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Congressional Reform: Toward a Modern Congress

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PUBLIC ACCOUNTANTS AND ATTORNEYS: NEGLIGENCE AND THE THIRD PARTY

I. Introduction

The scope of the liability of a public accountant, who negligently performs services which result in economic damages to third persons not in privity of contract with the accountant, has generated a great deal of literature[1] and litigation.[2] Only recently[3] have inroads been made on the rule of *Ultramares Corp. v. Touche,*[4] that third parties not in privity of contract with the accountant may not recover economic damages caused by the public accountant's negligence. These inroads are significant in view of the fact that the accounting profession has in the past been protected, for policy reasons, from what was feared would be "liability in an indeterminate amount for an indeterminate time to an indeterminate class."[5]

The same reasons which would lead to an expansion of the accountant's liability would, in applicable situations, dictate an expansion of the attorney's third-party liability; a liability, which prior to the recent decisions dealing with public accountants, had expanded to the point of allowing third parties to recover economic damages for negligence in limited circumstances.[6]

This note will analyze the present scope of the accountant's liability to third

1 See criticizing *Ultramares:* Bradley, *Auditor's Liability and the Need for Increased Accounting Uniformity,* 30 LAW & CONTEMP. PROB. 898 (1965); Hawkins, *Professional Negligence Liability of Public Accountants,* 12 VAND. L. REV. 797 (1959), article is also printed in I. ROADY & W. ANDERSEN, PROFESSIONAL NEGLIGENCE at 256-283 (1960); Levitin, *Accountants' Scope of Liability for Defective Financial Reports,* 15 HASTINGS L.J. 436 (1964); Solomon, *Ultramares Revisited: A Modern Study of Accountants' Liability To the Public,* 18 DE PAUL L. REV. 56 (1968); Note, *Accountants' Liabilities for False and Misleading Financial Statements,* 67 COLUM. L. REV. 1437 (1967); Note, *The Accountants' Liability — For What and To Whom,* 36 IOWA L. REV. 319 (1951); Note, *Potential Liability of Accountants to Third Parties for Negligence,* 41 ST. JOHN'S L. REV. 588 (1967); Comment, *Accountant's Liabilities to Third Parties Under Common Law and Federal Securities Law,* 9 B.C. IND. & COM. L. REV. 137 (1967); Comment, *Accountant's Liability to Third Parties for Negligence,* 23 U. MIAMI L. REV. 256 (1968); Comment, *Auditor's Responsibility for Misrepresentation: Inadequate Protection for Users of Financial Statements,* 44 WASH. L. REV. 139 (1968).

For a more favorable view of *Ultramares* see: Katsoris, *Accountants' Third Party Liability — How Far Do We Go?,* 36 FORDHAM L. REV. 191 (1967); Comment, *Torts: Accountant Liable to Third Party for Negligent Misrepresentation,* 53 MINN. L. REV. 1375 (1969); Comment, *Auditors' Third Party Liability: An Ill-Considered Extension of the Law,* 46 WASH. L. REV. 675 (1971).

2 Cases involving public accountants and third parties are numerous. For decisions within the last ten years in which the scope of duty owed to third parties was set out see: Security-First National Bank of Los Angeles v. Lutz, 297 F.2d 159 (9th Cir. 1961); Investment Corporation of Florida v. Buchman, 208 So. 2d 291 (Fla. Ct. App. 1968); Blank v. Kaitz, 350 Mass. 779, 216 N.E.2d 110 (1966); Teich v. Arthur Andersen & Co., 40 Misc. 2d 519, 243 N.Y.S.2d 368 (1963, *rev'd per curiam,* 24 App. Div. 2d 749, 263 N.Y.S.2d 932 (1965). The most recent decisions in which the scope of the duty has been increased are: Rusch Factors, Inc. v. Levin, 284 F. Supp. 85 (D. R.I. 1968); Ryan v. Kanne, 170 N.W.2d 395 (Iowa 1969); Shatterproof Glass Corporation v. James, 466 S.W.2d 873 (Tex. Civ. App. 1971).

3 *See* Rusch Factors, Inc. v. Levin, 284 F. Supp. 85 (D. R.I. 1968); Ryan v. Kanne, 170 N.W.2d 395 (Iowa 1969); Shatterproof Glass Corporation v. James, 466 S.W.2d 873 (Tex. Civ. App. 1971).

4 255 N.Y. 170, 174 N.E. 441 (1931).

5 *Id.* at 179, 174 N.E. at 444.

