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Just When You Thought You Knew Who You Represented: A New Decision May Upset the Law Regarding Attorney Liability to Third Parties

The issue of duties owed by attorneys to third parties is one of growing importance nationally as broader classes of plaintiffs seek to hold attorneys liable for malpractice. Illinois has long had a stable state of that law following the decision in *Pelham v. Grisheimer*,[1] which implemented an intent to benefit test. Recently, however, the Illinois Appellate Court, First District, in *Meriturn Partners, LLC v. Banner & Witcoff, Ltd.*,[2] issued an opinion that has the potential to significantly upset the well-settled law in this area. Instead of relying on *Pelham* and its progeny, the court turned directly to the Restatement (Third) of the Law Governing Lawyers. It supplemented its affirmation of the trial court in favor of plaintiffs by finding that even if there was no attorney-client relationship between the defendant attorneys and the second group of plaintiffs—an investment group that provided funds for a joint venture led by the primary plaintiff, Meriturn Partners—the investment group was a third-party beneficiary of the legal advice provided by defendants, and the defendants knew or should have known the investment group relied upon the advice provided to them and to the primary plaintiff. Whether this signals a change in the law or is simply an outlier remains to be seen. But, in addressing this issue, counsel must be prepared to address the law prior to *Meriturn Partners* as well as the decision itself.

Meriturn Partners v. Banner & Witcoff

This lawsuit involved the reliance by the plaintiffs, Meriturn Partners and others, on the legal work conducted by attorneys Jeffrey Hechtman and Joseph Berghammer of Banner & Witcoff, Ltd., regarding the feasibility of plaintiffs' investment into a troubled business, which included an analysis of the ownership of certain necessary patents.

Meriturn Partners is a private equity company that invests in troubled businesses and attempts to turn them around into successful, profit-driving companies.[3] In 2005, Meriturn was looking to invest in Sustainable Solutions, Inc., a company in the business of repurposing industrial waste into useable products.[4] Meriturn first conducted its own investigation into the potential investment in Sustainable Solutions, with founder, Lee Hansen, taking the lead on behalf of Meriturn.[5] In order to continue with its due diligence, Meriturn later retained attorney Jeffrey Hechtman to first

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organize and then carry out the transaction in which it would invest in Sustainable Solutions.[6] Hechtman, in turn, recommended Meriturn retain additional counsel because of the number of patents involved in the proprietary processes that were the business of Sustainable Solutions.[7] Due diligence had to be conducted as to the ownership of the various patents.[8] He recommended, and Meriturn retained, Banner & Witcoff and attorney Joseph Berghammer, who focused his practice in intellectual property law.[9] Berghammer was to perform due diligence on intellectual property issues involved in the anticipated transaction.[10]

Berghammer prepared a retention letter memorializing the creation of the attorney-client relationship and the initiation of the representation.[11] In the letter, Berghammer also set forth the terms of the parties' relationship.[12] Importantly, the letter only referred to the representation of Meriturn Partners.[13] However, Meriturn's typical strategy was to manage its transactions using some of its own money and some money from its individual clients.[14] In this case, Meriturn committed $3 million of its own and $3 million from an investor group for a total investment of $6 million.[15]

During Berghammer's pre-transaction due diligence work, there were instances when he communicated with Meriturn employees as well as times when he communicated with representatives of the investor group.[16] These communications included both emails and conference calls.[17] Part of Banner & Witcoff's due diligence work was a review of Sustainable Solutions' patents.[18] A separate attorney at the firm, Paul Rivard, was the attorney who primarily handled this aspect of the legal work.[19] Following Rivard's patent review, Banner & Witcoff informed Meriturn that all relevant patents in the transaction were owned and controlled by Sustainable Solutions.[20] Based at least in part on this representation, Meriturn went forward with the investment, and a new business entity was created that encapsulated the takeover and was prepared to do business.[21]

Shortly after the transaction was complete, Meriturn learned that one of the critical patents was owned by the in-laws of the owner of Sustainable Solutions, and not by the corporation.[22] Based on the court's language, this fact appeared to be undisputed. Therefore, the legal advice confirming that Sustainable Solutions owned all relevant patents was erroneous.[23] Thereafter, the new company faltered, losing out on a potential business opportunity that purportedly would have included a $23 million investment into the new venture and would have resulted in projected multimillion dollar yearly royalties.[24] In the professional negligence lawsuit against Banner & Witcoff, Meriturn alleged the proposed business opportunity failed, at least in part, because Sustainable Solutions did not own the critical patent.[25]

Meriturn and the client investor group filed suit against Banner & Witcoff and Berghammer, and the case was ultimately tried to a jury, which returned a verdict of $6 million in favor of the plaintiffs.[26] Ultimately, both plaintiffs and defendants appealed the judgment, with the defendants arguing they only represented Meriturn and therefore were not liable for the $3 million loss incurred by the outside investor group, while the plaintiffs argued they were entitled to lost profits which were not awarded at the trial level.[27]

On appeal, the primary issue was whether the plaintiffs other than Meriturn Partners were entitled to recover damages for the legal malpractice committed by the defendants.[28] The defendants argued that they only agreed to represent Meriturn, as explicitly set forth in the retention agreement.[29] The court noted that in order to prevail on a legal malpractice claim, a plaintiff must prove the existence of an attorney-client relationship with the defendant.[30] The attorney and the client must consent to the formation of the relationship.[31] The court specifically noted a client is not able to unilaterally create an attorney-client relationship, and further, a putative client's belief that the attorney is representing him is only one aspect to be considered when determining if an attorney-client relationship exists.[32] Key to the court's determination was the finding that "if an attorney knows that a person is relying on his performance of services and he performs for that person's benefit without limitation, an attorney-client relationship *can be found.*"[33]

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The determination of whether an attorney-client relationship exists is a question of law.[34] However, in order for a court to make the determination, a finding of fact must often be made.[35] In *Meriturn Partners*, evidence in addition to the written retention agreement was introduced that persuaded the jury and the appellate court that Banner & Witcoff was working on behalf of the investor group as well as Meriturn.

