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Recent Developments: Flaherty v. Weinberg: Attorney Nonclient Liability

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Flaherty v. Weinberg: ATTORNEY NONCLIENT LIABILITY

In Flaherty v. Weinberg, 303 Md. 116, 492 A.2d 618 (1985) the Court of Appeals of Maryland was faced with the question of whether an attorney may be liable to a nonclient resulting from professional malpractice. After a discussion of the treatment of the issue by other jurisdictions and an examination of prior Maryland court decisions, the court held that an attorney may indeed be liable to a nonclient for professional malpractice, but only under certain circumstances.

The Flahertys contracted to purchase property in Frederick County, Maryland and secured a mortgage loan from First Federal. Weinberg was retained by First Federal to represent it at settlement, although the Flahertys did not retain counsel. At settlement, the Flahertys were assured by Weinberg, relying upon the Ford land survey, that the boundaries of the property were the same as described in the sales contract. Several years after settlement, and after several improvements had already been made to the property, the Flahertys had another survey done. This survey revealed that the prior Ford survey had misstated the property's boundaries by eight feet. Upon learning of this discrepancy, the Flahertys questioned Weinberg concerning the existence of any other land surveys. Weinberg provided the Flahertys with the Fox land survey, which had been ordered by First Federal and was completed several weeks after settlement. The Fox survey revealed that the Ford survey was erroneous and that there was indeed an encroachment of eight feet by the Flahertys onto their neighbor's property.

The Flahertys filed a declaration, which was later amended, in the Circuit Court for Frederick County against Weinberg asserting three causes of action: (1) negligence; (2) breach of warranties; and (3) negligent misrepresentation. The trial court sustained Weinberg's demurrers to all three causes of action and it is from these rulings that this case reached the Court of Appeals of Maryland.

The *Flaherty* court began by exploring the historical background of this issue, including its treatment by courts in other jurisdictions. The United States Supreme Court, in *National Savings Bank v. Ward*, 100 U.S. 195 (1880), held that an attorney is not liable to a third party for professional malpractice in the absense of fraud, collusion, or privity of contract. The opinion is based on two major concerns: "(1) that to allow such liability would deprive the parties to the contract of their own agreement; and (2) that a duty to the general public would impose a huge potential burden of liability on the contracting parties." *Needham v. Hamilton*, 459 A.2d 1060, 1061, (D.C. App. 1983) (quoting *Guy v. Liederbach*, 279 Pa. Super. 543, 547, 421 A.2d 333, 335 (1980), *aff'd in part* 501 Pa. 47, 459 A.2d 744 (1983).

The traditional rule requiring strict privity of contract in attorney malpractice cases has been relaxed in many jurisdictions. There are several theories upon which this relaxation has been based, including: (1) third party beneficiary; (2) balancing of factors; (3) assumption of duty; and (4) fiduciary or agency. The third party beneficiary theory arises when two parties, the attorney and the client, enter into an agreement with the intent to confer a direct benefit to a third party. This theory has been applied in numerous cases, especially those involving the drafting or execution of wills. The *Needham* court based its decision to hold an attorney liable to a third party in an action involving the drafting of a will for two reasons: (1) that the rationales supporting privity of contract do not apply in this situation; and (2) that the purpose of the will is to accomplish the transfer of the testator's estate to the beneficiaries. *Needham*, 459 A.2d at 1062-63.

The balancing of factors theory, as set forth in *Lucas v. Hamm*, 364 P.2d 685, 15 Cal. Rptr. 821 (1981), requires the court to balance a number of factors in order to determine whether to impose a duty on the attorney not in privity with the third party. These factors include: (1) extent to which the transaction was intended to affect the third party; (2) foreseeability of harm to the third party; (3) degree of harm that the third party suffered; (4) connection between the attorney's conduct and the injury sustained; (5) moral blame attached to the conduct; and (6) policy of preventing future harm. *Flaherty*, 303 Md. at 124, 492 A.2d at 622.

The assumption of duty theory states that once an attorney agrees to act for the benefit of another and he undertakes to fulfill that promise, the attorney then has a duty of care in fulfilling that promise. The third party must show that the attorney undertook an action and that the injury was a foreseeable result of the negligent performance of that action. The fiduciary or agency theory is similar to the assumption of duty theory, and neither theory has been accepted in the context of attorney malpractice cases. *Id.* at 123, n.4, 492 A.2d at 621.

In the *Flaherty* decision, Judge Cole examined the development of Maryland case law regarding attorney liability to nonclients. This examination begins with *Wlodarek v. Thrift*, 178 Md. 453, 13 A.2d 774 (1940), involving an action brought by a successor in title against an attorney for his erroneous opinion that the title was good and marketable, when in fact it was actually defective. The Maryland Court of Appeals adopted the traditional privity of contract rule and held that the attorney did not owe a duty to the plaintiffs and was therefore not liable. The court continued its adherence to the traditional privity rule in *Kendall v. Rogers*, 181 Md. 606, 31 A.2d 313 (1943) and *Reamer v. Kessler*, 233 Md. 311, 196 A.2d 896 (1964).