6 *See* Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied,* 368 U.S. 987 (1962); Licata v. Spector, 26 Conn. Supp. 378, 225 A.2d 28 (1968).

parties, discuss the policy reasons and problems of increasing the accountant's liability to the full extent of foreseeability, compare the accountant's scope of liability to that of the attorney, and discuss the impact on the legal profession of the extension of the public accountant's liability to the full limits of foreseeability, an extension which would necessitate that *Ultramares*[7] be overruled.

II. Privity of Contract—Evolution and Erosion

When a public accountant or attorney is retained to perform services, he does so pursuant to a contract of employment. The contractual relationship imposes certain obligations on the attorney or accountant, one of which is a duty to exercise reasonable care in accordance with the standards of his profession in performing the contract.[8] When the accountant or attorney fails to exercise the degree of care required, he may be liable to his client for breach of contract or in tort law for negligence in the performance of the contract.[9]

The liability for negligence of a contracting party to a third person with whom he has not made a contract has a long history filled with certain obstacles. One of these obstacles is the fact that there has been no direct transaction between the plaintiff and defendant—they are not in "privity" of contract. The absence of "privity" between the parties makes it difficult to base any duty to the plaintiff upon the contract itself. But by entering into the contract, the law may impose a duty, sounding in tort and not in contract, upon the contracting party to exercise reasonable care in the performance of the contract to avoid damages to third persons not in "privity" of contract. The evolution of this duty to third parties was slow.[10]

In 1842, the Court of Exchequer in *Winterbottom v. Wright*[11] held that the breach of a contract to keep a mailcoach in repair could not give rise to a cause of action to a passenger in the coach who was injured when it collapsed. Lord Abinger, recognizing that there was no privity of contract between the parties, stated:

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7 This note will not cover the accountant's or attorney's liability for fraud or gross negligence, nor will the effects of the Securities Act of 1933 and the Securities Exchange Act of 1934 be discussed. It should be noted that the scope of the accountant's and lawyer's third party liability in these areas of the law can be quite extensive. For a discussion on the Federal Security Laws see: Note, *Accountants' Liabilities for False and Misleading Financial Statements,* 61 COLUM. L. REV. 1437 (1967); Comment, *Accountants' Liabilities to Third Parties Under Common Law and Federal Securities Law,* 9 B.C. IND. & COM. L. REV. 137 (1967); Comment, *Auditor's Responsibility for Misrepresentation: Inadequate Protection for Users of Financial Statements,* 44 WASH. L. REV. 139 (1968). For a discussion on fraud see note 26 *infra.* Also, it should be noted that significant developments have taken place in the criminal law affecting public accountants. *See* United States v. Simon, 425 F.2d 796 (2nd Cir. 1969), *cert. denied,* 397 U.S. 1006 (1970). For an excellent discussion on the criminal liability of the public accountant and in particular the *Simon* case see Note, *The Criminal Liability of Public Accountants: A Study of United States v. Simon,* 46 NOTRE DAME LAWYER 564 (1971).

8 Gammel v. Ernst & Ernst, 245 Minn. 249, 72 N.W.2d 364 (1955).

9 *Id. See also* American Indemnity Co. v. Ernst & Ernst, 106 S.W.2d 763 (Tex. Civ. App. 1937), indicating the importance of the contract or tort alternatives as far as the statute of limitations is concerned.

10 W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 93 (4h ed. 1971).

11 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842). *See also* Langride v. Levy, 2 N. & W. 519, 150 Eng. Rep. 863 (Ex. 1837).

> Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.[12]

The words of Lord Abinger were interpreted by subsequent courts to mean that there could be no action, even in tort, for the negligent performance of a contract injuring a third person not in "privity" of contract.[13]

In the latter part of the nineteenth century, the idea of a general duty, irrespective of contract, to avoid unreasonable risks of harm to the person or property of another had begun to develop in England, as exemplified by Judge Brett's dictum in *Heaven v. Pender*.[14] Due to the defendant dock owner's negligence, the plaintiff ship painter was injured. Addressing himself to the question of duty, Judge Brett observed:

> . . . [W]henever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.[15]

The foundation for the abrogation of the privity doctrine in the United States was laid in *Thomas v. Winchester*[16] decided in 1852. The New York court held that the vendor who sold mislabeled poison to a druggist, who in turn sold to a customer, was liable to the customer for injuries caused as a result of his negligent mislabeling. The court had no problem in finding a duty to avoid injury where negligence would put human life in imminent danger.

