

Courts Consider Third-Party Malpractice Claims

BY LAZAR EMANUEL

In recent months, a number of courts have considered the circumstances under which a lawyer may be liable to non-client third parties for malpractice. In New York, the court upheld a claim against the firm of McDermott, Will and Emery by a non-client who was the general partner of a firm which had invested in the law firm's client. The claim was based upon an opinion letter which the firm had given to its client. *Reich Family v. McDermott, Will and Emery* (NYLJ, Oct. 29, 2003; NYPRR, December 2003, p. 8). The firm argued that it was acting for its client and that there was no contractual privity between it and the plaintiff. The court rejected the notion that privity was required:

....when there is no contractual privity between the parties, a party can assert a negligence claim against an attorney when there is an awareness that the attorney's statement is to be used for a specific purpose, reliance on the statement, and some conduct linking the attorney to the non-client evincing their understanding of that reliance.

Since *Reich*, several courts in other states have considered malpractice claims by non-clients.

In *Harrigfeld v Hancock*, Idaho No. 28445 (1/29/04), the Idaho Supreme Court answered a certified question from the U.S. Court of Appeals for the Ninth Circuit. Attorney Hancock prepared a will for his client and then prepared three successful codicils to the will. After the client died, two of her heirs alleged that the codicils were supposed to be cumulative in nature but that Hancock had negligently drafted the third codicil so as to revoke the other two, thereby depriving the heirs of property the client intended them to have.

Responding to the Circuit Court's question, the Idaho court stated:

"...an attorney preparing testamentary instruments owes a duty to the beneficiaries named or identified therein to prepare such instruments...so as to effectuate the testator's intent as expressed in the necessary instruments."

The Idaho court noted that an attorney-client relationship is generally a requirement for an action in malpractice. But in recent years, the courts have eased the need for privity, relying instead on the nature and purpose of the transaction. The courts use a "balance of the harms" test "to determine whether to recognize a new duty or to extend a duty beyond its previous scope."

On these facts, the "balance of the harms" test would support the malpractice claim of the heirs who were deprived of their property.

Connecticut Courts Permit Claim Against Patent Lawyer

In *Sever v. Glickman*, D. Conn., Civ. No. 3:02CV 00722, 1/9/04, Delcath Systems, Inc. retained Lawyer Feldman to file a patent application for a medical device. Feldman retained the services of Sever, a patent attorney. The parties asserted a series of claims and counterclaims against each other, including one by Delcath against Sever for legal malpractice. Sever moved to dismiss all the claims against him. The District Court granted Sever's motion except for Delcath's claims for breach of fiduciary duty and malpractice.

Judge Alfred A. Cavallo held that a lawyer may be liable to a third party for malpractice despite a lack of privity. He cited *Prudential Insurance Company of America v. Dewey Ballantine, Busby Palmer & Wood*, 605 N.E.2d 318 (N.Y. 1992), which established three bases for imposing liability.

- 1) an awareness by the lawyer that information will be used by the third party for a particular purpose;
- 2) reliance by the third party in furtherance of that purpose; and
- 3) conduct linking the parties and showing their awareness of the reliance.

Wyoming Court Rejects Malpractice Liability

In applying the "balancing of harms" tests, some courts have ruled against liability to third parties. In *re Estate of Drwenski*, Wyo., No. 03-29, 1/28/04. Lawyer McCullough was retained by his client to represent him in a divorce action. The client was in ill health and knew he might die. After instituting the divorce action, he changed his will to leave the bulk of his estate to his daughter. The client died two months later. Because the divorce was not final at his death, his wife became entitled to her 25% elective share of the estate.

The client's daughter sued McCullough, alleging his malpractice in not pursuing the divorce with greater dispatch. She alleged that McCullough knew her father was dying and that his intent to leave nothing to his wife would be frustrated if McCullough did not proceed quickly,

The Wyoming court recognized that this was a case of first impression and looked to the law of other states. It found an emerging trend to hold lawyers liable to non-clients in some circumstances. Some courts follow the Restatement view and focus on the purpose of the transaction: if the primary purpose is to benefit the third-party, the lawyer owes a duty to that party.

Here, the court held, there was no evidence that the deceased client intended to benefit anyone except himself in pursuing the divorce. The will benefiting the daughter was made after the divorce action was begun. Furthermore, the client had rejected his wife's offer of settlement three months before his death.