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SUPREME COURT OF THE STATE OF WASHINGTON

STEWART TITLE GUARANTY COMPANY,
a Texas Corporation

Appellant,

v.

WITHERSPOON, KELLEY, DAVENPORT & TOOLE, PS,
a Washington corporation; DUANE M. SWINTON and
JANE DOE SWINTON, and the marital community
comprised thereof,

Respondents.

REPLY BRIEF OF APPELLANT

David P. Hirschi (WSBA No. 35202)
Jeffrey J. Steele (*Pro Hac Vice*)
HIRSCHI STEELE & BAER, PLLC
136 E. South Temple, Suite 1400
Salt Lake City, Utah 84111
801-990-0500
Lead Attorney for Appellant

Brian J. Waid (WSBA No. 26038)
WAID LAW OFFICE
4847 California Ave. S. W., Ste 100
Seattle, Washington 98116
206-388-1926
Local Counsel for Appellant

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STATEMENT OF THE CASE

This is a legal malpractice action. Sterling Savings Bank (“Sterling”) tendered a claim to Stewart Title Guaranty Company (“Stewart”) to defend the priority of its deed of trust from the competing lien claim of Mountain West Construction (“MWC”). CP 2413-14. Rather than simply paying the lien claim, Stewart exercised its contractual rights under the policy and elected to defend. CP 2424-38. Stewart retained Duane Swinton (“Swinton”) of Witherspoon Kelley Davenport & Toole, P.S. (“Witherspoon”) to defend Sterling in MWC’s lawsuit to foreclose its lien (the “MWC Litigation”). CP 2414; 2440-47. Stewart expected and relied upon Witherspoon to competently and properly investigate MWC’s claims and Sterling’s defenses. CP 2414; 2382. Stewart expected and relied upon Witherspoon to keep it informed concerning the MWC Litigation, and to make informed, competent recommendations relating to Sterling’s defense so that Stewart could control the defense as required under the insurance policy. CP 2412-22; 2440-47. Witherspoon recognized its obligations to keep Stewart informed, make recommendations and raise appropriate affirmative defenses. CP 2356-57; 2359.

Although Witherspoon argues that it was being fired for being “too loyal” to Sterling (Resp. Br. 2, 49), in fact it was fired for failing to

competently defend Sterling in the MWC Litigation. In response to a Motion for Summary Judgment filed by MWC, Witherspoon erroneously concluded that there were no viable defenses to the priority of MWC's lien. CP 2412-22; 2455-56. Without investigating or addressing equitable subrogation as a potential defense, Witherspoon recommended that Stewart not oppose MWC's motion for summary judgment on lien priority. *Id.* Based upon Witherspoon's recommendations and analysis, Stewart agreed. CP 2412-22.

Witherspoon then drafted and entered into a Stipulation and Order for Partial Summary Judgment (the "Stipulation"). CP 2412-22; 2460-61. Although Stewart agreed with Witherspoon's recommendation to not oppose the motion, Stewart Title never authorized Witherspoon to enter into the Stipulation, and did not even see the Stipulation until after it was entered by the Court. CP 2412-22.

The Stipulation was too broad and Witherspoon had not researched the affirmative defense of equitable subrogation prior to entering into the Stipulation. CP 2352-54; 2380. Witherspoon was not even aware that Sterling's loan proceeds had paid off other liens. CP 2412-22; 2478-80. Witherspoon admitted its error (CP 2412-22; 2484) and attempted to assert the equitable subrogation defense (CP 2412-22; 2486-93). Although Witherspoon did not intend to waive affirmative defenses when it drafted

and entered into the Stipulation (CP 2361-63; 2368), the Court subsequently relied on the Stipulation in denying Sterling's Motion to Amend Answer to assert equitable subrogation. CP 2412-22; 2463-65.

The question now before the Court is whether equitable subrogation was an available defense in the MWC Litigation. Witherspoon argues that no malpractice could have been committed because the law regarding equitable subrogation was not clear. Importantly, this Court is not tasked with deciding whether Sterling could have obtained a better result had Witherspoon timely asserted an equitable subrogation defense. The trial court never reached that question because it determined as a matter of law that equitable subrogation was not an available defense to Sterling in the MWC Litigation. The primary issue before this Court is therefore whether equitable subrogation was an available defense in the MWC Litigation. Witherspoon also disputes the trial court's ruling that it owed a duty of care to Stewart Title.

ARGUMENT

A. **Witherspoon's Unjust Enrichment Analysis Focuses on the Wrong Issue and the Wrong Party**

Witherspoon seeks to turn the Court's attention from MWC's windfall to Stewart's alleged negligence by arguing that "no unjust enrichment results when a title company pays a claim caused by its own

error.” Resp. Br. 20. This approach ignores Sterling’s role as the claimant and misinterprets the intent and focus of the *Restatement*. Further, Witherspoon’s argument would immunize retained counsel from malpractice when an insurer has to pay a claim due to malpractice.

Restatement (Third) of Property: Mortgages §7.6 intends to prevent unjust enrichment from “a person receiving an unearned windfall at the expense of another.” *Restatement* 7.6, cmt a; *Bank of America, N.A. v. Prestance Corp.*, 160 Wn.2d 560, 567, 160 P.3d 17 (2007). Under the *Restatement*, an “unwarranted and unjust windfall” occurs when a subordinate or intervening lien holder receives **an unexpected elevation in lien priority** over a party who paid for, and expected, the higher priority lien. *Restatement* 7.6, cmt a. Conversely, equitable subrogation will not be applied if either: (1) the claimant expected to have a non-priority lien; or (2) its application would prejudice an intervening lien holder by putting its lien in a worse position than expected.¹ *Restatement* 7.6, cmt e. Once the claimant establishes that it expected to have a priority lien, the focus turns to the expectations of the intervening lien

¹ Prejudice may exist if the intervening lien holder thought the property was unencumbered, or if the obligation seeking to be subrogated carries a higher interest rate or principal balance than the lien being discharged, resulting in less foreclosure proceeds than anticipated to satisfy junior liens. *Id.* at cmt. f. However, “a mere extension of time” for repayment which results from subrogating a new obligation to the position of the former obligation “is generally not regarded as seriously prejudicial . . . and is often advantageous to [the intervening lien claimant].” *Id.* at cmt e.

holder. The claimant's knowledge of the intervening lien (which typically equates to negligence or worse in a lending context) is "not necessarily relevant" (*Restatement* 7.6, cmt. e; *see also Prestance*, 160 Wn.2d at 566-67), because equitable subrogation merely seeks to "preserve the proper priorities by keeping the first mortgage first and the second mortgage second" (*Prestance*, 160 Wn.2d at 560). In the instant matter, Sterling clearly expected to receive a first position lien on the Cook Addition property. App. Br. 10-13.² The relevant question therefore becomes whether MWC's lien would be prejudiced by equitable subrogation, and not, as argued by Witherspoon, whether Stewart's negligence should disqualify Sterling's affirmative defense.

1. MWC would not be prejudiced by application of equitable subrogation in the MWC Litigation

Witherspoon's brief fails to address MWC's "windfall" in any meaningful depth. Witherspoon instead relies on conclusory statements that MWC was simply an innocent third party seeking payment for work it actually performed. Resp. Br. 22, 23, 25. The issue is not, however, whether MWC should have been paid for its work – it is whether MWC **expected** to have **lien priority** over Sterling if it were to claim a lien for

² Sterling's loan documents and closing instructions clearly required that Sterling be given a first lien position on the property. Witherspoon's argument, if followed, that Sterling's loan officer Lisa Irwin did not expect Sterling "to stand in the shoes" of the IFA and Brown liens (Resp. Br. 37), creates an issue of fact precluding summary judgment. *See* App. Br. 33-37.

unpaid work. It is obvious from the record that MWC expected that its lien rights would be subordinate to Sterling's project financing:

- When MWC commenced construction, the Cook Addition was already encumbered by the liens of IFA and Brown (CP 743-747, 749-753);
- MWC knew that Milne was in the process of securing new financing from Sterling (CP 615);
- MWC would not begin construction until it was assured that financing was in place to pay its contract (CP 614-15; 714);
- MWC thought that Sterling's funding was, in fact, in place at the time it began work (CP 616);
- Because it expected an inferior lien, MWC bargained for 18% interest on all unpaid amounts (CP 714);
- MWC treated DAD and JA as the same entity (CP 619-20; 622); and
- When MWC filed its lien, it was **surprised** to learn that its work commencement date predated the recording of Sterling's trust deed (CP 625-26), allowing it to assert that its lien had priority over Sterling's lien.

Moreover, Witherspoon does not argue that the terms of the Sterling loan were prejudicial to MWC; in fact Sterling's loan increased the relative value of MWC's lien rights because the loan's terms were more favorable than the IFA and Brown obligations. CP 784-823. Sterling bargained for a first priority lien, and equitable subrogation should have been applied to preserve that expectation. MWC "can hardly complain about this result, for they are no worse off than before the senior obligation was discharged. If there were no subrogation, [MWC's lien] would be promoted in priority, giving them an unwarranted and unjust windfall." *See Restatement 7.6, cmt a., Prestance*, 160 Wn.2d at 565.

2. ***Coy* and *Kim* do not justify departure from *Restatement* 7.6 and *Prestance***

Witherspoon argues that *Coy v. Raabe*, (69 Wn.2d 346, 418 P.2d 728 (1966)) and *Kim v. Lee*, (145 Wn.2d 79, 31 P.3d 665 (2001)) create an exception to the *Restatement* because “no unjust enrichment results when a title company pays a claim caused by its own error.” Resp. Br. 20. This assertion ignores critical distinctions between the facts of *Coy*, *Kim*, and the underlying MWC Litigation, as well as the more current, controlling principles of *Prestance* and *Restatement* 7.6.

First, the facts and equities of *Kim* are distinguishable on several bases: (1) the intervening lien holder in *Kim* would have been prejudiced by the application of equitable subrogation (*Kim*, 145 Wn.2d at 88, 90, 93); (2) the title insurer in *Kim* had actual knowledge of the intervening lien (*id.* at 92)³; (3) the intervening lien holder in *Kim* was a stranger to the underlying transaction (*id.* at 82-83, 91-92); and (4) the title insurer in *Kim* was directly asserting equitable subrogation (*id.* at 85). Similarly, in *Coy*, the intervening lien holder was an innocent bona fide purchaser who changed his position in reliance on the title company’s mistake (*Coy*, 69 Wn.2d at 350), and the title insurer directly asserted equitable subrogation (*id.*). In contrast, the foregoing issues are not implicated here. Rather, the

³ *Prestance* held that such knowledge is irrelevant. *Prestance*, 160 Wn.2d at 566.

terms of Sterling's loan were not prejudicial to MWC, MWC relied upon Sterling's loan to finance its work, bargained for an inferior lien position, and explicitly expected its rights to be subordinate to Sterling's lien. Furthermore, Sterling would have been asserting equitable subrogation in its own name.