The doctrine of privity was further weakened by Judge Cardozo's opinion in *MacPherson v. Buick Motor Co.*[17] in 1916. In holding a car manufacturer liable to a customer not in privity, Judge Cardozo stated:

> If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.
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> . . . .
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> We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have the source of the obligation where it ought to be. We have put its source in the law.[18]

MacPherson is indicative of the erosion of privity in those cases where negligence resulted in physical harm to person or property. In the sphere of

12 152 Eng. Rep. at 405.

13 The interpretation has been condemned as faulty; nevertheless, a general rule developed that one not in privity could maintain no action against a contracting party. W. PROSSER, note 10 *supra*.

14 11 Q.B.D. 503, 510 (Ct. App. 1883).

15 *Id.* at 509.

16 6 N.Y. 397, 58 Am. Dec. 455 (1852).

17 217 N.Y. 382, 111 N.E. 1050 (1916).

18 *Id.* at 389-90, 111 N.E. at 1053.

tangible, physical damages, the limitations of privity have given way to the more general duty of reasonable care to avoid foreseeable risks of physical harm.[19]

The first significant case[20] extending liability for negligence beyond privity of contract, where only intangible economic damages[21] were involved, was *Glanzer v. Shepard.*[22] Judge Cardozo, speaking for the Court of Appeals of New York, rejected the argument that no duty was owed to the plaintiffs because there was no contract between the plaintiffs and defendant. The plaintiffs, Glanzer Bros., purchased a quantity of beans. The seller of the beans contracted with the defendant, a public weigher, to certify the correct weight of the beans. The defendant knew that the plaintiffs were to use the certificates as the basis for their payment to the seller. The defendant negligently overstated the weight, and as a result the plaintiffs overpaid. In allowing the plaintiffs to recover for their economic damages, Judge Cardozo, holding that there was a duty owed to the plaintiffs, stated:

> We do not need to state the duty in terms of contract or of privity. Growing out of a contract, it has nonetheless an origin not exclusively contractual. Given the contract and the relation, the duty is imposed by law.[23]

Judge Cardozo recognized that the defendant's duty could have been stated in contract.[24] On the facts—the relationship of the parties and the specific transaction—the third-party-beneficiary rule of *Lawrence v. Fox*[25] would have been applicable. The approach in contract was declined and instead the duty was stated in tort. Judge Cardozo acknowledged the strong precedent against expansion of liability in tort,[26] but refused to follow such precedent, observing that "the bounds of duty are enlarged by knowledge of a prospective use."[27] *Glanzer* was thought[28] to be the beginning of what would develop into a general duty of reasonable care to avoid all foreseeable risks of economic damages to third parties not in privity of contract. However, this was not to be.

In 1931, nine years after the decision in *Glanzer,* Judge Cardozo issued his opinion in *Ultramares Corp. v. Touche,*[29] which refused to extend the scope of liability for economic damages caused by negligence to the full limits of foreseeability[30] in favor of a third party not in privity. Viewed either as the strength of

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19 W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 96 (4th ed. 1971).

20 There had been other extensions beyond the privity rule where abstractors were involved. However, liability in these instances was achieved by theories of third party beneficiary or agency rather than by resort to a general duty of care; *see* Hawkins, *supra* note 1, at 814 n.77.

21 For definitional purposes, economic damage is monetary loss, i.e., money lost as a result of investments, loans, purchases, sales or other types of financial transactions. Tangible damage is physical injury to the person or property of another.

22 233 N.Y. 236, 135 N.E. 275 (1922).

23 *Id.* at 276.

24 *Id.* at 277.

25 20 N.Y. 268 (1859).

26 Saving Bank v. Ward, 100 U.S. 195 (1879). *See also* Landell v. Lybrand, 264 Pa. 406, 107 A. 783 (1919).

27 233 N.Y. at 240, 135 N.E. at 276.

28 Note, *Privity of Contract and Tort Liability,* 21 MICH. L. REV. 200 (1922).

29 255 N.Y. 170, 174 N.E. 441 (1931). Hereinafter referred to as *Ultramares.*

30 Foreseeability is generally defined as the "ability to see or know in advance, hence, the reasonable anticipation that harm or injury is a likely result of acts or omissions." BLACK'S LAW DICTIONARY 777 (4th ed. 1968). In the context of public accounting, a rule of "full foreseeability" would necessarily embrace all individuals or institutions that the accountant