Attorney Berghammer testified that he had never heard of the other named plaintiffs and that he never agreed to represent anyone other than Meriturn.[36] He admitted taking part in conference calls and exchanging emails with individuals other than Lee Hansen, but testified he believed the individuals were also part of Meriturn.[37] Hechtman, the lawyer leading the transaction, and the lawyer on whose recommendation Banner & Witcoff was retained, gave conflicting testimony. Hechtman testified he was personally aware that he represented both Meriturn and the outside investor group, and more importantly, testified that he told Berghammer about the structure of the transaction.[38] Not only did Hechtman testify that he told Berghammer they were providing legal representation for the entire transaction, but he also testified he gave Berghammer background information on some of the individual investors.[39] Lee Hansen also testified that Berghammer was retained to perform the intellectual property due diligence for the entire transaction, and he explained to Berghammer that other investors were involved.[40]

The court noted there was sufficient evidence to support a finding that Berghammer consented to perform services for all plaintiffs, as they were parties to the entire transaction.[41] The court also pointed out that Berghammer "never attempted to limit the scope of the representation to only Meriturn's investment activity."[42] Based on the evidence that Berghammer knew investors were going to be involved and depend on his legal work, and because those investors were on conference calls in which he gave legal advice and exchanged confidential information, the court found Berghammer should have known his legal advice was being used by individuals outside of Meriturn.[43]

The court also insulated plaintiffs' verdict via a second line of reasoning. After first finding there was an attorney-client relationship, it also found the investment group plaintiffs could have recovered on a legal malpractice claim on the basis that they were known third-party beneficiaries to the attorney-client relationship between Meriturn and the defendant attorneys.[44] The court determined the defendants acted at the direction of or on behalf of the client to benefit or influence a third party.[45] It was undisputed there were third-party investors and it was undisputed those investors utilized the defendants' legal advice. The question was whether the defendants knew of the investors and agreed to provide them with legal advice. Ultimately, the court noted there was sufficient evidence to support a finding that the defendants were retained to provide legal advice and direction concerning the entirety of the $6 million investment, and there was sufficient evidence the attorneys knew or should have known the client investor group relied on the legal opinions the defendants provided to Meriturn. Based on the language of the opinion, it is clear the court believed there was a surplus of evidence that would allow a jury to find that either there was an attorney-client relationship between the investor group and the attorneys or the investor group was a known third-party beneficiary that used and relied upon the defendants' legal advice.

The opinion provides instruction for attorneys who may find themselves involved in similar transactional matters. At various times throughout its detailed account of the chronology of events, the court noted that the defendants did not limit the scope of their representation. It found the defendants did not attempt to limit the scope once they learned of the outside investors. Further, the defendants did not attempt to limit the scope when they held a conference call to discuss legal advice, even though the outside investors were participants.[46] Because the defendants were acting at the direction of Meriturn and provided legal services for the entirety of the transaction, including the total $6 million investment, the court found the defendants had no legal basis to escape liability.[47]

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The parties cross-appealed the jury verdict on the issue of damages as well. The defendants argued the jury award was not reduced by the salvageable value of the new company. In response, the plaintiffs argued the entire investment was lost.[48] The court noted the jury was provided with the evidence of the salvage value and simply resolved the question in plaintiffs' favor, which was not against the manifest weight of the evidence.[49]

In their appeal, the plaintiffs also argued the loss of the original $6 million combined investment was compounded by the loss of future profits, which were not awarded by the jury despite evidence and expert testimony in support of such damages.[50] Plaintiffs' expert testified they would have made money elsewhere, and pursuant to this "alternative investment theory," they should be awarded damages for lost profits in an amount equal to Meriturn's average rate of return in its investments.[51] The jury rejected the plaintiffs' theory that they would not have invested in Sustainable Solutions if they timely learned the company did not own the critical patent, and instead would have invested in another venture that earned profits.[52] On appeal, the court affirmed the decision, noting the jury was not required to find that plaintiffs would have made any money at all based on other investment performances.[53]

Similarly, the plaintiffs appealed the trial court's decision to bar the introduction of plaintiffs' sales projection theory of lost profits.[54] Under this theory, the plaintiffs claimed they should have been able to present evidence of their internally projected profits from the proposed venture with the assumption that Sustainable Solutions owned or could have purchased the critical patent.[55] The trial court correctly barred plaintiffs from introducing this theory of recovery, relying on the "new business rule," which precludes expert speculation as to lost profits when there is no historical data to demonstrate the likelihood of future profits.[56] Since the business had not yet been established, the profit stream could not yet have been interrupted.[57]

The court concluded by affirming the trial court in all respects. It found no reason to disturb the finding that all plaintiffs lost a total of $6 million—their total investment into the failed company —based on the failure to ascertain the ownership of a critical patent. The court found sufficient evidence to demonstrate the client investors had an attorney-client relationship with the attorneys performing due diligence on the patents, and even if there was no relationship, the client investors were third-party beneficiaries of which the defendant attorneys were aware.