Witherspoon argues that it makes no difference whether the insured or insurer is claiming equitable subrogation "because under *Kim*, courts must look through the insured" to the insurer. Resp. Br. 24. In fact, *Kim* did not "look through" the insured because in *Kim* the title company directly asserted the equitable subrogation claim on its own behalf. *Kim* 145 Wn.2d at 85. Witherspoon's argument has also been rejected by other courts applying *Restatement* 7.6. The Ninth Circuit Court of Appeals specifically refused to apply *Coy* to cases in which insured parties claimed equitable subrogation, despite arguments from intervening lien holders that the title insurers were negligent and were the "real party in interest." *See, Mort v. United States*, 86 F.3d 890, 895 (9th Cir. 1996); *see also, In re: Tiffany*, 342 Fed. Appx. 303, 2009 U.S. App. LEXIS 17694 (9th Cir) (attached as Appendix E to App. Br.). The Arizona Supreme Court held in *Sourcecorp, Inc. v. Norcutt*, 274 P.3d 1204, 1209 (Az. 2012) (emphasis added):

Finally, Sourcecorp argues that because the Norcutts

obtained title insurance from which they could recoup any losses, equitable considerations preclude subrogation. Sourcecorp contends that neither the Norcutts nor the insurer should benefit from the insurer's negligence in failing to discover the recorded lien. Accepting these arguments, however, would require us to ignore the key concern underlying equitable subrogation and would unjustly enrich Sourcecorp . . . Denying subrogation here, therefore, would give Sourcecorp a windfall independent of whether the Norcutts were insured or had constructive notice of the judgment lien . . . We also agree with the court of appeals that **it would be anomalous to deny equitable subrogation merely because a party had been diligent in obtaining title insurance.**⁴

Furthermore, the policy of "looking through" an insured's claim based on the involvement of its insurer has been rejected in the general context of insurance defense law. *See, e.g.* App. Br. 48.

Finally, Witherspoon's proposal that equitable subrogation be denied as a matter of law in all cases where title insurers knew or should have known about intervening liens ignores the subsequent effect of the *Prestance* opinion and its endorsement of *Restatement 7.6* for the express purpose of facilitating refinancing and lowering title insurance premiums. *Prestance*, 160 Wn.2d at 580-81. If equitable subrogation is unavailable as a defense to insured parties, the doctrine will have no impact on the reduction of title insurance premiums and little if any impact on

⁴ Appellate courts in New York, New Jersey, Mississippi, Indiana, Colorado, the District of Columbia, and Ohio have all also interpreted *Restatement 7.6* and held that alleged negligence of a title insurer is irrelevant to equitable subrogation absent any prejudice to the intervening lienholder. *See* App. Br. 45-47 (summarizing cases).

facilitating the refinancing of properties encumbered by multiple liens. *Prestance's* adoption of *Restatement 7.6* should instead control the Court's interpretation of earlier cases such as *Coy* and *Kim, i.e.*, "[e]quitable subrogation should never be allowed if a junior interest is materially prejudiced, but if the junior interests are unaffected, **then there is no reason to deny it.**" *Id.* at 572 (emphasis added). Stewart's title insurance policy to Sterling is an indemnity contract and should have no bearing on Sterling's legal rights against third parties. CP 2424-2438.

B. Witherspoon's Argument that Sterling Did Not Answer for the Debt of Another Sacrifices Substance for the Sake of Form

The trial court granted summary judgment to Witherspoon on the basis that "the loan between JA and Sterling was not a refinance of the existing liens owed by DAD on the Cook's Addition property, as required by *Restatement 7.6*, adopted by our Supreme Court" CP 1757. Notably, only *Kim*, and not the *Restatement*, purportedly limits equitable subrogation to refinance transactions. Witherspoon therefore attempts to rewrite the trial court's ruling into a broader rule that Sterling did not "answer for the debt of another" because "[I]ending money to purchase property and lending money to discharge someone else's obligations are fundamentally different transactions." Resp. Br. 28. Witherspoon thus tries to disqualify Sterling from asserting equitable subrogation based

upon aspects of the **form** of the transaction, whereas *Restatement 7.6* and *Prestance* (and even *Kim*) repeatedly emphasize that the **substance** of the transaction should determine the outcome. From a substantive perspective, there is no reason why equitable subrogation should not have been applied to preserve Sterling's lien priority.

1. Equitable subrogation also applies to purchase transactions

Witherspoon relies on general subrogation case law for the proposition that equitable subrogation is only available to a party who “**answers** for the debt of another” due to a legal or moral obligation, and “not a volunteer.” Resp. Br. 26-27 (emphasis added). However, the Restatement instead focuses on whether a party “**performs** the obligation of another” and eliminates the volunteer limitation described by Witherspoon. *Restatement 7.6(a)* (emphasis added), and, ill. 5. Under the *Restatement*, it does not matter who pays the obligation and whether it is done “in order to protect his or her interest . . . or upon a request from the obligor or the obligor's successor to do so . . .” (*id.* at (b)).⁵ This distinction further confirms that equitable subrogation primarily seeks to preserve bargained for lien priorities. *See Prestance*, 160 Wn.2d at 564.

Witherspoon argues that Sterling did not **answer** the IFA and

⁵ The *Restatement* also recognizes that a particular transaction may fall within more than one subsection of the *Restatement*. *Id.* at illustration 29.

Brown obligations because Sterling's loan funds passed to JA's control, and then to DAD's control before paying off the Brown and IFA liens. In a lending context, however, *Restatement 7.6* explicitly rejects this logic, noting, for example, that "[i]n a refinancing, the new lender may disburse funds directly to the [borrower] with an understanding or agreement that the [borrower] will pay the prior mortgage. **The mechanics of the transaction are not controlling**" *Id.* at cmt e (emphasis added).

Witherspoon argues that this example does not extend to a purchase because the borrower in turn delivers the loan proceeds to the seller, who then "may" pay his own obligations independently. Resp. Br. 28.

However this is a semantic argument with no policy justification under the facts of this case. The only thing added to the transaction by DAD as the "seller" was one more procedural step to the same exact substantive result. The loan funds were disbursed from Sterling and paid to IFA and Brown in the same closing transaction. CP 657-58. Sterling's escrow instructions clearly stated that no money was to be disbursed to DAD (CP 711), and Sterling required that the loan funds be used to remove any existing liens. CP 607; 711. As the seller, DAD wanted to take money out of the closing but Sterling would not allow it. CP 1683-84.

Regardless of how the transaction is characterized procedurally, Sterling substantively performed the obligations to IFA and Brown, to secure itself

with a first priority lien on the Cook Addition.

For the reasons explained above, other jurisdictions following *Restatement 7.6* apply equitable subrogation to purchase transactions without reservation. *See* App. Br. at 22-26.⁶ The Supreme Judicial Court of Massachusetts explained that the only likely difference between applying equitable subrogation to a sale rather than a refinance was that refinancing mortgages may be subrogated more easily because they are less likely to prejudice junior mortgages. *See East Boston Savings Bank v. Ogan*, 428 Mass. 327, 701 N.E.2d 331, 329, n.3 (cited with approval by *Prestance* 160 Wn.2d at 575). Here, the trial court did not discuss the prejudice to MWC or Sterling if equitable subrogation were not applied, but focused instead on the mechanics and form of the transaction. Because there was no prejudice to MWC in equitably subrogating Sterling's loan, lending money to purchase the property rather than refinance is not "fundamentally different" as Witherspoon argued, and equitable subrogation should have been applied.

Witherspoon also argues that applying equitable subrogation to a purchase transaction is inappropriate because "it creates an undeserved

⁶ Notably, in *Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn.App 474, 254 P.3d 835 (2011), relied upon by Witherspoon (Resp. Br. 20, 24, 31), the Court of Appeals considered applying equitable subrogation to a purchase transaction but ultimately denied the defense based on its finding of prejudice. *See id.* at 478, 483, 500, fn.19.

double recovery.” Resp. Br. 29. Witherspoon’s argument is answered by the *Restatement*: while “ordinarily one who is entitled to subrogation is permitted to enforce both the mortgage and the secured obligation,” equitable subrogation should only be applied “to the extent necessary to prevent unjust enrichment.” *Restatement* 7.6(a) and cmt. a.

Witherspoon contends that *Restatement* 7.6 does not apply to purchase transactions because the drafters of the *Restatement* drafted a separate section, *Restatement* 7.2, to specifically deal with the priority of purchase money mortgages. Resp. Br. 30. This interpretation is belied by the fact the *Restatement* also applies equitable subrogation to purchase transactions within the illustrations to *Restatement* 7.6. See ill. 5, 15, 17, 18, 19, 20 and 21. Furthermore, other jurisdictions following *Restatement* 7.6 have had no trouble applying equitable subrogation to purchase money loans so long as there is no prejudice to the intervening lien holder. See, *East Boston Savings, supra, Sourcecorp, supra*, and cases discussed in App. Br. 22-26.

2. The transaction qualifies as a refinance under *Kim*’s broad definition

Kim v. Lee includes a statement without any supporting citation that equitable subrogation only applies to refinance transactions. *Kim*, 145 Wn.2d at 87. However, *Kim* also adopted a broad interpretation of the

term “refinance” which includes a transaction involving two different borrowers so long as the parties are closely related. *Id.* Accordingly, even if *Kim’s* refinance requirement survives *Prestance*, Sterling’s loan transaction qualifies as a refinance under *Kim’s* expansive definition of that term. CP 784-823; 1734-1740. In an effort to discredit the close relationship of Milne, DAD and JA, Witherspoon asserts that “there is no evidence that DAD and JA acted as a family or coherent economic unit in the sale of the Cook Addition.” Resp. Br. 32. In fact, the evidence strongly suggests that they did indeed act as a coherent economic unit.⁷

Witherspoon dismisses the fact that “Milne guaranteed both the debt of DAD to Brown and IFA, and the debt of JA to Sterling” on the basis that Milne was simply a member of both entities. Resp. Br. 32. However, Witherspoon does not, and cannot, explain why **DAD also guaranteed JA’s loan** when it was **not** a member of JA, and was, in fact, the “seller” of the property. CP 580-582; 586.

Witherspoon’s argument that James’ involvement as an additional party in JA affects the unity of Milne, DAD and JA’s interests is also illusory. First, Witherspoon overstates James’ interest. While

⁷ See App. Br. 7, 30, 32 (citing evidence that JA had no assets or income of its own at the time it applied for the \$7.5 million loan from Sterling; that Sterling relied on the financial strength of DAD and Milne in making the loan and required them to guaranty it; that DAD’s contract to sell the finished lots to Soundbuilt Homes was never assigned to JA; and that DAD agreed to subordinate its equity in the project to Sterling’s loan instead of taking cash out from the sale proceeds).

Witherspoon claims that James was a 49% partner in JA, JA represented to Sterling that he held only a 19% interest. CP 559. If his interest in the partnership had been any greater, Sterling would have required that James personally guaranty the loan. CP 892. Furthermore, James' 19% share of potential profits would only be shared **after** Milne was paid the first \$1 million in profit to satisfy the subordinated promissory note from JA to DAD which Sterling required as part of its loan to prevent Milne from cashing out his equity in the property. CP 560. As a result, James' real financial interest was significantly less. Whereas the obligor of the loan in *Kim* changed from parent to child, the obligors in this case changed from DAD and Milne, to DAD, Milne and JA, with Milne also being the majority owner of JA. In substance, the relationship of Milne and his entities was even closer than the familial relationship of the Kims.