the privity doctrine or the narrowing of the scope of duty to avoid economic loss, the effect of *Ultramares* was to limit the recovery for negligence causing economic damages to less than all those people who might foreseeably be injured. In *Ultramares*, the defendants, a firm of certified public accountants, were retained by Fred Stern & Co., Inc., to prepare and certify a balance sheet representing its financial condition. In performing their audit, the defendants were negligent, and as a result[31] the balance sheet showed a net worth of approximately $1,070,000 when in fact Fred Stern & Co. was insolvent. The defendants knew that in the usual course of business the balance sheet, when certified, would be exhibited by the Stern Company to banks, creditors, stockholders, purchasers, or sellers, according to the needs of the occasion, as the basis of financial dealings. The defendants did not know the exact persons to whom the certified balance sheet would be shown or the extent or number of transactions in which it would be used, and, most importantly, the accountants did not know that the balance sheet would be submitted to the plaintiff. Relying upon the balance sheet and the accompanying certificate of the defendant accountants, the plaintiff loaned money to Stern. Ten months after the loan, Stern was declared bankrupt. The plaintiff's cause of action alleged fraud[32] and negligence. The Court of Appeals of New York affirmed the trial term's dismissal of the first cause of action based on negligence. On the facts, the defendants were negligent, the only question being whether the accountants owed a duty to the plaintiff. Judge Cardozo, in questioning the wisdom of a duty of reasonable care to all who rely on the balance sheet, observed:

> If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.[33]

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knows or should reasonably expect will rely upon the certified financial statements. That is, it is foreseeable that lending institutions, creditors, stockholders, and other classes of individuals or institutions will rely upon the accountant's services.

31 The court stated that the evidence supported a finding of negligence in conducting the audit. The evidence indicated that in certain areas of the audit, the diligence of the auditors did not meet the professional standards. A false entry was posted to accounts receivable for approximately $706,000 by one of Stern Co.'s employees. The auditors had notice of the entry but failed to verify its validity. Apparently, the auditor did not trace the entry to the general journal or to any supporting invoices, any of these steps would have alerted the auditor to the suspicious circumstances surrounding this entry. The accounts receivable and other assets were overstated with the resultant overstatement of net worth (capital account).

32 The scope of liability for fraud includes those third parties the accountant should have reasonably foreseen would be injured by his misrepresentation. *See* Rusch Factors, Inc. v. Levin, 284 F. Supp. 85, 90 (D. R.I. 1968. In *Ultramares*, Judge Cardozo, defining the scope of duty for fraud, stated at 255 N.Y. 179, 174 N.E. 444:

> To creditors and investors to whom the employer exhibited the certificate, the defendants owed a like duty to make it without fraud, since there was notice in the circumstances of its making that the employer did not intend to keep it to himself.

See also State Street Trust Co. v. Ernst, 278 N.Y. 104, 15 N.E. 2d 416 (1938); Duro Sportswear, Inc. v. Cogen, 131 N.Y.S.2d 20 (Sup. Ct. 1954), *aff'd mem.*, 285 App. Div. 864, 137 N.Y.S.2d 829 (1955). For a more extensive treatment of fraud see generally Levitin, *supra* note 1; Solomon, *supra* note 1; Katsoris, *supra* note 1; and Hawkins, *supra* note 1.

33 174 N.E. at 444.

Judge Cardozo noted that "[t]he assault upon the citadel of privity is proceeding in these days apace."[34] He had precedent from his own decision in *Glanzer* to continue the "assult," yet he chose not to. *Glanzer* was not overruled but merely distinguished. Cardozo stated:

> In *Glanzer v. Shepard,* the seller of beans requested the defendants, public weighers, to make return of the weight and furnish the buyer with a copy. . . . Here was something more than the rendition of a service in the expectation that the one who ordered the certificate would use it thereafter in the operations of his business as occasion might require. Here was a case where the transmission of the certificate to another was not merely one possibility among many, but the "end and aim of the transaction," . . . In a word, the service rendered by the defendant in Glanzer v. Shepard was primarily for the information of a third person, in effect, if not in name, a party to the contract, and only incidentally for that of the formal promisee. In the case at hand, the service was primarily for the benefit of the Stern Company . . . and only incidentally or collaterally for use of those to whom Stern and his associates might exhibit it thereafter.[35]