General Principles of Duties Owed by Attorneys in Illinois Prior to *Meriturn Partners*

Under Illinois law, the question of whether a duty exists in the legal malpractice context has been a question of law for the court to determine.[58] The general rule is that an attorney owes a legal duty only to his client and not to third parties.[59] This limited duty serves to protect the personal, highly confidential and fiduciary nature of the attorney-client relationship.[60] As a consequence, an attorney-client relationship arises only when both the attorney and the client consent to its formation.[61] Thus, the client must explicitly authorize the attorney to work on his behalf and the attorney must indicate an acceptance of that authority to work on the client's behalf in order to establish an attorney-client relationship.[62] To further this point, some Illinois courts have held that the relationship between an attorney and client is a contractual one and is only created by a retainer, an offer to retain, or a fee paid.[63]

As is the case with almost everything in Illinois law, there is an exception to the general rule. That exception arises in the third-party beneficiary context. That third-party beneficiary exception, however, is a narrow and limited one.[64] The fact that a third party may benefit from an attorney's representation of his client is insufficient.[65] Rather, the law only imposes a duty of care upon an attorney for the benefit of a non-client third party when the primary purpose and intent of the attorney-client relationship is to benefit or influence the third party.[66] "The key consideration is [that] the attorney

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[must be] acting at the discretion of or on behalf of the client to benefit or influence a third party."[67] This test, known as the intent-to-benefit test, does not change simply because the third party's interests are deemed to be "non-adverse" to the attorney-client relationship.[68]

In applying the above rule, Illinois courts have repeatedly rejected the argument that one's status as a corporate shareholder, officer or director makes him a third-party beneficiary to an attorney-client relationship that exists between a lawyer and the corporate entity.[69]

The Illinois Rules of Professional Responsibility provide in pertinent part that: "a lawyer shall not represent a client if the representation … of [that] client will be directly adverse to another client" or "the representation of [that] client [] will be materially limited by the lawyer's responsibilities to another client, a former client or a third person."[70] Illinois courts have repeatedly recognized that the potential for such conflicts of interest often arise when an attorney represents a corporate entity and its shareholders, officers or directors.[71]

For instance, Illinois courts have consistently held that attorneys representing an executor of an estate do not simultaneously represent the estate's beneficiaries due to the inherent potential conflicts of interest that may arise.[72] Similarly, Illinois courts have repeatedly declined to impose a duty of care upon corporate attorneys to shareholders, officers or directors simply because they might be impacted by the attorney's services to the corporation.[73] Illinois law does not require a lawyer to exercise clairvoyance to advise upon what is merely conceivable.[74]

In *Pelham*, the leading case on the duties an Illinois attorney owes to third parties (which was not even cited by the *Meriturn Partners* court), the Illinois Supreme Court held that "for a nonclient to succeed in a negligence action against an attorney, he must prove that the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party."[75] And, the Court reiterated this test in subsequent decisions.

The test for imposition of a legal duty on an attorney under Illinois law is clear—attorneys generally do not owe a duty to non-clients unless the primary purpose and intent of the attorney-client relationship is to benefit or influence the third party.[76] Until *Meriturn Partners*, an attorney's knowledge of reliance by a third party with whom the attorney had no relationship was irrelevant.

Intent to Directly Benefit Test Under *Pelham*

In Illinois, the extension of attorney liability to third-party non-clients began with the Supreme Court's decision in *Pelham v. Griesheimer*, in which the Court adopted the "intent to directly benefit test."[77] In *Pelham*, the plaintiffs brought claims against their mother's divorce attorney for malpractice that allegedly occurred when the plaintiffs' parents obtained a divorce.[78] During the divorce, the plaintiffs' mother advised the attorneys that the divorce decree should include a provision requiring the plaintiffs' father to maintain life insurance naming the plaintiffs as beneficiaries.[79] Following the father's death, however, the plaintiffs learned their father had named his second wife as the beneficiary to his life insurance policy.[80]

Following the payment of the life insurance proceeds to the father's second wife, the plaintiffs brought a legal malpractice claim against their mother's attorney.[81] In their complaint, the plaintiffs asserted the defendant owed a "duty to exercise a reasonable degree of professional care and skill, as an attorney, with reference to seeing that the plaintiffs became the prime beneficiaries in all life insurance policies" that insured their father.[82]

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In response to the plaintiffs' complaint, the defendant attorney filed a motion to dismiss asserting, in part, that he owed no duty as plaintiffs were not his clients.[83] The circuit court and appellate court agreed with the defendant attorney and the plaintiffs appealed.[84]

In reviewing the plaintiffs' complaint, the Supreme Court first held that plaintiffs' cause of action sounded in tort and not contract, which required plaintiffs to establish the defendant attorney owed them a common law duty.[85] In determining whether the defendant owed plaintiffs a duty, the Supreme Court stated "[t]he determination of the duty—whether the defendant and the plaintiffs stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiffs—is an issue of law for the determination of the court."[86]

Thereafter, the Supreme Court examined Illinois law with respect to attorney liability to non-clients.[87] In doing so, the Supreme Court held that privity (i.e., a contractual relationship between a plaintiff and a defendant attorney) was "not an indispensable prerequisite to establishing a duty of care between a nonclient and an attorney in a suit for legal malpractice."[88] Instead, the Supreme Court set a different prerequisite for establishing a duty: the intent to directly benefit test.

In establishing the intent to directly benefit test, the Supreme Court acknowledged the "traditional, general rule [had] been that the attorney [was] liable only to his client, not to third persons," and "[t]he concept of privity [had] long protected attorneys from malpractice claims by nonclients" as well as the fact that "several Illinois cases [had] refused to extend the obligations of an attorney to nonclient third parties."[89] The Court, however, also acknowledged the "trend in tort law [had] been to abolish privity of contract as a prerequisite to establishing a duty."[90]

Following this, the Supreme Court held that privity was no longer the standard for determining whether an attorney owes a duty to a party in Illinois, and the Court adopted the intent to directly benefit test.[91] In doing so, the Court stated:

> While privity of contract has been abolished in many areas of tort law, the concern is still that liability for negligence not extend to an unlimited and unknown number of potential plaintiffs. In the area of legal malpractice the attorney's obligations to his client must remain paramount. In such cases the best approach is that the plaintiffs must allege and prove facts demonstrating that they are in the nature of third-party intended beneficiaries of the relationship between the client and the attorney in order to recover in tort. By this we mean that to establish a duty owed by the defendant attorney to the nonclient the nonclient must allege and prove that the intent of the client to benefit the nonclient third party was the primary or direct purpose of the transaction or relationship.[92]

