Haw. 2001); Johnson v. Sandler, Balkin, Hellman & Weinstein, P.C., 958 S.W.2d 42, 48 (Mo. Ct. App. 1997) (trust).

142. *Ogle*, 466 N.E.2d at 227.

client but is a party in some other relation to the litigation.[143] The largest group of these cases arises out of divorce and child custody litigation.[144] In the divorce area, a leading case is *Pelham v. Griesheimer*.[145] The Illinois Supreme Court held that, although the children of a divorcing parent were not direct adversaries of the lawyer's client, the former wife, their interests were sufficiently adverse to preclude a duty. Creating a duty by the lawyer to the children "would interfere with the undivided loyalty which the lawyer owes his client and would detract from achieving the most advantageous position for his client."[146]

The relational argument suggests that there might be a duty to the children in this situation. In this case, the third party's interests do not necessarily conflict with the client's interest. Moreover, unlike the case in which the adversary is represented by counsel to protect its interests, in the litigation of family disputes when children are unrepresented, the lawyer knows that their interests will be significantly affected by the litigation and that they must depend on the parents and parents' lawyers

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143. For other variations, see Meighan v. Shore, 40 Cal. Rptr. 2d 744 (Cal. Ct. App. 1995) (action by the spouse of a lawyer's client in a tort action for failure of the lawyer to advise the client or spouse of the availability of an action for loss of consortium), *distinguished by* Hall v. Superior Court, 133 Cal. Rptr. 2d 806, 811 (Cal. Ct. App. 2003) (spouses had not consulted lawyer together as to their joint rights); Klancke v. Smith, 829 P.2d 464 (Colo. Ct. App. 1991) (lawyer not liable for paying to client part of award owed to client's children); Perez v. Stern, 777 N.W.2d 545, 550 (Neb. 2010) (attorney hired by personal representative of decedent's estate to file a wrongful death action owed duty to decedent's minor children); Tipton v. Willamette Subscription Television, 735 P.2d 1250, 1252 (Or. Ct. App.) (litigation had not commenced but lawyer's client and plaintiff were in an adversarial position; lawyer not liable for sending demand letter); Oxendine v. Overturf, 973 P.2d 417, 421–22 (co-heir against attorney for personal representative); *In re* Estate of Drwenski, 83 P.3d 457, 465 (Wyo. 2004) (lawyer not liable to child of client in divorce proceeding).

144. *See* Rushing v. Bosse, 652 So. 2d 869, 872–73 (Fla. Dist. Ct. App. 1995) (action for professional negligence by adopted child against lawyer for adoptive parents upheld); Makela v. Roach, 492 N.E.2d 191 (Ill. App. Ct. 1986) (lawyer for wife not liable to husband or son for advice concerning transfer of assets); Wilson-Cunningham v. Meyer, 820 P.2d 725 (Kan. Ct. App. 1991) (lawyer owed no duty to children to file divorce decree of parents); Lamare v. Basbanes, 636 N.E.2d 218 (Mass. 1994) (lawyer for father in divorce proceedings not liable to mother or children, so lawyer not liable after father abducted children); Leon v. Martinez, 598 N.Y.S.2d 274, 276–77 (N.Y. App. Div. 1993) (lawyer not liable for failure to pay part of settlement under agreement of client and third parties); Darrow v. Zigan, Nos. 07CA25, 07AP25, 2009 WL 1278385 (Ohio Ct. App. May 1, 2009) (lawyer for husband in dissolution proceeding not liable to wife for failing to promptly file deeds as part of dissolution); Strait v. Kennedy, 13 P.3d 671 (Wash. Ct. App. 2000) (lawyer not liable to client's children for failing to timely finalize client's divorce prior to her death); Cosner v. Ridinger, 882 P.2d 1243 (Wyo. 1994) (lawyer for custodial parent, spouse after remarriage, and grandparent not liable to noncustodial parent).