3. Stewart does not need to and is not trying to prove that Milne, DAD and JA are the same entity

Witherspoon mischaracterizes Stewart's presentation of the interrelationship between Milne, DAD and JA as a "desperate measure" to avoid equitable subrogation's refinance limitation,⁸ and states that

⁸ Far from desperate, Stewart's simple argument is threefold: (1) equitable subrogation is not limited to refinance transactions (addressed at length above); (2) even if *Kim's* refinance limitation applies, the substance of this transaction falls within *Kim's* definition of refinance (also addressed above); and (3) evidence of how MWC and their subcontractors treated Milne, JA and DAD interchangeably further shows that MWC expected that any lien for unpaid work would be subordinate to Sterling's financing.

Stewart's "unitary entity theory was not endorsed by a single witness." (Resp. Br. 33). Witherspoon overlooks the most important witness, Steve Davis, the principal of MWC who oversaw construction of the Cook Addition. Mr. Davis candidly testified that for all practical purposes he thought DAD, JA and Milne were one and the same. CP 618-19; 620; 622. MWC signed contracts with each entity (CP 622), they billed the entities interchangeably (CP 623), they sent their notice of commencement of work to both entities as owners of the property (CP 617-18), and they filed their claim of lien against JA, DAD and Milne as owners of the property (CP 124). MWC did not care who owned the property, only that Sterling's financing was in place to pay for its work. CP 614-15. This evidence is not offered to pierce the corporate veil and impose personal liability on Milne for the actions of DAD and JA, but to show that Milne, DAD and JA are sufficiently related to fall within the broad holding of *Kim*, and that MWC's expectations were not prejudiced in any way as a result of the change in borrower for the project financing.

C. Stewart Title Has Standing Because Witherspoon Owed it a Duty of Care

The trial court correctly held that Stewart Title has standing to sue for malpractice because Witherspoon owed Stewart Title a duty of care as a third-party intended beneficiary under *Trask v. Butler*, 123 Wn.2d 835,

872 P.2d 1080 (1994). *Trask* articulated the factors to consider in determining whether an attorney owes a duty to a non-client, as follows

(*Trask*, 123 Wn.2d. at 842-3)⁹:

- (1) the extent to which the transaction was intended to benefit the plaintiff;
- (2) the foreseeability of harm to the plaintiff;
- (3) the degree of certainty that the plaintiff suffered injury;
- (4) the closeness of the connection between the defendant's conduct and the injury;

⁹ Other jurisdictions have similarly found that an attorney owes a non-client insurer a duty of care in defending the insured. In *Paradigm Insurance Company v. The Langerman Law Offices*, 24 P.3d 593 (2001 Ariz.), the Supreme Court of Arizona concluded that "when an insurer assigns an attorney to represent an insured, the lawyer has a duty to the insurer arising from the understanding that the lawyer's services are ordinarily intended to benefit both insurer and insured when their interests coincide. This duty exists even if the insurer is a nonclient." *Paradigm Ins. Co.*, 24 P.3d at 602. The *Paradigm Ins. Co.* Court further noted that "[i]f a lawyer's liability to the insurer depends entirely on the existence of an attorney-client relationship and for some reason the insurer is not a client, then the lawyer has no duty to the insurer that hired him, assigned the case to him, and pays his fees. There are many problems with that result; if that lawyer's negligence damages the insurer only, the negligent attorney fortuitously escapes liability. Or if the lawyer's negligence injures both insurer and insured in a case in which the insured is the only client but refuses to proceed against the lawyer, the insurer is helpless and has no remedy. Such unjust results are not just bad policy but unnecessary." *Paradigm Ins. Co.*, 24 P.3d. at 599-600. See also *Unigard Insurance Group v. O'Flaherty & Belgium*, 45 Cal. Rptr. 2d 565, 567 (CA. App., 2nd Dist., Div. 3 1995) ("when, pursuant to insurance policy obligations, an insurer hires and compensates counsel to defend an insured, provided that the interests of the insurer and insured are not in conflict, the retained attorney owes a duty of care to the insurer which will support its independent right to bring a legal malpractice action against the attorney for negligent acts committed in the representation of the insured"); *Atlanta International Insurance Company v. Bell*, 475 N.W.2d 294 (Mich. 1991) ("defense counsel occupies a fiduciary relationship to the insured, as well as to the insurance company and implicitly, if not explicitly, represents to the insured the ability to exercise professional competence and skill in conducting the insured's defense. Furthermore, because the insurance company, not the client, is required to satisfy a judgment arriving from a defense counsel's malpractice, the client has no real incentive to sue defense counsel.") (internal citations and quotations omitted); see also Pltf's MSJ re duty for explanation of additional cases. CP 2340.

- (5) the policy of preventing future harm; and
- (6) the extent to which the profession would be unduly burdened by a finding of liability.

Here, the trial court correctly determined that “Witherspoon had a limited duty to provide competent advice. Under *Trask*, Stewart was a third-party beneficiary of Witherspoon’s advice.” CP 523.

1. Stewart was an intended beneficiary and there was no conflict of interest between it and Sterling

“The important factor under the multi-factor balancing test is whether the attorney’s services were intended to affect the plaintiff [non-client].” *Trask*, 123 Wn.2d at 841 (citation omitted). Here, the interests of Stewart Title and Sterling were completely aligned – protecting the priority and superiority of the Sterling deed of trust against the competing MWC lien claim. CP 53-55; 2379; 2381-82; 2414-15. Because Stewart Title owed obligations to defend Sterling under the terms of the insurance policy, Witherspoon’s defense of Sterling was inherently intended to benefit Stewart Title. Indeed, it was by providing a successful defense of Sterling that Stewart Title would discharge its obligations to Sterling under the insurance policy.¹⁰

As noted by the trial court, the retention letter from Stewart to Witherspoon stated that Stewart retained the right to direct the litigation,

¹⁰ See, e.g. *Johnson v. Continental Casualty Co.*, 57 Wn. App. 359, 362, 788 P.2d 598 (1990) (an insurer must retain competent defense counsel for the insured).

and Witherspoon owed Stewart a duty to inform. CP 523; 2440-47. The trial court identified undisputed facts demonstrating that “Witherspoon recommended a course of action for Sterling,” and “Witherspoon’s recommendations, made for its client Sterling, and benefitting a non-client, Stewart, results in a benefit to Stewart that is more than merely incidental. . . . Those benefits were a substantial amount of money.” CP 524. Witherspoon gave information to Stewart to enable Stewart to make decisions in directing the litigation, and Stewart Title ultimately bore the risk of any loss incurred by Sterling as a result of the MWC litigation. Even Swinton knew and admitted in his deposition that Witherspoon’s efforts were intended to benefit both Sterling and Stewart Title. CP 2367.

The evidence contradicts Witherspoon’s attempts to manufacture a conflict of interest between Sterling and Stewart Title, where none actually existed. It is undisputed that Stewart accepted the defense of Sterling without a reservation of rights. CP 2414. In addition, Swinton admitted he did not see any conflict of interest between Stewart and Sterling. CP 2358; 2379-80. In the event that Witherspoon believed there was a conflict of interest between Stewart and Sterling, it was obligated to identify the conflict and communicate it to both parties. CP 2415; 2440-41. There is no evidence that Witherspoon ever communicated to anyone a conflict of interest between Stewart and Sterling. Thus, during the

relevant time period, “Witherspoon acted and communicated as if Sterling’s and Stewart’s interests were aligned.” CP 524.

2. All of the other *Trask* factors are satisfied

The trial court concluded that *Trask* “factors two through six have been established for the purpose of establishing a duty” owed by Witherspoon to Stewart, CP 525, noting (CP 525):

There was a foreseeability of harm if advice given constituted a failure of the standards of practice, and a closeness between Witherspoon’s conduct and the alleged injury. In this case, Stewart required and Witherspoon accepted a duty to inform that was not, at least at the time discussed herein, a conflict between the client and the insurer. Witherspoon recommended a course of action. As Witherspoon had a professional duty to provide competent advice, and Stewart was an intended beneficiary of the advice, and their interests were aligned, there was a closeness between the injury complained of and the act.

Apparently conceding that *Trask* factors two through six are satisfied, Witherspoon has not argued them in its Brief. Witherspoon instead misconstrues the *Trask* factors.¹¹ Witherspoon cannot unilaterally modify legal precedent to suit its needs. The actual *Trask* factors are clearly enumerated in the Court’s decision.

Even if this Court were to adopt Witherspoon’s modified elements,

¹¹ Resp. Br. 44 states: “*Trask* focused on three primary considerations in applying the various factors: (1) whether the absence of a duty would mean no one could sue the attorney for an error; (2) whether the nonclient had some effective way to protect its own interests aside from a malpractice claim; and (3) whether imposing a duty on the lawyer to the nonclient would create potential conflicts risking divided loyalty to the client.” Compare *Trask*, 123 Wn.2d. at 842-3.

each supports imposition of a duty. First, in the absence of a duty, insurers like Stewart would be left without a remedy when defense counsel such as Witherspoon commits malpractice and the insured has no motivation to sue. *Paradigm Ins. Co.*, 24 P.3d. at 599-600. This is particularly evident here where the trial court denied Stewart's attempt to pursue Sterling's claims against Witherspoon via subrogation. CP 526.

Witherspoon's argument that Stewart has other ways of protecting itself is similarly without merit. That Stewart could sue JA and pursue remedies against its agent that issued the title policy misses the mark. At most, such arguments might apply to allocation of fault and/or a calculation of damages. Other available remedies do not preclude imposition of a duty, particularly where those remedies do not provide the same scope of relief.

Finally, public policy favors the imposition of a duty. *Trask* does **not** stand for the proposition that the mere possibility that a client's interests may be adverse to those of a non-client precludes the duty. *Trask* refused to find a duty to non-clients because an **actual** conflict of interest existed. Witherspoon likewise misapplies *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986). *Tank* concluded that "the duty of good faith of an insurance company defending **under a reservation of rights** includes an enhanced obligation of fairness toward

its insured.” *Tank*, 105 Wn.2d at 383 (emphasis added). The issue in *Tank* is not implicated here.¹² There was no reservation of rights in this matter during the time Witherspoon was retained by Stewart. CP 2414. Accordingly, the trial court properly concluded that Stewart’s retention letter to Witherspoon “is consistent with *Tank* that the first duty is to the client, Sterling. The duty that Witherspoon could have to Stewart, a non-client, comes from the duty to inform and is dependent, in part, on the extent to which counsel makes recommendations and urges a course of action, and dependent, in part, on whether the parties had an alignment of interests at the time.” CP 523-4. Witherspoon thus owed a duty of care to Stewart.