According to the Supreme Court, analyzing a lawyer's duty to a non-client "to the concept of a third-party direct beneficiary serves the purposes of limiting the scope of the duty owed by an attorney to nonclients."[93] The Court stated that the "key consideration is the attorney's acting at the direction of or on behalf of the client to benefit or influence a third party."[94] Thereafter, the Court concluded that "for a nonclient to succeed in a negligence action against an attorney, he must prove that the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party."[95]

In articulating the intent to benefit test in *Pelham*, the Supreme Court rejected a balancing test utilized by California courts to determine whether an attorney owes a duty to a non-client.[96] That balancing test looked at the following factors to determine whether an attorney owed a duty to a non-client: (1) the extent to which the transactions were intended to

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affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered harm; (4) the closeness of the connection between the attorney defendant's conduct and the injury suffered; and (5) the moral blame attached to the attorney defendant's conduct and the policy of preventing future harm.[97] In rejecting the California balancing test, which is similar to the analysis applied by the *Meriturn Partners* court, the Supreme Court stated that "[t]he analogy to third-party direct beneficiaries to determine the duty owed to a nonclient by an attorney in a negligence action provides for a broader scope of liability than privity, but a narrower scope of liability than the balancing approach used in California."[98] And essentially, the Court narrowed the focus to one question: "[w]ere the services intended to benefit the plaintiff?"[99]

Applying the intent to directly benefit test to the plaintiffs' appeal, the Supreme Court found the plaintiffs were not "in the nature of direct third-party beneficiaries" to the defendant attorney's services.[100] The Court held the attorney's services in the divorce proceeding were intended to benefit the parties getting the divorce and not to directly benefit their children.[101] Moreover, the Court noted that if it found the attorney's services in a divorce were to benefit the children, there was the possibility that a conflict could arise which could have required the attorney to choose between advocating for his client or the children.[102] Since the Court found the children were not intended to directly benefit from the defendant attorney's service, the defendant owed the plaintiffs no duty and the circuit court properly dismissed the claims.

Further Clarification in *York v. Stiefel*

A year after it decided *Pelham*, the Supreme Court again reviewed attorney liability to third-party non-clients in the case of *York v. Stiefel*.[103] In *York*, two married couples brought legal malpractice claims against an attorney asserting that the defendant attorney provided them with negligent legal advice concerning the execution of personal guarantees.[104] Unlike *Pelham*, the legal malpractice claim in *York* arose out of transactional legal advice and not a traditionally adversarial legal proceeding.

According to the allegations of the plaintiffs' complaint in *York*, the two husband plaintiffs retained the defendant attorney to assist in the creation of a corporation that would operate an automobile dealership in Peoria, Illinois.[105] Following the auto dealership's incorporation, the husband plaintiffs negotiated for financing with a bank to acquire the dealership, and subsequently, the husband plaintiffs executed personal guarantees to secure that financing.[106]

Besides the financing necessary for the acquisition of the dealership, the husband plaintiffs also negotiated an agreement with the bank regarding floor plan financing related to the acquisition of automobiles.[107] According to the plaintiffs' allegations, the defendant attorney assisted with negotiating the floor plan financing.[108] Importantly, the floor plan financing agreement did not require the execution of a personal guarantee.[109]

Three years after the dealership's opening, the bank discovered the dealership violated the terms of the floor plan financing agreement and the bank sought to foreclose on the floor plan agreement.[110] The bank, however, stated that if the husband plaintiffs tendered their saving accounts to the bank and signed second mortgages on their homes waiving the homestead exemption, the bank would stop its foreclosure proceeding.[111] The husband plaintiffs immediately contacted the defendant attorney regarding the bank's offer.[112]

In reviewing the bank's offer, the defendant attorney talked with the husband plaintiffs and the bank representatives, but did not review the documents related to the lines of credit or the personal guarantees.[113] Based on his discussion with the bank's representatives and the husband plaintiffs, the defendant attorney recommended the husband plaintiffs tender their savings and execute the second mortgages on their homes.[114] In support of his advice, the defendant attorney told

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the husband plaintiffs that since they had already pledged their personal assets, a corporate bankruptcy would not help them avoid the bank's foreclosure proceeding.[115] Based on the attorney's advice, the husband and wife plaintiffs tendered their savings and executed the second mortgages waiving the homestead exemptions.[116]

Following the execution of the documents, the bank provided the dealership with thirty days of financing in order to allow it to find another lender.[117] The husband plaintiffs, however, could not find another lender, which resulted in the bank taking possession of the dealership and closing it down.[118]

After the bank's repossession of the dealership, the two couples brought claims against the attorney defendant for negligent legal advice related to the execution of the second mortgages.[119] As part of their claims, the plaintiffs asserted the defendant committed malpractice by advising the husband plaintiffs to sign second mortgages on their homes when the defendant had not reviewed the documents related to the loans to confirm the extent of the personal guarantees.[120]

During trial, the trial court declared a mistrial regarding one of the husband plaintiffs' claims, but allowed the remaining three plaintiffs' negligence claims to go to the jury.[121] The jury returned a verdict in favor of the three remaining plaintiffs, and the attorney defendant appealed.[122] In light of the Supreme Court's ruling in *Pelham*, the appellate court reversed the jury's verdict and the plaintiffs appealed that decision.[123]

The Supreme Court examined the relationship between the parties to ascertain whether the defendant attorney owed any duty.[124] In doing so, the Court separated out the claims between the plaintiff wives and the plaintiff husbands, and held that because the evidence showed the wives were not the attorney's clients, the attorney did not owe them any duty.[125] The Court, however, reversed the appellate court's decision as to the husband because the evidence showed that he was the defendant's client.[126]