Judge Cardozo's decision in *Ultramares* has been criticized as being inconsistent with his decision in *MacPherson.*[36] In *MacPherson,* the car manufacturer, who put the car on the market, was successfully sued by the third party who was physically injured as a result of the manufacturer's negligence. In *Ultramares,* the accountant placed in the "market" a negligently prepared audit report. A third party relied upon the report and was denied recovery against the accountant. The harm was foreseeable in both instances,[37] yet the treatment of economic damages vis-à-vis physical damages was different. Policy reasons prompted Judge Cardozo to limit the recovery for economic damages. Judge Cardozo was concerned with the detrimental effects that liability to the full limits of foreseeability would have on the accounting profession,[38] and likewise on the legal profession.[39] The policy reasons enunciated in *Ultramares* have been subject to numerous criticisms.[40] Nevertheless, the proposition set forth in *Ultramares* that the scope of liability for economic loss should be more limited than for tangible, physical damages remained unscathed until the 1960's. Prior to the 1960's, it appeared that the only way a third party could recover for economic damages for negligence in the performance of services was to show that services were rendered "primarily for the benefit of" the third party and that the defendant knew that the particular third party would rely on its services.[41]

34 *Id.* at 445.
35 *Id.* at 445, 446.
36 For an excellent critique of *Ultramares* see: Solomon, *Ultramares Revisited: A Modern Study of Accountants' Liability to the Public,* 18 DE PAUL L. REV. 56 (1968); *see also* Seavey, *Mr. Justice Cardozo and the Law of Torts,* 52 HARV. L. REV. 372, 400 (1939).
37 See note 30 *supra,* for a definition of foreseeability in the context of public accounting.
38 See the text accompanying notes 112 through 115 *infra.*
39 See the text accompanying note 133 *infra.*
40 *Supra* note 1. *See also* Rusch Factors, Inc. v. Levin, 284 F. Supp. 85, 91 (D. R.I. 1968); Ryan v. Kanne, 170 N.W.2d 395, 401 (Iowa 1969).
41 Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922). *See* International Products Co. v. Erie R. Co., 244 N.Y. 331, 155 N.E. 662 (1927); United States v. Rogers & Rogers, 161 F. Supp. 132 (S.D. Cal. 1958); Robitscher v. United Clay Products Company, 143 A.2d 99 (Mun. App. D.C. 1958).

In 1961, in *M. Miller Co. v. Central Contra Costa Sanitary Dist.,*[42] the scope of liability for economic damages resulting from negligence was extended to a plaintiff, who, though not specifically known and identified to the defendant, was allowed recovery because he was a member of a foreseeable limited class. The defendant engineering firm negligently prepared a soil report knowing that the report would be used by prospective bidders in the preparation of their bids and by the successful bidder in his work. As a result of his reliance on the report, the plaintiff suffered a $918,000 loss. The court rejected the defense of lack of privity of contract and held the defendant liable for negligent misrepresentation.

One year later, in *Texas Tunneling Co. v. City of Chattanooga,*[43] the federal district court was presented with facts very similar to those in *M. Miller Co.* The court rejected any notions of privity and talked in terms of the scope of the duty. The limitations placed on the extent of duty by *Ultramares* were condemned as not being congruent with the complex industrial, commercial society that existed in 1962, some thirty years after the *Ultramares* decision.[44] In fashioning a duty, the court stated:

> A more reasonable solution to this problem, and one which constitutes no innovation in the law of negligence, is to hold that a duty is owed to the class of persons which a given act may foreseeably affect, as distinct from a plaintiff who is individually foreseeable. . . .
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> The Court therefore concludes that, as between the Restatement view on the one hand, recognizing responsibility to foreseeable classes of persons, and the *Ultramares* view on the other, requiring foreseeability as to the specific plaintiff, the former is more consonant with the legal and practical considerations obtaining in Tennessee today.[45]

The idea of liability to an unknown plaintiff who is a member of a foreseeable class or limited group was solidified in *Rozny v. Marnul.*[46] *Rozny* is the first state supreme court decision allowing recovery for economic damages caused by negligent misrepresentation to an unknown third party not in privity.[47] The Illinois Supreme Court rejected the concept of privity[48] and in doing so stated:

> This process of adhering to or eliminating the privity requirement has proved to be an unsatisfactory method of establishing the scope of tort liability to third persons. . . . [W]e emphasize that lack of direct contractual relationship between the parties is not a defense in a tort action in this jurisdiction. Thus, tort liability will henceforth be measured by the scope of the duty owed rather than the artificial concepts of privity. . . . Having discarded any remnants of the privity concept, we now concern ourselves

42 198 Cal. App. 2d 305, 18 Cal. Rptr. 13 (1961).

43 204 F. Supp. 821 (E.D. Tenn. 1962), *rev'd,* 329 F.2d 402 (6th Cir. 1964). The Sixth Circuit reversed because it would not "fashion a rule not yet adopted in Tennessee." 329 F.2d at 407.