3. *Restatement § 51* supports finding a duty

In addition to upholding the trial court’s finding of duty under the *Trask* factors, this Court should also find that Witherspoon owed a duty to Stewart as a non-client in accordance with *Restatement (Third) of the Law Governing Lawyers § 51* (ALI 2000) (attached as Appendix A). Contrary to Witherspoon’s assertion that the trial court rejected Stewart’s argument

¹² “The case involving *Tank* presents the question, broadly stated, of the nature of an insurance company’s duty of good faith toward its insured **when the company defends under a reservation of rights ...**” *Id.* (emphasis added); *see also, Id.* at 385 (emphasis added) (“[t]he real issue in this case is: what does an insurer’s duty of good faith entail **when the insurer defends under a reservation of rights?**”).

pertaining to *Restatement 51* (Resp. Br. 40, n.7)¹³, the trial court's Memorandum Order on duty simply does not mention the *Restatement*. CP 522-527. Nevertheless, the order closely follows the *Restatement's* rationale. *See id.*

Restatement 51 subsection (3) requires that the lawyer: (a) know that the lawyer's services benefit a non-client; and (b) that such a duty would not significantly impair the lawyer's performance of obligations to the client. The trial court specifically found that "Stewart required and Witherspoon accepted a duty to inform that was not, at least at the time discussed herein, a conflict between the client and the insurer." CP 525. *Restatement 51(3)(c)* provides that the "absence of such a duty would make enforcement of those obligations to the client unlikely." The trial court held that "Sterling clearly is not pursuing Witherspoon. Assuming without deciding that Witherspoon committed malpractice, a ruling that no third party duty existed would mean that Witherspoon escapes liability." CP 526. Accordingly, although the trial court did not expressly adopt *Restatement 51*, it is evident that the trial court's reasoning paralleled *Restatement 51*.

CONCLUSION

The MWC Litigation is the exact situation that equitable

¹³ To support its statement that the trial court rejected Stewart's arguments pertaining to the *Restatement*, Witherspoon cites only its briefs, and not the trial court's decision.

subrogation was designed to remedy. MWC received an unearned windfall – the elevation of the priority of its lien – because equitable subrogation was not timely asserted by Witherspoon. Equitable subrogation would have preserved the parties’ expectations and bargains.

Because Sterling could have successfully asserted equitable subrogation as a defense to the MWC lien claim, this Court should reverse the trial court and conclude that equitable subrogation was available to Sterling as a complete defense in the MWC Litigation, and remand to the trial court to determine whether Witherspoon’s failure to timely assert equitable subrogation constituted malpractice.

The trial court correctly found that Witherspoon owed Stewart a duty of care either as an intended beneficiary of Witherspoon’s representation of Sterling in accordance with *Trask* or pursuant to *Restatement* § 51. Accordingly, this Court should affirm the trial court’s decision that Witherspoon owed a duty of care to Stewart – consistent with the majority opinion on the issue and the public policy of holding defense counsel accountable to insurers.

DATED this 26th day of November, 2012

/s/ David P. Hirschi
David P. Hirschi, WSBA # 35202
Hirschi Steele & Baer, PLLC
Brian J. Waid, WSBA # 26038
Attorneys for Appellant

APPENDIX TO APPELLANT'S REPLY BRIEF

APPENDIX A - *Restatement (Third) of the Law Governing Lawyers* §51



1 of 1 DOCUMENT

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Case Citations

Chapter 4 - Lawyer Civil Liability

Topic 1 - Liability for Professional Negligence and Breach of Fiduciary Duty

Restat 3d of the Law Governing Lawyers, § 51

§ 51 Duty of Care to Certain Nonclients

For purposes of liability under § 48, a lawyer owes a duty to use care within the meaning of § 52 in each of the following circumstances:

- (1) to a prospective client, as stated in § 15;
- (2) to a nonclient when and to the extent that:

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

- (b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection;

- (3) to a nonclient when and to the extent that:

- (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient;

- (b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and

- (c) the absence of such a duty would make enforcement of those obligations to the client unlikely; and

- (4) to a nonclient when and to the extent that:

- (a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;

- (b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;

- (c) the nonclient is not reasonably able to protect its rights; and

APPENDIX A

(d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.

COMMENTS & ILLUSTRATIONS: Comment:

a. Scope and cross-references. This Section sets forth the limited circumstances in which a lawyer owes a duty of care to a nonclient. Compare § 14, describing when one becomes a client, and § 50, which sets forth a lawyer's duty to a client. On the meaning of the term "duty," see § 50, Comment *a*. Even when a duty exists, a lawyer is liable for negligence only if the lawyer violates the duty (see § 52), the violation is the legal cause of damages (see § 53), and no defense is established (see § 54).

As stated in § 54(1), a lawyer is not liable under this Section for any action or inaction the lawyer reasonably believed to be required by law, including a professional rule. As stated in §§ 66(3) and 67(4), a lawyer who takes action or decides not to take action permitted under those Sections is not, solely by reason of such action or inaction, liable for damages.

In appropriate circumstances, a lawyer is also subject to liability to a nonclient on grounds other than negligence (see §§ 48 & 56), for litigation sanctions (see § 110), and for acting without authority (see § 30). On indemnity and contribution, see § 53, Comment *i*. This Section does not consider those liabilities, such as liabilities arising under securities or similar legislation. Nor does the Section consider when a lawyer found liable to a nonclient may recover from a client under such theories as indemnity, contribution, or subrogation. On a client's liability to a nonclient arising out of a lawyer's conduct, see § 26, Comment *d*.

b. Rationale. Lawyers regularly act in disputes and transactions involving nonclients who will foreseeably be harmed by inappropriate acts of the lawyers. Holding lawyers liable for such harm is sometimes warranted. Yet it is often difficult to distinguish between harm resulting from inappropriate lawyer conduct on the one hand and, on the other hand, detriment to a nonclient resulting from a lawyer's fulfilling the proper function of helping a client through lawful means. Making lawyers liable to nonclients, moreover, could tend to discourage lawyers from vigorous representation. Hence, a duty of care to nonclients arises only in the limited circumstances described in the Section. Such a duty must be applied in light of those conflicting concerns.

c. Opposing parties. A lawyer representing a party in litigation has no duty of care to the opposing party under this Section, and hence no liability for lack of care, except in unusual situations such as when a litigant is provided an opinion letter from opposing counsel as part of a settlement (see Subsection (2) and Comment *e* hereto). Imposing such a duty could discourage vigorous representation of the lawyer's own client through fear of liability to the opponent. Moreover, the opposing party is protected by the rules and procedures of the adversary system and, usually, by counsel. In some circumstances, a lawyer's negligence will entitle an opposing party to relief other than damages, such as vacating a settlement induced by negligent misrepresentation. For a lawyer's liability to sanctions, which may include payments to an opposing party, based on certain litigation misconduct, see § 110. See also § 56, on liability for intentional torts.

Similarly, a lawyer representing a client in an arm's-length business transaction does not owe a duty of care to opposing nonclients, except in the exceptional circumstances described in this Section. On liability for aiding a client's unlawful conduct, see § 56.

Illustration:

1. Lawyer represents Plaintiff in a personal-injury action against Defendant. Because Lawyer fails to conduct an appropriate factual investigation, Lawyer includes a groundless claim in the complaint. Defendant incurs legal expenses in obtaining dismissal of this claim. Lawyer is not liable for negligence to Defendant. Lawyer may, however, be subject to litigation sanctions for having asserted a claim

without proper investigation (see § 110). On claims against lawyers for wrongful use of civil proceedings and the like, see § 57(2) and Comment *d* thereto.

d. Prospective clients (Subsection (1)). When a person discusses with a lawyer the possibility of their forming a client-lawyer relationship, and even if no such relationship arises, the lawyer may be liable for failure to use reasonable care to the extent the lawyer advises or provides other legal services for the person (see § 15(2) and the Comments thereto). On duties to a former client, see § 50, Comment *c*.

e. Inviting reliance of a nonclient (Subsection (2)). When a lawyer or that lawyer's client (with the lawyer's acquiescence) invites a nonclient to rely on the lawyer's opinion or other legal services, and the nonclient reasonably does so, the lawyer owes a duty to the nonclient to use care (see § 52), unless the jurisdiction's general tort law excludes liability on the ground of remoteness. Accordingly, the nonclient has a claim against the lawyer if the lawyer's negligence with respect to the opinion or other legal services causes injury to the nonclient (see § 95). The lawyer's client typically benefits from the nonclient's reliance, for example, when providing the opinion was called for as a condition to closing under a loan agreement, and recognition of such a claim does not conflict with duties the lawyer properly owed to the client. Allowing the claim tends to benefit future clients in similar situations by giving nonclients reason to rely on similar invitations. See *Restatement Second, Torts* § 552. If a client is injured by a lawyer's negligence in providing opinions or services to a nonclient, for example because that renders the client liable to the nonclient as the lawyer's principal, the lawyer may have corresponding liability to the client (see § 50).

Clients or lawyers may invite nonclients to rely on a lawyer's legal opinion or services in various circumstances (see § 95). For example, a sales contract for personal property may provide that as a condition to closing the seller's lawyer will provide the buyer with an opinion letter regarding the absence of liens on the property being sold (see *id.*, Illustrations 1 & 2; § 52, Illustration 2). A nonclient may require such an opinion letter as a condition for engaging in a transaction with a lawyer's client. A lawyer's opinion may state the results of a lawyer's investigation and analysis of facts as well as the lawyer's legal conclusions (see § 95). On when a lawyer may properly decline to provide an opinion and on a lawyer's duty when a client insists on nondisclosure, see § 95, Comment *d*. A lawyer's acquiescence in use of the lawyer's opinion may be manifested either before or after the lawyer renders it.

In some circumstances, reliance by unspecified persons may be expected, as when a lawyer for a borrower writes an opinion letter to the original lender in a bank credit transaction knowing that the letter will be used to solicit other lenders to become participants in syndication of the loan. Whether a subsequent syndication participant can recover for the lawyer's negligence in providing such an opinion letter depends on what, if anything, the letter says about reliance and whether the jurisdiction in question, as a matter of general tort law, adheres to the limitations on duty of *Restatement Second, Torts* § 552(2) or those of *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y.1931), or has rejected such limitations. To account for such differences in general tort law, Subsection (2) refers to applicable law excluding liability to persons too remote from the lawyer.

When a lawyer owes a duty to a nonclient under this Section, whether the nonclient's cause of action may be asserted in contract or in tort should be determined by reference to the applicable law of professional liability generally. The cause of action ordinarily is in substance identical to a claim for negligent misrepresentation and is subject to rules such as those concerning proof of materiality and reliance (see *Restatement Second, Torts* §§ 552-554). For liability under securities legislation, see § 56, Comment *i*. Whether the representations are actionable may be affected by the duties of disclosure, if any, that the client owes the nonclient (see § 98, Comment *e*). In the absence of such duties of disclosure, the duty of a lawyer providing an opinion is ordinarily limited to using care to avoid making or adopting misrepresentations. On a lawyer's obligations in furnishing an opinion, see § 95, Comment *c*. On intentionally making or assisting misrepresentations, see § 56, Comment *f*, and § 98.

A lawyer may avoid liability to nonclients under Subsection (2) by making clear that an opinion or representation is directed only to a client and should not be relied on by others. Likewise, a lawyer may limit or avoid liability under Subsection (2) by qualifying a representation, for example by making clear through limiting or disclaiming language in

an opinion letter that the lawyer is relying on facts provided by the client without independent investigation by the lawyer (assuming that the lawyer does not know the facts provided by the client to be false, in which case the lawyer would be liable for misrepresentation). The effectiveness of a limitation or disclaimer depends on whether it was reasonable in the circumstances to conclude that those provided with the opinion would receive the limitation or disclaimer and understand its import. The relevant circumstances include customary practices known to the recipient concerning the construction of opinions and whether the recipient is represented by counsel or a similarly experienced agent.