In making its ruling, the Supreme Court stated that because the plaintiffs asserted a negligence claim, they had the burden to establish the existence of a duty of care.[127] To meet that burden, the plaintiffs had to show that either (1) they were clients of the defendant, or (2) the primary purpose of the attorney-client relationship was to benefit them.[128]

The Court then held that the wives failed to establish a duty because they offered no evidence to demonstrate they were the defendant's clients or that the primary purpose of the defendant's legal services was to benefit them.[129] In support of this finding, the Court noted (1) the wives did not seek legal advice from the defendant; (2) the defendant did not speak directly to the wives while rendering legal advice; and (3) the legal advice sought was not directly for the wives' benefit.[130] Further, while acknowledging the defendant attorney's advice impacted the wives' decision to execute the second mortgage and waive the homestead exception, the Court found the wives were merely incidental beneficiaries to the attorney's services, and the Court stated that "incidental beneficiaries are not qualified to bring a malpractice action of this character."[131]

McLane v. Russell

After *York*, the Supreme Court again considered an attorney's duty to a third-party non-client in the case of *McLane v. Russell*.[132] In *McLane*, the plaintiff beneficiaries and executor of a will brought a legal malpractice claim against the defendant attorney who drafted the testator's will.[133] As part of their claim, the plaintiff beneficiaries asserted that the attorney defendant committed malpractice by failing to fulfill the testator's wishes while drafting the will.[134]

The plaintiffs were tenant farmers on property owned by the testator and her sister.[135] Subsequent to the attorney's retention, the testator and her sister requested that he place the farm in joint tenancy with a right of survivorship in favor of the other sister.[136]

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Sometime after the sisters executed the joint tenancy deed, the testator's sister was adjudicated incompetent, and the testator approached the defendant attorney about drafting a will that left the farm to the plaintiffs.[137] The defendant attorney drafted a revised will that purportedly left the property to the plaintiffs only if the testator's incompetent sister died first.[138] Once the defendant completed drafting the will, the testator signed it.[139] The defendant attorney did not, however, sever the joint tenancy deed that existed between the testator and her sister.[140]

Following the testator's death, the testator's sister received the property, and after the sister's death, the property was transferred to the testator's cousins.[141] Thereafter, the plaintiffs brought a legal malpractice claim against the testator's attorney claiming the attorney breached his duty of care by failing to sever the joint tenancy between the testator and her sister.[142] After a jury award in the plaintiffs' favor, the defendant attorney appealed, asserting in relevant part, that the plaintiffs could not state a claim against him because the plaintiffs were not the intended beneficiaries of his legal services, and therefore he did not owe the plaintiffs a duty.[143]

In reviewing the duty issue, the Supreme Court began its analysis by stating the "determination of whether a duty exists is an issue of law to be determined by the court," and "[t]o conclude that a duty exists, a court must find that the defendant and the plaintiff stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff."[144]

The Court went on to state that "[t]ypically, an attorney owes a professional obligation only to his client, not to nonclient third persons," but in *Pelham*, the Supreme Court "held that, under limited circumstances, a nonclient may maintain a negligence action against an attorney."[145] According to the Court, *Pelham* stood for the proposition that "a nonclient-plaintiff seeking to recover in tort for legal malpractice must establish that the defendant-attorney owed him a duty of due care by showing that the primary purpose of the relationship between the defendant-attorney and the client was to benefit or influence the nonclient-plaintiff."[146]

Following this, the Supreme Court focused on the defendant attorney's two arguments. First, the defendant argued he did not owe a duty to the plaintiffs because his twenty-five year relationship with the testator did not demonstrate that the attorney-client relationship between the testator and the defendant was intended to primarily benefit the plaintiffs.[147] In responding to this argument, the Supreme Court stated that a court could consider a single transaction in a lengthy relationship in order to ascertain whether a duty was owed to a third party.[148] And because the defendant attorney had a professional obligation to draft the testator's will with reasonable care in that single transaction, he could not escape any duty he owed to testator or the plaintiffs as the beneficiaries of those services.[149]

Second, the defendant argued that the imposition of a legal duty to the plaintiffs was contrary to Illinois law because the plaintiffs were merely contingent beneficiaries under the testator's will, as the plaintiffs would only take the farm in the event the testator's sister died first.[150] In response to this argument, the Supreme Court looked at the specific facts presented at the trial. In reviewing those facts, the Court held the testator had not intended to make the plaintiffs contingent beneficiaries, as the evidence showed that the testator had intended to pass her ownership of the farm to the plaintiffs regardless of when her sister died.[151] Consequently, the Court rejected the notion that the plaintiffs were contingent beneficiaries, and the Court held that because the plaintiffs were not contingent beneficiaries under the testator's will, the defendant attorney owed them a duty under *Pelham*.

Reddick v. Suits

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Similar to *York*, the Second District Appellate Court considered the "intent to directly benefit test" in a transactional setting in *Reddick v. Suits*.[152] In *Reddick*, the plaintiffs brought a legal malpractice claim against the defendant attorney for failing to exercise reasonable care in reinstating an administratively dissolved corporation.[153] The plaintiffs were Haul Reddick, individually and as the administrator of the decedent's estate, and Debra Reddick, the decedent's widow.[154]

In 2005, the defendant attorney incorporated a business called RPF Holdings, Inc. (RPF) for the decedent and two additional shareholders.[155] At the time RPF was incorporated, the RPF shareholders wanted to transfer the assets from a corporation called Rochelle Plastics, Inc. (Rochelle) to RPF, as Rochelle was in default to a creditor.[156] The defendant attorney helped arrange for the transfer of those assets, which required RPF to assume Rochelle's debt.[157]