44 204 F. Supp. at 833.

45 *Id.* at 834. The court was referring to *Restatement, Torts* § 552, for the most recent tentative draft of § 552, see note 50 *infra.*

46 43 Ill. 2d 54, 250 N.E.2d 656 (1969).

47 For an extensive treatment of *Rozny,* see Comment, *Pecuniary Liability to Third Parties for Negligent Misrepresentation,* 64 Nw. U.L. Rev. 903 (1970).

48 *Accord,* Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied,* 368 U.S. 987 (1962).

with the scope of the defendant's liability using traditional tortious misrepresentation standards.[49]

The case involved a surveyor who negligently prepared a plat which eventually resulted in damages to the plaintiff who had become owner of the property. The court aligned its thinking with the tentative Restatement (Second) of Torts § 552 (Tent. Draft, No. 12, 1966),[50] recognizing that the draft extends liability to a "nebulous group whose reliance on the survey was something more than foreseeable but something less than identifiably known."[51]

Having discarded the concept of privity as artificial,[52] the courts have focused on the scope of the duty owed. At this point of the development of the law, it appears that professionals such as attorneys and public accountants owe a duty of due care to those third parties who are known or who, though unknown, are members of a foreseeable limited class or group that will rely on the services performed.[53]

However, the durability of *Utramares* as a limitation on recovery for economic damages is questionable. In a recent line of decisions involving public accountants,[54] there are indications that recovery to the full extent of foreseeability may be allowed. Such an extension of liability would necessarily involve the overrule[55] of *Ultramares* and accordingly would increase the legal responsibility of other professions, in addition to public accounting, in those situations involving recovery for economic damages.[56]

In examining the recent decisions involving the accounting profession, there

49 43 Ill. 2d at 62, 250 N.E.2d at 660.

50 The proposed *Restatement of Torts* § 552 states the law, at p. 14, as follows:

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

For illustrations posed by the draftsmen pertaining to public accountants see note 80 *infra*.

51 43 Ill. 2d at 67, 250 N.E.2d at 663.

52 Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969); Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied,* 368 U.S. 987 (1962); Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958); Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922).

53 Rusch Factors, Inc. v. Levin, 284 F. Supp. 85 (D.R.I. 1968); Ryan v. Kanne, 170 N.W.2d 395 (Iowa 1969); Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969). See note 80 *infra*.

54 Rusch Factors, Inc. v. Levin, 284 F. Supp. 85 (D.R.I. 1968); Ryan v. Kanne, 170 N.W.2d 395 (Iowa 1969); Shatterproof Glass Corporation v. James, 466 S.W.2d 873 (Tex. Civ. App. 1971). These decisions are discussed in the text accompanying notes 70 through 94.

55 See the text beginning at note 111 *infra* for a discussion of the overrule or retention of *Ultramares* and the policy arguments involved.

56 See text accompanying notes 133-37 *infra*.

can be discerned a judicial attitude indicating the eventual expansion of the scope of liability to the point where actions solely for economic damages caused by the negligence of an attorney or accountant will be treated the same as actions for tangible damages caused by negligence. However, no court has yet taken affirmative steps to overrule *Ultramares*. *Ultramares*, though weakened, is still solid law.[57]

III. Development of Public Accountant's Liability to Third Parties for Negligence

The history[58] of suits against public accountants by third parties can be traced back to 1919. The court in *Landell v. Lybrand*,[59] denied the plaintiff investor's action for negligence, holding that the alleged negligence of the defendant accountant was not supported by a duty owed to the plaintiff. Relying upon the accountant's report, the plaintiff purchased stock in a company. Due to the alleged negligence of the accountants, the financial statements were false and the stock was valueless. The court declared that a duty would be owed to the plaintiff only if there was a contractual relationship between the parties or if fraud was proven. In the absence of such allegations, there could be no liability. This was nothing more than the general rule of *Winterbottom*[60] being resounded.

Two years later *Glanzer*[61] was decided. At this point, it appeared by analogy that an accountant who had negligently performed his audit, in circumstances where he could foresee that it would be relied upon by third persons, would be liable notwithstanding the *Landell* decision. However, *Ultramares*[62] soon set the limits. Judge Cardozo did not overrule, but merely distinguished *Glanzer*. However, the distinction made in *Ultramares* was not taken up by the courts,[63] instead they accepted *Ultramares* as holding that accountants owe no duty to persons not in privity.[64] This interpretation has been applied in cases factually similar to *Glanzer*—a negligent misrepresentation relied upon by a known third party for a specific transaction.[65]

In 1968, the Florida Appellate Court, in *Investment Corporation of Florida*

57 Stephens Industries, Inc. v. Haskins and Sells, 438 F.2d 357, 359-60 (10th Cir. 1971).

58 For a historical treatment of the public accountant's liability see: Levitin, *Accountants' Scope of Liability for Defective Financial Reports*, 15 HASTINGS L.J. 436 (1964); Hawkins, *Professional Negligence Liability of Public Accountants*, 12 VAND. L. REV. 797 (1959).