When a nonclient is invited to rely on a lawyer's legal services, other than the lawyer's opinion, the analysis is similar. For example, if the seller's lawyer at a real-estate closing offers to record the deed for the buyer, the lawyer is subject to liability to the buyer for negligence in doing so, even if the buyer did not thereby become a client of the lawyer. When a nonclient is invited to rely on a lawyer's nonlegal services, the lawyer's duty of care is determined by the law applicable to providers of the services in question.

f. A nonclient enforcing a lawyer's duties to a client (Subsection (3)). When a lawyer knows (see Comment *h* hereto) that a client intends a lawyer's services to benefit a third person who is not a client, allowing the nonclient to recover from the lawyer for negligence in performing those services may promote the lawyer's loyal and effective pursuit of the client's objectives. The nonclient, moreover, may be the only person likely to enforce the lawyer's duty to the client, for example because the client has died.

A nonclient's claim under Subsection (3) is recognized only when doing so will both implement the client's intent and serve to fulfill the lawyer's obligations to the client without impairing performance of those obligations in the circumstances of the representation. A duty to a third person hence exists only when the client intends to benefit the third person as one of the primary objectives of the representation, as in the Illustrations below and in Comment *g* hereto. Without adequate evidence of such an intent, upholding a third person's claim could expose lawyers to liability for following a client's instructions in circumstances where it would be difficult to prove what those instructions had been. Threat of such liability would tend to discourage lawyers from following client instructions adversely affecting third persons. When the claim is that the lawyer failed to exercise care in preparing a document, such as a will, for which the law imposes formal or evidentiary requirements, the third person must prove the client's intent by evidence that would satisfy the burden of proof applicable to construction or reformation (as the case may be) of the document. See Restatement Third, Property (Donative Transfers) §§ 11.2 and 12.1 (Tentative Draft No. 1, 1995) (preponderance of evidence to resolve ambiguity in donative instruments; clear and convincing evidence to reform such instruments).

Subsections (3) and (4), although related in their justifications, differ in application. In situations falling under Subsection (3), the client need not owe any preexisting duty to the intended beneficiary. The scope of the intended benefit depends on the client's intent and the lawyer's undertaking. On the other hand, the duty under Subsection (4) typically arises when a lawyer helps a client-fiduciary to carry out a duty of the fiduciary to a beneficiary recognized and defined by trust or other law.

Illustrations:

2. Client retains Lawyer to prepare and help in the drafting and execution of a will leaving Client's estate to Nonclient. Lawyer prepares the will naming Nonclient as the sole beneficiary, but negligently arranges for Client to sign it before an inadequate number of witnesses. Client's intent to benefit Nonclient thus appears on the face of the will executed by Client. After Client dies, the will is held ineffective due to the lack of witnesses, and Nonclient is thereby harmed. Lawyer is subject to liability to Nonclient for negligence in drafting and supervising execution of the will.

3. Same facts as in Illustration 2, except that Lawyer arranges for Client to sign the will before the proper number of witnesses, but Nonclient later alleges that Lawyer negligently wrote the will to name someone other than Nonclient as the legatee. Client's intent to benefit Nonclient thus does not appear on

the face of the will. Nonclient can establish the existence of a duty from Lawyer to Nonclient only by producing clear and convincing evidence that Client communicated to Lawyer Client's intent that Nonclient be the legatee. If Lawyer is held liable to Nonclient in situations such as this and the preceding Illustration, applicable principles of law may provide that Lawyer may recover from their unintended recipients the estate assets that should have gone to Nonclient.

4. Same facts as in Illustration 2, except that Lawyer arranges for Client to sign the will before the proper number of witnesses. After Client's death, Heir has the will set aside on the ground that Client was incompetent and then sues Lawyer for expenses imposed on Heir by the will, alleging that Lawyer negligently assisted Client to execute a will despite Client's incompetence. Lawyer is not subject to liability to Heir for negligence. Recognizing a duty by lawyers to heirs to use care in not assisting incompetent clients to execute wills would impair performance of lawyers' duty to assist clients even when the clients' competence might later be challenged. Whether Lawyer is liable to Client's estate or personal representative (due to privity with the lawyer) is beyond the scope of this Restatement. On a lawyer's obligations to a client with diminished capacity, see § 24.

g. A liability insurer's claim for professional negligence. Under Subsection (3), a lawyer designated by an insurer to defend an insured owes a duty of care to the insurer with respect to matters as to which the interests of the insurer and insured are not in conflict, whether or not the insurer is held to be a co-client of the lawyer (see § 134, Comment *f*). For example, if the lawyer negligently fails to oppose a motion for summary judgment against the insured and the insurer must pay the resulting adverse judgment, the insurer has a claim against the lawyer for any proximately caused loss. In such circumstances, the insured and insurer, under the insurance contract, both have a reasonable expectation that the lawyer's services will benefit both insured and insurer. Recognizing that the lawyer owes a duty to the insurer promotes enforcement of the lawyer's obligations to the insured. However, such a duty does not arise when it would significantly impair, in the circumstances of the representation, the lawyer's performance of obligations to the insured. For example, if the lawyer recommends acceptance of a settlement offer just below the policy limits and the insurer accepts the offer, the insurer may not later seek to recover from the lawyer on a claim that a competent lawyer in the circumstances would have advised that the offer be rejected. Allowing recovery in such circumstances would give the lawyer an interest in recommending rejection of a settlement offer beneficial to the insured in order to escape possible liability to the insurer.

h. Duty based on knowledge of a breach of fiduciary duty owed by a client (Subsection (4)). A lawyer representing a client in the client's capacity as a fiduciary (as opposed to the client's personal capacity) may in some circumstances be liable to a beneficiary for a failure to use care to protect the beneficiary. The duty should be recognized only when the requirements of Subsection (4) are met and when action by the lawyer would not violate applicable professional rules (see § 54(1)). The duty arises from the fact that a fiduciary has obligations to the beneficiary that go beyond fair dealing at arm's length. A lawyer is usually so situated as to have special opportunity to observe whether the fiduciary is complying with those obligations. Because fiduciaries are generally obliged to pursue the interests of their beneficiaries, the duty does not subject the lawyer to conflicting or inconsistent duties. A lawyer who knowingly assists a client to violate the client's fiduciary duties is civilly liable, as would be a nonlawyer (see *Restatement Second, Trusts* § 326). Moreover, to the extent that the lawyer has assisted in creating a risk of injury, it is appropriate to impose a preventive and corrective duty on the lawyer (cf. *Restatement Second, Torts* § 321).

The duty recognized by Subsection (4) is limited to lawyers representing only a limited category of the persons described as fiduciaries--trustees, executors, guardians, and other fiduciaries acting primarily to fulfill similar functions. Fiduciary responsibility, imposing strict duties to protect specific property for the benefit of specific, designated persons, is the chief end of such relationships. The lawyer is hence less likely to encounter conflicting considerations arising from other responsibilities of the fiduciary-client than are entailed in other relationships in which fiduciary duty is only a part of a broader role. Thus, Subsection (4) does not apply when the client is a partner in a business partnership, a corporate officer or director, or a controlling stockholder.

The scope of a client's fiduciary duties is delimited by the law governing the relationship in question (see, e.g.,

Restatement Second, Trusts §§ 169-185). Whether and when such law allows a beneficiary to assert derivatively the claim of a trust or other entity against a lawyer is beyond the scope of this Restatement (see *Restatement Second, Trusts* § 282). Even when a relationship is fiduciary, not all the attendant duties are fiduciary. Thus, violations of duties of loyalty by a fiduciary are ordinarily considered breaches of fiduciary duty, while violations of duties of care are not.

Sometimes a lawyer represents both a fiduciary and the fiduciary's beneficiary and thus may be liable to the beneficiary as a client under § 50 and may incur obligations concerning conflict of interests (see §§ 130-131). A lawyer who represents only the fiduciary may avoid such liability by making clear to the beneficiary that the lawyer represents the fiduciary rather than the beneficiary (compare § 103, Comment *e*).

The duty recognized by Subsection (4) arises only when the lawyer knows that appropriate action by the lawyer is necessary to prevent or mitigate a breach of the client's fiduciary duty. As used in this Subsection and Subsection (3) (see Comment *f*), "know" is the equivalent of the same term defined in ABA Model Rules of Professional Conduct, Terminology P [5] (1983) ("... 'Knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."). The concept is functionally the same as the terminology "has reason to know" as defined in *Restatement Second, Torts* § 12(1) (actor has reason to know when actor "has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such facts exists."). The "know" terminology should not be confused with "should know" (see *id.* § 12(2)). As used in Subsection (3) and (4) "knows" neither assumes nor requires a duty of inquiry.

Generally, a lawyer must follow instruction of the client-fiduciary (see § 21(2) hereto) and may assume in the absence of contrary information that the fiduciary is complying with the law. The duty stated in Subsection (4) applies only to breaches constituting crime or fraud, as determined by applicable law and subject to the limitations set out in § 67, Comment *d*, and § 82, Comment *d*, or those in which the lawyer has assisted or is assisting the fiduciary. A lawyer assists fiduciary breaches, for example, by preparing documents needed to accomplish the fiduciary's wrongful conduct or assisting the fiduciary to conceal such conduct. On the other hand, a lawyer subsequently consulted by a fiduciary to deal with the consequences of a breach of fiduciary duty committed before the consultation began is under no duty to inform the beneficiary of the breach or otherwise to act to rectify it. Such a duty would prevent a person serving as fiduciary from obtaining the effective assistance of counsel with respect to such a past breach.

Liability under Subsection (4) exists only when the beneficiary of the client's fiduciary duty is not reasonably able to protect its rights. That would be so, for example, when the fiduciary client is a guardian for a beneficiary unable (for reasons of youth or incapacity) to manage his or her own affairs. By contrast, for example, a beneficiary of a family voting trust who is in business and has access to the relevant information has no similar need of protection by the trustee's lawyer. In any event, whether or not there is liability under this Section, a lawyer may be liable to a nonclient as stated in § 56.

A lawyer owes no duty to a beneficiary if recognizing such duty would create conflicting or inconsistent duties that might significantly impair the lawyer's performance of obligations to the lawyer's client in the circumstances of the representation. Such impairment might occur, for example, if the lawyer were subject to liability for assisting the fiduciary in an open dispute with a beneficiary or for assisting the fiduciary in exercise of its judgment that would benefit one beneficiary at the expense of another. For similar reasons, a lawyer is not subject to liability to a beneficiary under Subsection (4) for representing the fiduciary in a dispute or negotiation with the beneficiary with respect to a matter affecting the fiduciary's interests.