In 2007, the decedent became ill and his brother began to operate RPF's business as its president. Before the decedent's death, the decedent's brother determined that RPF was not financially viable, and he suggested the corporation be liquidated and no further funds be invested.[158] Subsequently, the decedent passed, and his brother became the estate's executor and a member of RPF's board of directors.[159] The decedent's wife also became a member of RPF's board.[160]

While he was president, the decedent's brother was looking for a way to sell RPF and learned that the Illinois Secretary of State had administratively dissolved RPF in 2006, which potentially subjected RPF's officers, directors and shareholders to individual liability for corporate debts.[161] As a consequence, the defendant attorney was contacted about reinstating RPF's corporate status, and the defendant attorney began the process of trying to reinstate RPF.[162]

Needless to say, the defendant attorney never properly reinstated RPF,[163] and RPF continued operations by incurring debts for operating costs.[164] Later, a vendor sued RPF, the decedent's brother, the decedent's wife, the decedent's estate, and several other officers and directors for RPF's outstanding debts.[165] The vendor asserted individual claims against the officers and directors (including the decedent's brother, estate, and wife), claiming those parties were not entitled to corporate protection due to the fact the Secretary of State had administratively dissolved the corporation.[166]

The decedent's brother settled the vendor's claim and brought a legal malpractice claim against the attorney for failing to properly reinstate RPF, which subjected the individual parties to personal liability in the vendor's suit.[167] The defendant attorney moved for summary judgment arguing that he did not owe the plaintiffs a duty.[168] The trial court agreed, and dismissed the plaintiffs' claims.[169] The plaintiffs appealed.[170]

On appeal, the plaintiffs contended that the defendant attorney owed them a duty as intended beneficiaries of his legal services.[171] In support of their argument, the plaintiffs asserted that the primary intent of the defendant's legal services associated with reinstating RPF was to obtain the protection against corporate liability for the officers, directors, and therefore, the defendant attorney owed them a duty as a matter of law.[172]

In assessing this argument, the court first stated that under *Pelham* "an attorney will owe a duty to a third party only where the attorney was hired by the client specifically for the purpose of benefitting that third party" and that the "'key consideration' for determining if the attorney owed a duty to the third party is whether the attorney was 'acting at the direction of or on behalf of the client to benefit or influence [the] third party.'"[173] Applying that test, the court held the attorney did not owe a duty to the plaintiffs.[174] Specifically, the court stated:

> While [the decedent's brother] in fact retained [the defendant attorney], he, in his capacity as an agent of RPF, retained [the defendant attorney] to represent RPF with regard to reinstating it from an administrative dissolution. The corporate entity, RPF, was [the defendant's] client, and the purpose of [the defendant's] engagement was to restore RPF's good standing. This would have two direct benefits to RPF: it would enable RPF to conduct business, and it would facilitate the sale of RPF's assets. The restoration of RPF's good standing would have an

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> incidental benefit to the directors and officers in that they would no longer be personally liable for any contracts entered into or business conducted by RPF. We cannot say, however, that [the defendant] was acting at RPF's direction to benefit or influence the directors or officers of RPF. Consequently, [the defendant] owed no duty to plaintiffs, and the trial court's judgment was correct.[175]

The court went on to state that regardless of plaintiffs' arguments concerning their potential liabilities based on the defendant's actions, it could not escape "the paramount command of *Pelham*, namely, to consider whether the third party was an intended beneficiary of the client's representation by the attorney."[176] And "[s]imply because the third party here, plaintiffs, were at risk of personal liability does not transform the incidental benefits of [the defendant's] representation of RPF into direct and intended benefits for plaintiffs."[177]

The plaintiffs also argued that Illinois courts had relaxed *Pelham*'s intent to directly benefit test in a non-adverse legal setting.[178] Rejecting this argument, the court indicated that the relaxed standard advocated by the plaintiffs was not supported by *Pelham*'s plain language, but even if a relaxed standard existed, the evidence still did not establish the plaintiffs were intended beneficiaries of the defendant's services.[179] Instead, the court stated "the paramount consideration [is] whether the attorney acted at the direction of or on behalf of the client to directly benefit or influence the third party."[180] And the court found:

> nothing in the evidence that indicates that the representation was designed to insulate plaintiffs from potential personal liability for the business that RPF conducted while it was dissolved. Instead, the evidence shows that the reinstatement was, at most, intended to put RPF in the condition where plaintiffs could continue with their intention of selling RPF's assets to an interested buyer. The protection of plaintiffs from personal liability was only incidental to that primary purpose. Accordingly, despite any relaxation accruing from the nonadversarial nature of the representation, we cannot conclude that [the defendant] owed a duty to plaintiffs as intended third-party beneficiaries of his representation of RPF.[181]

The limitation recognized by the *Reddick* court was disregarded by the *Meriturn Partners* court, reflecting the outlying nature of the *Meriturn Partners* opinion.

Harris v. Wunsch

The most recent discussion by the Illinois Supreme Court of duties owed to third parties is found in *Harris v. John C. Wunsch, P.C.*[182] In *Harris*, the Court considered whether the defendant attorney owed a duty to a decedent's disabled son in a medical malpractice wrongful death suit.