59 264 Pa. 406, 107 A. 783 (1919).

60 See note 11 *supra*, 152 Eng. Rep. 402. It should be noted that by 1919, there had developed certain exceptions to the rule of *Winterbottom*. In the realm of physical damages see Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (1852); MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). In the realm of economic damages, proof of fraud was an exception to the rule of privity of contract.

61 *See* Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922).

62 Ultramares Corporation v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931).

63 Hawkins, *supra* note 58, at 815; Levitin, *supra* note 58, at 447.

64 *See generally* O'Connor v. Ludlam, 92 F.2d 50 (2d Cir. 1937); State Street Trust Co. v. Ernst, 278 N.Y. 104, 15 N.E.2d 416 (1938); Duro Sportswear, Inc. v. Cogen, 131 N.Y.S.2d 20 (Supr. Ct. 1954), *aff'd without opinion*, 285 App. Div. 864, 137 N.Y.S.2d 829 (1955); C.I.T. Financial Corp. v. Glover, 224 F.2d 44 (2d Cir. 1955).

65 Candler v. Crane, Christmas & Co., [1951] 2 K.B. 164; for a criticism of the Candler decision see Seavey, *Candler v. Crane, Christmas & Co. — Negligent Misrepresentation by Accountants*, 67 L.Q. REV. 466 (1951).

v. Buchman,[66] was faced with facts that fit within the *Glanzer* mold.[67] The plaintiff had desired to purchase a large block of stock in the Belcher-Young Company. The purchase was conditioned on a favorable certified financial statement. The defendant accountants were retained by Belcher-Young. The accountants knew that the plaintiffs would rely on the certified financial statements in making their decision to buy the stock or rescind the contract. The plaintiffs purchased the stock and within a year the Belcher-Young corporation failed financially. The plaintiff alleged that the "defendants owed a duty of care to known third parties."[68] The court held that the defendant accountants were not liable to known third parties for negligence in the preparation of a certified financial statement. The Florida Appellate Court recognized that there were policy arguments in favor of both parties, but declined to break from precedent.[69]

Two months later, the Rhode Island Federal District Court, in *Rusch Factors, Inc. v. Levin*, [70] was confronted with a defendant accountant's assertion of lack of privity as a complete defense to a similar negligence charge. The plaintiff, a New York commercial banking and factoring corporation, had loaned money to a Rhode Island corporation on the strength of financial statements certified by the defendant accountant. The Rhode Island corporation subsequently went into receivership and the plaintiff brought an action for damages resulting from the defendant's negligent misrepresentations in the financial statements.[71] In denying the defendant accountant's motion to dismiss, the court stated that ". . . an accountant should be liable in negligence for careless financial misrepresentations relied upon by actually foreseen and limited classes of persons."[72]

The court, in formulating the rationale for its decision, observed:

> The reluctance of the courts to hold the accounting profession to an obligation of care which extends to all reasonably foreseeable reliant parties is predicated upon the social utility rationale first articulated by Judge Cardozo in the *Ultramares* case . . . .
>
> The wisdom of the decision in *Ultramares* has been doubted . . . and this Court shares the doubt. Why should an innocent reliant party be forced to carry the weighty burden of an accountant's professional malpractice? Isn't the risk of loss more easily distributed and fairly spread by imposing it on the accounting profession, which can pass the cost of insuring against the risk onto its customers, who can in turn pass the cost onto the entire consuming public? Finally, wouldn't a rule of foreseeability elevate the cau-

66 208 So. 2d 291 (Fla. Ct. App. 1968).

67 For a discussion of the case see Note, *Accountant's Liability to Third Parties for Negligence*, 23 U. MIAMI L. REV. 256 (1968).

68 *See* 208 So. 2d 291 292.

69 The precedent followed was *Sickler v. Indian River Abstract & Guaranty Co.*, 142 Fla. 528, 195 So. 195 (1940), which held that an abstractor is not liable to persons with whom there is no privity of contract. The court also followed *State Street Trust Co. v. Ernst*, 278 N.Y. 104, 15 N.E.2d 416 (1938), which interpreted *Ultramares* as meaning an accountant could not be liable for ordinary negligence in the absence of a contractual relationship.