145. 440 N.E.2d 96 (Ill. 1982).

146. *Id.* at 100.

to account for their interests. Because the litigating parents often focus in an emotionally intense way on their own interests, it is the responsibility of the participant in the process who has some degree of detachment—the lawyer—to consider the interests of the children.

The intermediate accountant cases are those in which the non-client has a less direct relation to the accountant and the preparation of the financial statements but is not so attenuated as simply to be a member of the general public.[147] The contractual argument suggests that liability is appropriate only when the accountant has specific knowledge and intent with respect to the third party who will rely and the transaction in which the reliance will occur. The accountant assumed the responsibility of preparing the audit for a known non-client in a particular transaction. Imposing liability to a different non-client and in a different transaction is beyond the scope of the liability assumed and opens the floodgates to other cases in which the accountant's liability may be indeterminate. Foreseeability of harm is much too generous a standard; in hindsight, everything is foreseeable. And, non-clients who rely on the audit are likely to be motivated by other factors as well and to have other means of obtaining information or controlling their risk.

The relational argument suggests that specific knowledge and intent are not necessary. Knowledge without intent is sufficient in all cases, and reason to know of the relying third party and transaction is sufficient in some cases. The accountant's role is to exercise reasonable care in the conduct of the audit. When the accountant knows or has reason to know of the non-client's reliance, the accountant can prepare for the risk of liability so the potential liability is not indeterminate. Even when the accountant only has reason to know of the nature of the reliance, without knowledge of the specific non-client or the transaction on which it relies, its risks are relatively predictable because of its knowledge of the client's business, so that the loss it causes should not be borne by the non-client.

Where an audit is not ordered for an identified third party, but the accountant knows that it will be used by some third party for a specific, identified purpose, for example, under the relational approach, it is immaterial that the accountant does not know the specific relying party; the accountant knows that its report will be used by some non-client in a particular, contemplated transaction.[148] The fact that the non-client is a member of an identifiable group rather than a named non-client does not

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147. For other types of cases involving accountants, see FEINMAN, PROFESSIONAL LIABILITY, *supra* note 1, at 115–46.

148. *See* RESTATEMENT (SECOND) OF TORTS § 552 cmt. h (1977); *see also* Kohala Agric. v. Deloitte & Touche, 949 P.2d 141, 167–70 (pattern of creating limited partnerships gave rise to knowledge).

increase the scope of the accountant's potential liability. The contractual approach recognizes that the expansion of liability may not be great here but may preclude a duty to avoid opening the floodgates to other cases.

Where the audit is not ordered for a special purpose but is a routine periodic audit, the accountant knows or should know that the client typically supplies a copy of the audit to a lender as part of its refinancing of working capital. The essential difference here is that the accountant must predict that a third party is likely to rely on the audit report in a specified type of transaction, but the accountant does not have actual, specific knowledge that the third party will do so. If the accountant knew that the routine audit would be supplied to a creditor to refinance an existing debt which was coming due, the accountant would be liable under the relational approach. As in *Ultramares*, the contractual approach would not find liability because of the increased indeterminacy.

CONCLUSION

The conventional form of a law journal article is to survey an area of law, identify a doctrinal problem within that area, evaluate conflicting precedents and policies, and suggest a solution. This is not that kind of article. This Article surveys the law under which lawyers and accountants are potentially liable to non-clients and identifies a doctrinal problem: in some cases, either negligence or negligent misrepresentation actions will be available and each will lead to a different result. The Article then points out that that problem suggests a deeper one: under what circumstances does a lawyer or accountant owe a duty to a non-client? The answer to that question is: it depends. It depends on how broadly or narrowly a court focuses on the role of the professional and the threat of indeterminate liability. Courts take two general approaches to these questions, here described as a contractual approach and a relational approach. The choice between those approaches, which determines the particular doctrinal problem, is ultimately a choice about on what basis the law should define the obligations professionals and others owe to each other in economic relations.