Beginning in 1970 with *Prescott v. Coppage*, 266 Md. 562, 296 A.2d 150 (1970), the Maryland appellate courts have begun to allow limited exceptions to the traditional strict privity rule in cases involving attorney liability to nonclients. In *Prescott*, the court allowed a third party beneficiary to sue a court appointed receiver for damages resulting from the improper performance of his duties. The court's decision did not abrogate the traditional privity rule, but merely fashioned a limited exception to that rule.

Several years later, the Court of Special Appeals of Maryland decided a case brought by the high bidders at a foreclosure sale against the attorney who conducted the sale. *Clagett v. Dacy*, 47 Md. App. 23, 420 A.2d 1285 (1980). The plaintiff's claim was that there was a duty owed to him by the attorney. This argument was rejected by the *Clagett* court which held that in order to fall within the third party beneficiary exception to the strict privity rule, the nonclient must be "a person or part of a class of persons specifically intended to be the beneficiary of the attorney's undertaking." *Id.* at 29, 420 A.2d at 1289.

Most recently in *Kirgan v. Parks*, 60 Md. App. 1, 478 A.2d 713, *cert.denied* 301 Md. 639, 484 A.2d 274 (1984), the Maryland courts were faced with an action by a testamentary beneficiary against the attorney who had drafted the testator's will. The court did not allow the plaintiff's claim, but left open the possibility under different circumstances.

After its review of Maryland case law the *Flaherty* court concluded that this state adheres to the traditional strict privity rule in attorney malpractice cases, with the sole exception being the third party beneficiary theory. It is therefore necessary for the nonclient to allege and prove that the intent of the client to benefit the nonclient was a direct purpose of the transaction. *Flaherty*, 303 Md. at 131, *492* A.2d at 625. The court went on to

alleviate fears that this exception might be abused by pointing out that: (1) if properly applied by the courts, this exception prohibits action by those persons deriving an *indirect* benefit from the transaction; and (2) the Code of Professional Responsibility requires an attorney to zealously represent his clients within the bounds of the law and to refrain from representing clients with conflicting interests. *Id.* at 131, 492 A.2d at 626.

–Marc Minkove

Zauderer v. Office of Disciplinary Counsel: ATTORNEY ADVERTISING

In *Zauderer v. Office of Disciplinary Counsel*, 105 S.Ct. 2265 (1985), the United States Supreme Court continued to delineate the path between an attorney's constitutional right to advertise and the valid police power of the state in regulating the conduct of lawyers. The plurality opinion secures the attorney's first amendment right to solicit business through nondeceptive printed advertisements, yet maintains the state's authority to compel disclosure of information so that the ads are not deceptive.

The *Zauderer* case involved an Ohio attorney who placed advertisements in thirty-six newspapers within the state to publicize his willingness to represent women who had suffered injuries from the use of the Dalkon Shield Intrauterine Device. The ad featured a line-drawn illustration of the contraceptive, and included the following textual information:

> The Dalkon Shield Interuterine (*sic*) Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by the clients.

Zauderer, 105 S.Ct. at 2271.

The attorney received numerous responses to the ads, and initiated suit for over one hundred clients.

The Office of Disciplinary Counsel filed a complaint against Zauderer claiming that the advertisement violated several of the state's disciplinary rules. The Supreme Court of Ohio found that Zauderer violated the disciplinary rules by his failure to disclose the clients potential liability for costs, by using an illustration in the advertisement, and because the ad constituted an impermissible self-recommendation. The Ohio court found this conduct warranted a public reprimand.

Zauderer filed his appeal to the Supreme Court of the United States, contending that Ohio's disciplinary rules violated the first amendment by authorizing the state to discipline him for the content of the Dalkon Shield ad.

While most states have adopted a code of professional responsibility which regulates the conduct of attorneys, the Supreme Court has recognized several constitutional problems with these general rules. The Supreme Court has recognized that an attorney has a constitutional right to advertise, and found that state regulations which provide blanket bans on advertising prices for routine legal services violated the first amendment. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). The Supreme Court has also found that rules prohibiting attorneys from using nondeceptive terminology to describe their fields of practice were an unconstitutional infringement on an attorney's first amendment rights. *In re R.M.J.*, 455 U.S. 191, (1978). Yet, the Supreme Court has allowed state regulations which prohibit in-person solicitation of clients, in certain circumstances. *Ohralik v. State Bar Assn.*, 436 U.S. 447 (1978).

It is against this background that Zauderer challenged the constitutionality of Ohio's disciplinary rules prohibiting the solicitation of legal business through printed advertisements containing advice and information regarding specific legal problems. He also challenged Ohio's restrictions on the use of illustrations, and the state's disclosure requirements relating to contingent fees.

The Supreme Court found that while the state could prohibit advertising that is inherently misleading, they could not use this reasoning to justify disciplining an attorney for running nondeceptive advertisements geared to persons with specific legal rights. The Court noted that Zauderer's ads did not provide deceptive or misleading information about Dalkon Shields, and, in fact, were totally accurate. *Zauderer*, 105 S.Ct. at 2276-77. The Supreme Court also noted an important distinction between in-person solicitation and printed advertising. While "in-person solicitation was a practice ripe with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud," *Ohralik*, 436 U.S. at 464-65, printed advertising is a "means of