Under Subsection (4) a lawyer is not liable for failing to take action that the lawyer reasonably believes to be forbidden by professional rules (see § 54(1)). Thus, a lawyer is not liable for failing to disclose confidences when the lawyer reasonably believes that disclosure is forbidden. For example, a lawyer is under no duty to disclose a prospective breach in a jurisdiction that allows disclosure only regarding a crime or fraud threatening imminent death or substantial bodily harm. However, liability could result from failing to attempt to prevent the breach of fiduciary duty through

means that do not entail disclosure. In any event, a lawyer's duty under this Section requires only the care set forth in § 52.

Illustrations:

5. Lawyer represents Client in Client's capacity as trustee of an express trust for the benefit of Beneficiary. Client tells Lawyer that Client proposes to transfer trust funds into Client's own account, in circumstances that would constitute embezzlement. Lawyer informs Client that the transfer would be criminal, but Client nevertheless makes the transfer, as Lawyer then knows. Lawyer takes no steps to prevent or rectify the consequences, for example by warning Beneficiary or informing the court to which Client as trustee must make an annual accounting. The jurisdiction's professional rules do not forbid such disclosures (see § 67). Client likewise makes no disclosure. The funds are lost, to the harm of Beneficiary. Lawyer is subject to liability to Beneficiary under this Section.

6. Same facts as in Illustration 5, except that Client asserts to Lawyer that the account to which Client proposes to transfer trust funds is the trust's account. Even though lawyer could have exercised diligence and thereby discovered this to be false, Lawyer does not do so. Lawyer is not liable to the harmed Beneficiary. Lawyer did not owe Beneficiary a duty to use care because Lawyer did not know (although further investigation would have revealed) that appropriate action was necessary to prevent a breach of fiduciary duty by Client.

7. Same facts as in Illustration 5, except that Client proposes to invest trust funds in a way that would be unlawful, but would not constitute a crime or fraud under applicable law. Lawyer's services are not used in consummating the investment. Lawyer does nothing to discourage the investment. Lawyer is not subject to liability to Beneficiary under this Section.

REPORTERS NOTES: REPORTER'S NOTE

Comment c. Opposing parties. On the absence of any duty of care to an opposing litigant, see, e.g., *Tappen v. Ager*, 599 F.2d 376 (10th Cir.1979); *Lamare v. Basbanes*, 636 N.E.2d 218 (Mass.1994); *Friedman v. Dozorc*, 312 N.W.2d 585 (Mich.1981); *Garcia v. Rodey, Dickason, Sloan, Akin & Robb*, 750 P.2d 118 (N.M.1988). For other examples, see *Goodman v. Kennedy*, 556 P.2d 737 (Cal.1976) (lawyer of corporation and officers who issued stock not liable to buyers for negligent advice not communicated to buyers); *B.L.M. v. Sabo & Deitsch*, 64 Cal.Rptr.2d 335 (Cal.Ct.App.1997) (lawyer not liable for negligent advice to client on which opposing party in transaction relied); *Arnona v. Smith*, 749 So.2d 63 (Miss.1999) (buyer's lawyer whose negligent title opinion causes buyers to cancel purchase not liable to sellers); *Rose v. Summers, Compton, Wells & Hamburg, P.C.*, 887 S.W.2d 683 (Mo.Ct.App.1994) (lawyer for limited partnership owes no duty to partners); *Tipton v. Willamette Subscription Television*, 735 P.2d 1250 (Or.Ct.App.1987) (lawyer who wrote claim letter not liable for negligent misrepresentation to recipient); *Green Spring Farms v. Kersten*, 401 N.W.2d 816 (Wis.1987) (seller's lawyer not liable to represented buyer for negligent misrepresentation in absence of opinion letter to buyer); *Brooks v. Zebre*, 792 P.2d 196 (Wyo. 1990) (lessee's lawyer owed no duty to lessor); *Annots.*, 61 A.L.R.4th 464 & 615 (1988). The leading United States case applying the privity doctrine to legal malpractice is *National Savings Bank v. Ward*, 100 U.S. 195, 10 Otto 195, 25 L.Ed. 621 (1879) (borrower's lawyer owes no duty of care to lending bank). See generally J. Feinman, *Economic Negligence*, ch. 9 (1994); 1 R. Mallen & J. Smith, *Legal Malpractice*, ch. 7 (4th ed.1996); Symposium, *The Lawyer's Duties and Liabilities to Third Parties*, 37 So. Tex. L. Rev. 957 (1996) (several authors); Probert & Hendricks, *Lawyer Malpractice: Duty Relationships Beyond Contract*, 55 *Notre Dame Lawyer* 708 (1980); Moore, *Expanding Duties of Attorneys to "Non-Clients": Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations*, 45 *S.C. L. Rev.* 659 (1994).

Comment d. Prospective clients (Subsection (1)). See § 15, *Comment e*, and Reporter's Note thereto.

Comment e. Inviting reliance of a nonclient (Subsection (2)). For situations in which one party to a transaction received an opinion from another's lawyer, who was held to owe a duty of care to the first party, see *Greycas, Inc. v. Proud*, 826 F.2d 1560 (7th Cir.1987), cert. denied, 484 U.S. 1043, 108 S.Ct. 775, 98 L.Ed.2d 862 (1988) (borrower required to furnish lawyer's no-lien letter to lender and lawyer issued opinion letter to lender in furtherance of borrower's obtaining loan); *Vanguard Prod., Inc. v. Martin*, 894 F.2d 375 (10th Cir.1990) (seller of lease was to select lawyer for title and closing work for whom buyer was to pay; buyer was not client, but was owed care when lawyer advised buyer on enforceability of third party's claim); *Stock West Corp. v. Taylor*, 942 F.2d 655 (9th Cir.1991) (duty to intended beneficiary of opinion letter), aff'd in part and vacated in relevant part on abstention grounds, 964 F.2d 912 (9th Cir.1992) (en banc); *Trust Co. of Louisiana v. N.N.P. Inc.*, 104 F.3d 1478 (5th Cir. 1997) (negligent misrepresentation of lawyer to nonclient that lawyer held collateral for loan to client); *First Nat'l Bank v. Trans Terra Corp.*, 142 F.3d 802 (5th Cir.1998) (negligent misrepresentation liability for title opinion given to lender); *Vereins-Und Westbank, AG v. Carter*, 691 F.Supp. 704 (S.D.N.Y.1988) (lawyer for borrower who wrote opinion letter required by lender and its assignee owed assignee care); *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 128 Cal.Rptr. 901 (Cal.Ct.App.1976) (borrower's lawyer who prepared opinion letter required by lender); *Courtney v. Waring*, 237 Cal.Rptr. 233 (Cal.Ct. App.1987) (franchisor's lawyer who prepared prospectus for franchisees); *Home Budget Loans, Inc. v. Jacoby & Meyers*, 255 Cal.Rptr. 483 (Cal.Ct. App.1989) (when mortgage broker required borrower to consult lawyer and provide letter stating that lawyer had explained transaction to borrower, lawyer owed duty to broker to explain transaction; borrower later sued for rescission); *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A.*, 892 P.2d 230 (Colo. 1995) (bond counsel and town counsel provided opinion letters to bank lending to town's redevelopment authority that litigation against town lacked merit); *Security Nat'l Bank v. Lish*, 311 A.2d 833 (D.C.1973) (borrower's lawyer made written and oral representations to lender as to prior liens); *Geaslen v. Berkson, Gorov & Levin Ltd.*, 581 N.E.2d 138 (Ill.App.Ct.1991) (buyer required to provide lawyer's opinion letter to seller), aff'd in part & rev'd in part on other grounds, 613 N.E.2d 702 (Ill.1993); *Capital Bank & Trust Co. v. Core*, 343 So.2d 284 (La. Ct.App.1977) (seller's lawyer wrote title opinion to be relied on by lender); *Kirkland Constr. Co. v. James*, 658 N.E.2d 699 (Mass.App.Ct.1995), appeal denied, 661 N.E.2d 935 (Mass. 1996); *Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 605 N.E.2d 318 (N.Y.1992) (lawyer who provided opinion letter to client's creditor to obtain refinancing); *McCamish, Martin, Brown & Loeffler v. F. E. Appling Interests*, 991 S.W.2d 787 (Tex.1999) (nonclient that obtained opinion of another party's lawyer as condition of contract may sue lawyer for negligent misrepresentation, not malpractice). On construction of opinion letters, see Tri Bar Opinion Committee, Third-Party "Closing" Opinions, 53 *Bus. Law.* 591 (Feb. 1998). See generally § 95, Reporter's Note; 31 C.F.R. § 10.33 (taxshelter opinions); S. FitzGibbon & D. Glazer, Legal Opinions (1992).

Under the doctrine of *Ultramares v. Touche*, 174 N.E. 441 (N.Y.1931), an accountant owes no duty of care to members of a class of unknown investors or lenders to whom the accountant's client foreseeably circulates financial statements negligently audited by the accountant. For differing approaches, compare, e.g., *Security Pacific Business Credit, Inc. v. Peat Marwick Main & Co.*, 597 N.E.2d 1080 (N.Y.1992) (following *Ultramares*), with, e.g., *Touche Ross v. Commercial Union Ins.*, 514 So.2d 315 (Miss.1987) (rejecting *Ultramares*), with *Bily v. Arthur Young & Co.*, 834 P.2d 745 (Cal.1992) (following *Ultramares*, but recognizing under *Restatement Second, Torts* § 552 liability for negligent misrepresentation to one of limited number of persons to whom client, with accountant's knowledge, intends to supply financial statements). Jurisdictions following *Ultramares* apply it to lawyers. E.g., *Alpert v. Shea Gould Climenko & Casey*, 559 N.Y.S.2d 312 (N.Y.App.Div.1990). Jurisdictions rejecting or modifying *Ultramares* apply similar rules to lawyers. *Molecular Technology Corp. v. Valentine*, 925 F.2d 910 (6th Cir.1991) (lawyer owes duty to buyers that lawyer should reasonably have foreseen would rely on securities offering statement); *Eisenberg v. Gagnon*, 766 F.2d 770 (3d Cir.), cert. denied, 474 U.S. 946, 106 S.Ct. 342, 88 L.Ed.2d 290 (1985) (lawyer-principal liable to buyers for negligent misrepresentation in offering memorandum); *In re American Continental Corp./Lincoln S. & L. Securities Litigation*, 794 F.Supp. 1424 (D.Ariz.1992) (firm liable to securities buyers for negligence in opinion letter); *Norman v. Brown, Todd & Heyburn*, 693 F.Supp. 1259 (D.Mass.1988) (lawyer who wrote tax-shelter opinion owes duty to buyers of tax-shelter units); *Century 21 Deep South Properties, Ltd. v. Corson*, 612 So.2d 359 (Miss. 1992) (dicta) (lawyer who does title work owes duty to later purchaser who foreseeably relies); *Petrillo v. Bachenberg*, 655 A.2d 1354 (N.J. 1995) (negligence of seller's lawyer in providing misleading information); *Century 21 Deep South, Inc.*

v. *Corson*, 612 So.2d 359, 372-74 (Miss. 1992) (lawyer performing title work liable to third parties who foreseeably rely on opinion); *United Leasing Corp. v. Miller*, 263 S.E.2d 313, 317 (N.C.Ct.App.), rev. denied, 267 S.E.2d 685 (N.C.1980) (nonclient lender had cause of action against lawyer for borrower who misrepresented state of title); *Bradford Sec. Processing Services, Inc. v. Plaza Bank & Trust*, 653 P.2d 188 (Okla. 1982) (bond counsel liable to buyer and pledgee of bond); *Haberman v. Washington Pub. Power Supply Sys.*, 744 P.2d 1032 (Wash.1987), appeal dism'd, 488 U.S. 805, 109 S.Ct. 35, 102 L.Ed.2d 15 (1988) (bond-offering statement).