The underlying medical malpractice suit was brought by the decedent's wife, who was appointed special administrator of his estate.[183] The decedent had two children who were also next of kin.[184] Settlement was reached between the estate and some of the defendants for $15,000, with a distribution order allowing each next of kin to receive $5,000.[185] Pursuant to the order of distribution, the disabled son's share of the settlement proceeds was paid to his mother, the plaintiff in the medical malpractice suit.[186] Subsequently, new counsel appeared to represent the estate because prior counsel was unable to take the medical malpractice suit to trial.[187] Prior to trial, a second settlement

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was reached whereby $118,000 was to be distributed to the mother and another $118,000 was to be distributed to the disabled son.[188] (The remaining child waived her claim to the proceeds of the settlement.[189])

After the settlement, the mother remained the disabled son's guardian.[190] The disabled son's sibling then discovered he was improperly care for and that the settlement proceeds distributed to him were not being used for his care. The sibling filed a motion seeking to modify the guardianship of the disabled son.[191]

Ultimately, the public guardian became the disabled son's guardian and an action was filed against the defendant lawyers for legal malpractice.[192] The defendant attorneys successfully moved to dismiss the complaint.[193] The trial court found the plaintiff's complaint did not plead allegations sufficient to establish duty or proximate cause.[194]

Finding that the trial court erred, the Supreme Court held that while the general rule is that an attorney only owes a duty to the client, if a non-client is an intended third-party beneficiary of the attorney's services, then the attorney has a duty to that intended third-party beneficiary and can be held liable for damage suffered by that non-client.[195] The Court determined that the "intent to directly benefit test" remained the test to be used to determine if a duty exists.[196] Under the Illinois Wrongful Death Act, the Court found, the decedent's spouse and next of kin were the true parties in interest and the amount recovered was for their "exclusive benefit."[197] The Court further held the duty owed cannot be only to the personal representative of the estate, who is a mere nominal party, because that would defeat the purpose of the Illinois Wrongful Death Act.[198]

Applying these principles, the Court found that the attorneys failed to adequately protect all of the beneficiaries and to ensure they each received their share of the settlement proceeds.[199] Thus, the Court found the plaintiff had sufficiently alleged a cause of action against the defendant attorneys.[200]

Application

The critical takeaway from *Meriturn* is the appellate court's repeated reliance on the defendant attorneys' failure, at different points in time, to limit their representation to the party named in the written retention agreement. Instead, the attorneys communications, which otherwise would have been privileged, included individuals outside of Meriturn Partners. An explicit limitation in the engagement letter with the client, notification to the third parties of that limitation, and careful protection of privileged communications by the attorneys during the scope of the representation all seem to be essential to limiting the scope of representation. If those steps had been taken in *Meriturn*, it is possible that the case would have turned out differently for the lawyers on the issue of whether an attorney-client relationship was created with the outside investor group. With regard to the secondary question of whether the investor group was a third-party beneficiary of the legal advice provided by the attorneys to Meriturn Partners, an explicit limitation of the scope of services may have protected the attorneys as well. The "intent to directly benefit test" may be defeated by a carefully-worded retention letter that outlines both the scope of the representation and the parties who may benefit from or use the legal advice.

(Endnotes)

1 *Pelham v. Griesheimer*, 92 Ill. 2d 13 (1982).

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[2] *Meriturn Partners, LLC, et al. v. Banner and Witcoff, Ltd., et al.*, 2015 IL App (1st) 131883.

[3] *Meriturn Partners*, 2015 IL App (1st) 131883, ¶ 3.

[4] *Id.* ¶ 4.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* ¶ 5.

[9] *Id.* ¶¶ 4-5.

[10] *Id.* ¶ 5.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* ¶ 6.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* ¶ 7.

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[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* ¶ 8.

[27] *Id.*

[28] *Id.* ¶ 10.

[29] *Id.*

[30] *Id., citing USF Holland, Inc. v. Radogno, Cameli & Hoag, P.C.*, 2014 IL App (1st) 131727, ¶ 53.

[31] *Id.*, *citing Kensington's Wine Auctioneers & Brokers, Inc. v. John Hart Fine Wine, Ltd.*, 392 Ill. App. 3d 1, 13 (1st Dist. 2009).

[32] *Id., citing Rosenbaum v. White*, 692 F.3d 593, 601 (7th Cir. 2012).

[33] *Id. (emphasis added), citing* Restatement (Third) of the Law Governing Lawyers § 14 (2000).

[34] *Id., citing Blue Water Partners, Inc. v. Mason*, 2012 IL App (1st) 102165, ¶ 38.

[35] *Id.*

[36] *Id.* ¶ 11.

[37] *Id.*

[38] *Id. ¶* 12.

[39] *Id.*

[40] *Id.*

[41] *Id.* ¶ 13.

[42] *Id.*

[43] *Id.*

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[44] *Id.* ¶ 14.

[45] *Id.*

[46] *Id.* ¶ 13.

[47] *Id.* ¶ 15.

[48] *Id.* ¶ 16.

[49] *Id.*

[50] *Id.* ¶¶ 17-18.

[51] *Id.*

[52] *Id.* ¶ 19.

[53] *Id.* ¶ 20.

[54] *Id.* ¶ 22.

[55] *Id.*

[56] *Id.* ¶ 23.

[57] *Id.*

[58] *Kopka v. Kamensky and Rubenstein*, 354 Ill. App. 3d 930, 934 (1st Dist. 2004).

[59] *Id*.

[60] *Id*.

[61] *Kensington's Wine Auctioneers and Brokers, Inc. v. John Hart Fine Wine, Ltd.*, 392 Ill. App. 3d 1, 13 (1st Dist. 2009).

[62] *Id*.

[63] *Corti v. Fleisher*, 93 Ill. App. 3d 517, 521 (1st Dist. 1981).

[64] *Schechter v. Blank*, 254 Ill. App. 3d 560, 564 (1st Dist. 1993).

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[65] *Id.* at 566-67.

[66] *Pelham*, 92 Ill. 2d at 21.

[67] *Id*.

[68] *See, Brumley v. Touche, Ross & Co.*, 139 Ill. App. 3d 831, 835 (2d Dist. 1985), superseded by statute, 225 ILCS 450/30.1; *see also, Williams v. Katz*, No. 91 C 1593, 1994 U.S. Dist. LEXIS 4028, *9-10 (N.D. Ill. April 1, 1994).