On the effect of qualifications and disclaimers in an opinion, see *Kline v. First W. Gov't Secs., Inc.*, 24 F.3d 480 (3d Cir.), cert. denied, 513 U.S. 1032, 115 S.Ct. 613, 130 L.Ed.2d 522 (1994) (under federal securities laws, statement that opinion based on assumed facts does not bar rule 10b-5 liability or prevent reasonable reliance on part of represented party as a matter of law, when lawyer had good reason to know of material inaccuracy); *Fortson v. Winstead, McGuire, Sechrest & Minick*, 961 F.2d 469 (4th Cir.1992) (similar disclaimer with other circumstances negated any possible obligation to ensure accuracy of statements found not in lawyer's opinion but in accompanying documents); *Resolution Trust Corp. v. Latham & Watkins*, 909 F.Supp. 923 (S.D.N.Y. 1995) (author of opinion letter on Florida law not liable for failure to discuss other states); *Washington Elec. Co-op. Inc. v. Massachusetts Munic. Wholesale Elec. Co.*, 894 F.Supp. 777 (D.Vt.1995) (statement that legal obligations were subject to judicial discretion absolved lawyer from any liability for not predicting changes in law); *In re Colonial Ltd. Partnership Litigation*, 854 F.Supp. 64 (D.Conn.1994) (cautions in accountant's projections precluded reliance on predictions of future performance, but did not preclude claim that projections concealed present fraud); *Andreo v. Friedlander, Gaines, Cohen, Rosenthal & Rosenberg*, 651 F.Supp. 877 (D.Conn.1986) (accountant had no liability for projections of future performance when report stated that accountant did not verify data and noted risks that could prevent projected performance); *Mark Twain Kansas City Bank v. Jackson, Brouillette, Pohl & Kirley, P.C.*, 912 S.W.2d 536 (Mo.Ct.App.1995) (negligent-misrepresentation liability barred where bank could not reasonably rely on lawyer's opinion stating "we take no responsibility to [sic] any information of opinion contained herein" and bank was aware of irregularities); Ark. Code Ann. § 16-114-303(2) (effectiveness of written statement that only stated persons are intended to rely); cf., ABA Formal Opin. 346 (1982). In federal-securities litigation, the effect of disclaimers has often been considered under the "bespeaks caution" doctrine, e.g., *In re Trump Casino Sec. Litig.*, 7 F.3d 357 (3d Cir.1993), cert. denied, 510 U.S. 1178, 114 S.Ct. 1219, 127 L.Ed.2d 565 (1994); see generally 2 R. Mallen & J. Smith, *Legal Malpractice* § 12.25, at 118-22 (4th ed.1996), and is now governed by the Private Securities Litigation Reform Act of 1995, 15 U.S.C. §§ 77z-2, 78u-5.

For instances in which a lawyer has been held to owe a duty of care to a nonclient who had been invited to rely on the lawyer's services and has reasonably done so, see *Trust Co. of Louisiana v. N.N.P., Inc.*, 92 F.3d 341 (5th Cir.1996) (lawyer agreed with perpetrators of fraud to provide custodial services for customers); *Nelson v. Nationwide Mortgage Corp.*, 659 F.Supp. 611 (D.D.C.1987) (lender's lawyer volunteered at closing to explain documents to unrepresented buyers and responded to questions); *Jurgens v. Abraham*, 616 F.Supp. 1381 (D.Mass.1985) (lawyer told nonclient that \$ 500,000 of proceeds of attachment were set aside for nonclient); *Simmerson v. Blanks*, 254 S.E.2d 716 (Ga.Ct.App.1979) (buyer's lawyer volunteered to file financing statement); *Jones v. Kootenai County Title Ins. Co.*, 873 P.2d 861 (Idaho 1994) (lawyer accepted money without repudiating instructions to transmit it and handle transaction in payor's best interests); *Stewart v. Sbarro*, 362 A.2d 581 (N.J.Super.Ct.App.Div.1976) (seller's lawyer undertook to obtain signatures on bond and mortgage and did not tell buyer's lawyer that this had not been done); *McEvoy v. Helikson*, 562 P.2d 540 (Or.1977) (lawyer agreed to secure client's passport so client could not leave jurisdiction with children in custody dispute); *Collins v. Binkley*, 750 S.W.2d 737 (Tenn. 1988) (seller's lawyer prepared deed with defective acknowledgment form, knowing that form was for use of buyer); *Bohn v. Cody*, 832 P.2d 71 (Wash.1992) (lawyer helped arrange loan to client from client's parents and misleadingly answered parents' question); *Al-Kandari v. JR Brown & Co.*, [1988] 2 W.L.R. 671 (C.A.) (Eng.) (court ordered husband's solicitor to have custody of husband's passport as condition for husband's access to children; solicitor liable to wife for negligently letting husband have passport, which husband used to remove children from country); see § 14, Comment e, and Reporter's Note thereto.

Comment f. A nonclient enforcing duties of a lawyer to a client (Subsection (3)). On a lawyer's liability to a will beneficiary for negligence in the drafting and execution of the will, see, e.g., *Lucas v. Hamm*, 364 P.2d 685 (Cal.1961);

Hesser v. Central Nat'l Bank, 956 P.2d 864 (Okla.1998); *Hale v. Groce*, 744 P.2d 1289 (Or. 1987); *Schreiner v. Scoville*, 410 N.W.2d 679 (Iowa 1987); *Ross v. Caunters*, [1980] Ch. 297 (Eng.); Markesinis, Doctrinal Clarity in Tort Litigation: A Comparative Lawyer's Viewpoint, 25 *Int'l Law*. 953 (1991). Contra, *McDonald v. Pettus*, 988 S.W.2d 9 (Ark.1999) (statute bars beneficiary's suit but personal representative may sue); *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex.1996); *Noble v. Bruce*, 709 A.2d 1264 (Md.1998).

For cases similar to Illustration 3, compare *Espinosa v. Sparber*, 612 So.2d 1378 (Fla.1993) (no liability when no frustration of testator's intent, as set forth in will); *Schreiner v. Scoville*, 410 N.W.2d 679 (Iowa 1987) (similar); *Kirgan v. Parks*, 478 A.2d 713 (Md.Ct.Spec.App.1984) (similar); *Mieras v. DeBona*, 550 N.W.2d 202 (Mich.1996) (similar), with *Heyer v. Flaig*, 449 P.2d 161 (Cal.1969) (allowing suit for failure to advise inclusion of post-testamentary marriage clause in will or postmarriage will change); *Stowe v. Smith*, 441 A.2d 81 (Conn. 1981) (allowing suit for failure to fulfill testators' intent, even though intent does not appear within four corners of will); *Teasdale v. Allen*, 520 A.2d 295 (D.C.1987) (similar); *Ogle v. Fuiten*, 466 N.E.2d 224 (Ill.1984) (similar); *Simpson v. Calivas*, 650 A.2d 318 (N.H.1994) (similar); *Hale v. Groce*, 744 P.2d 1289 (Or.1987) (similar).

Illustration 4 is based on *Gonsalves v. Alameda County Superior Court*, 24 Cal.Rptr.2d 52 (Cal.Ct.App.1993). See also *Radovich v. Locke-Paddon*, 41 Cal.Rptr.2d 573 (Cal.Ct.App.1995) (no liability for failure to secure timely execution of will where testator wanted to confer with sister before executing); *Krawczyk v. Stingle*, 543 A.2d 733 (Conn.1988) (no liability for negligent delay in writing estate-planning instrument). But see *White v. Jones*, [1995] W.L.R. 187 (Eng.) (H.L.1995) (solicitor liable to beneficiaries for negligent failure to draw up will).

On whether the theory of the will cases permits recovery in other situations, see, e.g., *Bucquet v. Livingston*, 129 Cal.Rptr. 514 (Cal.Ct.App.1976) (beneficiary of trust may sue settlor's lawyer after settlor's death for failure to advise settlor of adverse estate-tax consequences of trust provision); *Pelham v. Griesheimer*, 440 N.E.2d 96 (Ill.1982) (when divorce decree required husband to maintain children as prime beneficiaries of life insurance, wife's lawyer not liable to children for negligence in enforcing requirement, because benefiting children was not wife's primary purpose in retaining lawyer); *Holsapple v. McGrath*, 521 N.W.2d 711 (Iowa 1994) (lawyer for donor owes duty to donee, where donor died after executing invalid deed); *Pizel v. Zuspahn*, 795 P.2d 42 (Kan.), modified on denial of rehearing 803 P.2d 205 (Kan.1990) (lawyer liable after settlor's death to beneficiaries of inter vivos trust that lawyer negligently failed to put into proper operation); *Nevin v. Union Trust Co.*, 726 A.2d 694 (Me.1999) (personal representative but not beneficiaries may sue decedent's lawyer for negligent estate planning that increased estate taxes); *Flaherty v. Weinberg*, 492 A.2d 618 (Md.1985) (mortgagee bank's lawyer not liable to unrepresented buyer unless buyer proves bank intended to benefit buyer in retaining counsel); *Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261 (Minn.1992) (lawyer representing corporation may be liable to related corporation if related corporation was intended beneficiary, where client corporation had few assets, and lawyer knew that, if lawyer was unsuccessful, related corporation would bear large liability); *CPJ Enters., Inc. v. Gernander*, 521 N.W.2d 622 (Minn.Ct. App.1994) (lawyer for agent not liable to undisclosed principal); *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624 (Mo.1995) (trustor's lawyer liable to beneficiaries for acts after trustor's death); cf. *Zimmer Paper Prods., Inc. v. Berger & Montague, P.C.*, 758 F.2d 86 (3d Cir.), cert. denied, 474 U.S. 902, 106 S.Ct. 228, 88 L.Ed.2d 227 (1985) (considering suit by class member against class counsel).

Comment g. A liability insurer's claim for professional negligence. On whether an insurer may maintain an action for negligence against a lawyer designated by the insurer to defend the insured, see *Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322 (9th Cir.1995) (allowing suit for failure to transmit settlement offer on theory that insurer is client when there is no insurer-insured conflict of interest); *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 1999 WL 672662 (Ariz.Ct.App.1999) (insurer may sue so long as interests of company and insured are parallel); *Unigard Ins. Group v. O'Flaherty & Belgum*, 45 Cal.Rptr.2d 565 (Cal.Ct.App. 1995) (insurer may sue lawyer for not raising affirmative defense where there is no conflict of interest with insured); *Assurance Co. of America v. Haven*, 38 Cal.Rptr.2d 25 (Cal.Ct. App.1995) (malpractice suit not allowed when defense of suit against insured was under reservation of rights and insured and insurer had separate counsel; but insurer may sue lawyer for insured for failure to keep it informed of facts indicating that statute of limitations defense was available); *Atlanta Int'l Ins. Co. v. Bell*, 475

N.W.2d 294 (Mich.1991) (insurer is not client, but when lawyer failed to raise comparative-negligence defense, insurer may assert rights of insured against lawyer by equitable subrogation because insured and insurer have common interests); 3 R. Mallen & J. Smith, *Legal Malpractice* § 28.8 (4th ed.1996); Silver & Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 *Duke L.J.* 255 (1995); Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 *Tex. L. Rev.* 1583 (1994); cf. *Credit Gen. Ins. Co. v. Midwest Indem. Corp.*, 872 *F.Supp.* 523 (N.D.Ill.1995) (party that had promised to indemnify defendant may sue defendant's lawyer for negligent representation causing loss to party). Among the cases opposed, see, e.g., *Lavanant v. General Accident Ins. Co.*, 561 *N.Y.S.2d* 164 (N.Y.App.Div.1990), *aff'd*, 595 *N.E.2d* 819 (N.Y.1992) (due to lack of privity, insurer may not maintain claim for negligence against counsel designated for insured); *Safeway Managing Gen. Agency, Inc. v. Clark & Gamble*, 985 *S.W.2d* 166 (Tex.Ct.App.1998) (lawyer who arranged settlement that released only portion of judgment above policy limit liable to insurer for negligent misrepresentation, but not malpractice).

Comment h. Duty based on knowledge of a breach of fiduciary duty owed by a client (Subsection (4)). On a lawyer's duty of care to a beneficiary when the lawyer's client is a fiduciary, compare, e.g., *Fickett v. Superior Court*, 558 *P.2d* 988 (Ariz.Ct.App. 1976) (liability for failure to use care in detecting and preventing conservator's misappropriation of assets of incompetent person); *Morales v. Field, DeGoff, Huppert & MacGowan*, 160 *Cal.Rptr.* 239 (Cal.Ct.App.1979) (lawyer for trustee-executor and others had duty to disclose conflict to beneficiaries); *Home Ins. Co. v. Wynn*, 493 *S.E.2d* 622 (Ga.Ct.App.1997) (lawyer for parent who brought wrongful-death suit for children liable for helping parent divide proceeds wrongly); *Pizel v. Zuspahn*, 795 *P.2d* 42 (Kan.), modified on denial of rehearing 803 *P.2d* 205 (Kan.1990) (settlor's lawyer had duty to trust beneficiaries; suit brought when trust invalidated after settlor died); *Charleson v. Hardesty*, 839 *P.2d* 1303 (Nev.1992) (lawyer for trustee owes duty of care and fiduciary duties to beneficiaries); *Leyba v. Whitley*, 907 *P.2d* 172 (N.M.1995) (lawyer for personal representative bringing wrongful-death action owes duty to minor beneficiary to advise representative to hold proceeds in trust for beneficiaries); *Jenkins v. Wheeler*, 316 *S.E.2d* 354 (N.C.Ct. App.1984) (lawyer for executor had duty to beneficiary), with, e.g., *Weingarten v. Warren*, 753 *F.Supp.* 491 (S.D.N.Y.1990) (trustee's lawyer liable to beneficiary for aiding trustee's conversion, but not for malpractice); *Goldberg v. Frye*, 266 *Cal.Rptr.* 483 (Cal.Ct.App.1990) (administrator's lawyer owed no duty to independently represented legatees); *Hopkins v. Akins*, 637 *A.2d* 424 (D.C.1993) (lawyer of personal representative owes no duty to heir); *Rutkoski v. Hollis*, 600 *N.E.2d* 1284 (Ill.App.Ct.1992) (executor's lawyer owes no duty of care to beneficiary); *Spinner v. Nutt*, 631 *N.E.2d* 542 (Mass.1994) (trustee's lawyer owes no duty to beneficiaries); *Goldberger v. Kaplan, Strangis & Kaplan, P.A.*, 534 *N.W.2d* 734 (Minn. Ct.App.1995) (lawyer for personal representative owes no duty to estate beneficiaries); *Kramer v. Belfi*, 482 *N.Y.S.2d* 898 (N.Y.App.Div.1984) (similar, absent fraud, collusion, or malice); *Roberts v. Fearey*, 986 *P.2d* 690 (Or.Ct.App.1999) (trustee's lawyer owes beneficiary no duty); *Thompson v. Vinson & Elkins*, 859 *S.W.2d* 617 (Tex.Ct.App.1993) (similar); *Trask v. Butler*, 872 *P.2d* 1080 (Wash.1994) (lawyer for personal representative owed beneficiary no duty); *Anderson v. McBurney*, 467 *N.W.2d* 158 (Wis.Ct.App.1991) (lawyer for personal representative owes heir no duty to use care in searching for heir); Ohio R.C. § 1339.18 (fiduciary's lawyer owes beneficiary no duty absent express agreement). The position of the Section and Comment does not agree with that espoused in ABA Formal Op. 94-380 (1994) (obligations of lawyer under ABA Model Rules of Professional Conduct (1983) not affected when client is fiduciary).

Consistent with the position of the Section and Comment, an apparent majority of recent decisions holds that a lawyer for a limited partnership does not owe a duty of care to partners. Compare, e.g., *Wanetick v. Mel's of Modesto, Inc.*, 811 *F.Supp.* 1402, 1409 (N.D.Cal.1992) (lawyer for limited partnership not liable for fraudulent concealment from limited partners as such lawyer owes no fiduciary duty to limited partners); *Morin v. Trupin*, 711 *F.Supp.* 97, 103 (S.D.N.Y.1989) (same); *Rose v. Summers, Compton, Wells & Hamburg, P.C.*, 887 *S.W.2d* 683 (Mo.Ct.App.1994) (same); cf. *Johnson v. Superior Court*, 45 *Cal.Rptr.2d* 312, 320 (Cal.Ct.App.1995) (representation of partnership does not per se constitute representation of partners; 5-factor test described to determine whether such duty exists on particular facts), with, e.g., *Arpadi v. First MSP Corp.*, 628 *N.E.2d* 1335 (Ohio 1994) (lawyer for general partners owed duty to limited partners).

See generally Symposium, *The Lawyer's Duties and Liabilities to Third Parties*, 37 *So. Tex. L. Rev.* 957 (1996)

(several authors); Hazard, *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 *Geo. J. Legal Ethics* 15 (1987); Phelps, *Representing Trusts and Trustees-Who Is the Client and Do Notions of Privity Protect the Client Relationship?*, 66 *Conn. B.J.* 211 (1992); cf. Wash. Rules Prof. Conduct, Rule 1.6(c) (authorizing lawyer for court-appointed fiduciary to disclose fiduciary's breach to court).

For cases upholding liability of a lawyer to a nonclient for affirmatively aiding a client to breach fiduciary duties owed to the nonclient, see, e.g., *Whitfield v. Lindemann*, 853 F.2d 1298 (5th Cir.1988), cert. denied, 490 U.S. 1089, 109 S.Ct. 2428, 104 L.Ed.2d 986 (1989) (lawyer participated in pension-plan trustee's purchase of overvalued property); *Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057 (2d Cir.1977), cert. denied, 434 U.S. 1035, 98 S.Ct. 769, 54 L.Ed.2d 782 (1978) (partner's lawyer helped breach of trust to other partners by issuing false opinion letter, threatening suit in bad faith, etc.); *Weingarten v. Warren*, 753 F.Supp. 491 (S.D.N.Y.1990) (trustee's lawyer helped pay out principal as income, in furtherance of lawyer's self-interest); *Bouton v. Thompson*, 764 F.Supp. 20 (D.Conn.1991) (lawyer's misrepresentation helped client keep converted funds, creating ERISA liability); *Pierce v. Lyman*, 3 Cal.Rptr.2d 236 (Cal.Ct.App.1991) (lawyer helped trustees conceal risky investments from probate court); *Albright v. Burns*, 503 A.2d 386 (N.J.Super.Ct.App.Div.1986) (lawyer helped client who had power of attorney over nonclient's property, which client had sold, lend proceeds of sale to client without security; not a defense that lawyer had advised client not to do this); *Granewich v. Harding*, 985 P.2d 788 (Or.1999) (lawyer helped two shareholders of close corporation squeeze out third); 4 A. Scott & W. Fratcher, *Trusts* § 326.4 (4th ed.1988); *Restatement Second, Trusts* § 326. But see *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) (nonfiduciary not liable in damages under ERISA for knowingly aiding fiduciary's breach; but ERISA would make anyone exercising discretionary control over assets or management liable as a statutory fiduciary for such aid). On equitable relief against lawyers participating in ERISA violations, compare *Concha v. London*, 62 F.3d 1493 (9th Cir.1995) (available), with *Reich v. Continental Cas. Co.*, 33 F.3d 754 (7th Cir.1994), cert. denied, 513 U.S. 1152, 115 S.Ct. 1104, 130 L.Ed.2d 1071 (1995) (unavailable).

The Council and Members rejected a provision that would have recognized a lawyer's duty to affirmatively act to protect a nonclient when circumstances known to the lawyer make it clear that action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent the client from committing a crime imminently threatening death or serious bodily harm to an identifiable person who is unaware of the risk, and the lawyer's act has facilitated the crime. See § 66, Comment g. For the text of the rejected provision, see § 73[(5)] & Comment [i] (Tentative Draft No. 8, 1997). On the duty of psychotherapists when their clients threaten injury to a nonclient, see, e.g., *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal.1976); *Peck v. Counseling Service of Addison County, Inc.*, 499 A.2d 422 (Vt.1985); *Petersen v. State*, 671 P.2d 230 (Wash. 1983); Annot., 83 A.L.R.3d 1201 (1978). There are few cases involving lawyers. See *Hawkins v. King County*, 602 P.2d 361 (Wash.Ct.App.1979) (lawyer not liable to victim when lawyer knew, as did victim, that client was dangerous, but had no information that client planned to assault anyone); cf. *Seibel v. City & County of Honolulu*, 602 P.2d 532 (Haw.1979) (prosecuting attorney not liable for murder committed by released defendant); Merton, *Confidentiality and the "Dangerous" Patient: Implications of Tarasoff for Psychiatrists and Lawyers*, 31 *Emory L. Rev.* 263 (1982). As of February 1996, the professional rules of approximately 10 states required lawyers to disclose confidences when necessary to prevent a crime likely to cause death or serious bodily injury, while virtually every other state permitted but did not require such disclosure. See § 66, Comment b, and Reporter's Note thereto.

Legal Topics:

For related research and practice materials, see the following legal topics:

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Case No: 87087-0

Case Name: Stewart Title Guaranty Company v. Witherspoon, Kelley, Davenport & Toole, PS., et al.

Dear Court Clerk:

Attached please find the following pleadings to be filed in the above referenced case:

- Reply Brief of Appellant
- Declaration of Service Regarding Reply Brief of Appellant

Best Regards,
David P. Hirschi, WSBA #35202
Phone: (801)990-0500
Email: dave@hsblegal.com

Thank you,

Kristen C. Ricks

HIRSCHI STEELE & BAER, PLLC
136 E. South Temple, Suite 1400
Salt Lake City, Utah 84111
Ph. 801-990-0500 or 322-0593
Fax 801-322-0594
kristen@hsblegal.com

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