[69] *See, Kopka*, 354 Ill. App. 3d 935-36 (attorney for closely held corporation owes no duty to corporation's individual shareholders); *Majumdar v. Lurie*, 274 Ill. App. 3d 267, 270 (1st Dist. 1995) ("[T]he attorney for a corporate client owes his duty to the corporate entity, not its individual shareholders, officers, or directors."); *Felty v. Hatweg*, 169 Ill. App. 3d 406, 408 (4th Dist. 1988) (ownership of shares in a closely held corporation does not make shareholder a third-party beneficiary of the attorney-client relationship between the corporation and corporate counsel); *Hager-Freeman v. Spircoff*, 229 Ill. App. 3d 262, 277-78 (1st Dist. 1992) ("[T]he attorney for a corporation, even a closely held one, does not have a specific fiduciary duty toward the individual shareholders").

[70] *See,* Ill. Rule Prof. Resp. 1.7(a)(1-2).

[71] *Felty*, 169 Ill. App. 3d at 410 ("Even in closely held corporations, minority shareholders often have conflicting interests with the corporation"); *Torres v. Divis*, 144 Ill. App. 3d 958, 964 (2d Dist. 1986) (same).

[72] *Grimes v. Saikley*, 388 Ill. App. 3d 802, 816-17 (4th Dist. 2009).

[73] *Kopka*, 354 Ill. App. 3d at 935 (no duty owed by corporate counsel even though the impact of his services to the corporation might expose shareholders and principals to personal liability); *Felty*, 169 Ill. App. 3d at 408-10 (minority shareholders in a closely held corporation were not third-party beneficiaries of a lawyer's attorney-client relationship with the corporate entity simply because the attorney knew or should have known that the shareholders would rely upon his services).

[74] *Majumdar*, 274 Ill. App. 3d at 271.

[75] *Pelham*, 92 Ill. 2d at 21.

[76] *Pelham*, 92 Ill. 2d at 23; *Schechter*, 254 Ill. App. 3d at 567 ("It would strain the meaning of the 'primary purpose and intent' language in *Pelham* for a third party to come within that category simply because he may benefit from the attorney's representation of his client."

[77] *Pelham*, 92 Ill. 2d at 23.

[78] *Id.* at 16.

[79] *Id.*

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[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.* at 17-19.

[86] *Id.* at 18-19.

[87] *Id.* at 19.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 20.

[91] *Id.*

[92] *Id.* at 20-21.

[93] *Id.* at 21.

[94] *Id.*

[95] *Id.*

[96] *Id.* at 22.

[97] *Id.*

[98] *Id.* at 21-22.

[99] *Id.* at 22.

[100] *Id.* at 23.

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[101] *Id.* at 23-25.

[102] *Id.*

[103] *York v. Stiefel*, 99 Ill. 2d 312 (1983)

[104] *Id.* at 314.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.* at 315.

[109] *Id.* at 316.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.* at 317.

[114] *Id.*

[115] *Id.* at 316.

[116] *Id.* at 316-17.

[117] *Id.* at 318.

[118] *Id.* at 317-18.

[119] *Id.* at 320.

[120] *Id.*

[121] *Id.* at 314.

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[122] *Id.* at 320.

[123] *Id.*

[124] *Id.* at 320-21.

[125] *Id.* at 318-19.

[126] *Id.*

[127] *Id.* at 320.

[128] *Id.*

[129] *Id.* at 320-21.

[130] *Id.*

[131] *Id.*

[132] *McLane v. Russel,* 131 Ill. 2d 509 (1989).

[133] *Id.* at 512-13.

[134] *Id.* at 513.

[135] *Id.* at 512.

[136] *Id.*

[137] *Id.* at 512-13.

[138] *Id.* at 513.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

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[143] *Id.* at 514.

[144] *Id.* at 514-15.

[145] *Id.* at 515.

[146] *Id.*

[147] *Id.* at 517-19.

[148] *Id.* at 516-17.

[149] *Id.*

[150] *Id.* at 518-20.

[151] *Id.*

[152] *Reddick v. Suits*, 2011 IL App (2d) 100480.

[153] *Id.* ¶ 1.

[154] *Id.*

[155] *Id.* ¶ 2.

[156] *Id.* ¶ 3.

[157] *Id.*

[158] *Id.* ¶ 6.

[159] *Id.* ¶¶ 4-5.

[160] *Id.* ¶ 7.

[161] *Id.* ¶¶ 7-10.

[162] *Id.* ¶¶ 8-10.

[163] *Id.* ¶¶ 9-19.

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[164] *Id.* ¶ 20.

[165] *Id.* ¶ 21.

[166] *Id.* ¶¶ 21-23.

[167] *Id.* ¶ 28.

[168] *Id.* ¶ 29.

[169] *Id.*

[170] *Id.*

[171] *Id.* ¶ 35.

[172] *Id.* ¶¶ 35-38.

[173] *Id.* ¶ 35.

[174] *Id.*

[175] *Id.*

[176] *Id.* ¶ 44.

[177] *Id.*

[178] *Id.* ¶¶ 38-44.

[180] *Id.* ¶ 43.

[181] *Id.*

[182] *Harris v. John C. Wunsch, P.C.*, 2014 IL115997.

[183] *Id*. ¶ 3.

[184] *Id*.

[185] *Id*. ¶ 4.

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[186] *Id*.

[187] *Id*. ¶ 5.

[188] *Id*.

[189] *Id*.

[190] *Id*. ¶ 6.

[191] *Id*.

[192] *Id.* ¶ 7.

[193] *Id*. ¶ 8.

[194] *Id*.

[195] *Id*. ¶ 14.

[196] *Id*.

[197] *Id*. ¶ 16.

[198] *Id*.

[199] *Id*. ¶ 24.

[200] *Id*.

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