70 284 F. Supp. 85 (D.R.I. 1968).

71 The plaintiff also alleged fraud, and the court in a rather summary fashion stated that the plaintiff's complaint was sufficient insofar as it alleged fraud. However, almost the entire opinion was directed toward the allegation of negligence and the question of privity. *See* 284 F. Supp. at 90.

72 *Id.* at 92-93.

> tionary techniques of the accounting profession? For these reasons it appears to this Court that the decision in *Ultramares* constitutes an unwarranted inroad upon the principle that "[t]he risk reasonably to be perceived defines the duty to be obeyed."[73]

The factual context in which the preceding statements were made is significant. The criticism of *Ultramares* and the citation of *Palsgraf* were not made in a case dealing with an engineer,[74] a surveyor,[75] or other professional where the potential for liability is not as great as that of an accountant. Rather, the statements were made in a case involving a public accountant, the profession which was the focal point in *Ultramares*. The court, for the reasons enunciated, challenged the policy considerations which prompted Judge Cardozo's decision. In denying the defendant accountant's motion to dismiss, the court left open "for reconsideration in the light of trial development, the question of whether an accountant's liability for negligent misrepresentation ought to extend to the full limits of foreseeability."[76]

Rusch Factors, Inc. is significant for what it held and what it said.[77] It is the first American or English decision to hold an accountant liable for negligent misrepresentation to a reliant party not in privity.[78] The court criticized the decision in *Investment Corporation of Florida* as "wrong in so far as it failed either to perceive or to give weight to the distinction between *Ultramares* and *Glanzer*."[79] The court in *Rusch Factors, Inc.* not only extends the accountant's liability for negligence as far as *Glanzer*, but goes further and extends such liability to a limited foreseeable class.[80] The language in *Rusch Factors, Inc.* has

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73 *Id.* at 90-91.

74 M. Miller Co. v. Central Contra Costa Sanitary Dist., 198 Cal. App. 2d 305, 18 Cal. Rptr. 13 (1961); Texas Tunneling Company v. City of Chattanooga, Tenn., 204 F. Supp. 821 (E.D. Tenn. 1962), *rev'd*, 329 F.2d 402 (6th Cir. 1964).

75 Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969).

76 284 F. Supp. at 93. The question was never answered because the case was settled by the accountant's insurance company before the trial development began.

77 Because of the few facts provided in the opinion there is room for difference of opinion as to which is the holding and which is the dicta. However, the overriding intent of the court is clear — expanded liability in regard to rights of third parties.

78 284 F. Supp. at 90.

79 *Id.* at 92.

80 The court stated that an accountant should be liable to "actually foreseen and limited classes of persons." See text accompanying note 72 *supra*. The court's terminology will no doubt cause confusion in interpretation and application. The intention of the court may be deciphered by looking at the illustrations included with § 552 of the tentative draft, one of which the *Rusch Factors* court used. 284 F. Supp. at 92. The text of the draft may be found at note 50 *supra*. The illustrations pertaining to public accountants are:

> . . . . 2. A is negotiating with the X Bank for a credit of $50,000. The Bank requires an audit by certified public accountants. A employs B & Company, a firm of accountants, to make the audit, telling them that it is to meet the requirements of the X Bank. B & Company agree to make the audit, with the express understanding that it is for transmission to X Bank only. The X Bank fails, and A without any further communication with B & Company submits their certification to the Y Bank, which in reliance upon it extends a credit of $50,000 to A. The audit is so carelessly made as greatly to overstate the financial resources of A, and in consequence the Y Bank suffers pecuniary loss through its extension of credit. B & Company is not liable to Y Bank.
>
> 3. The same facts as in Illustration 2, except that nothing is said about supplying the information for the guidance of X Bank only, A merely informs B that he

been criticized as unclear.[81] However, the following factors:

1. the Court's rejection of the *Ultramares* rationale,[82]
2. the use of the *Palsgraf* language,[83]
3. the favorable citation of the tentative Restatement § 552,[84] and
4. the reservation to trial of the question of extension of liability to the full limits of foreseeability,[85]

indicate an intention by the court of an extensive scope of liability if not to the full limits of foreseeability.[86]

In 1969, the Iowa Supreme Court, in deciding *Ryan v. Kanne*,[87] followed the rationale of *Rusch Factors, Inc.* In an action brought by the accountant against his client and the successor corporation of the client, the successor corporation counterclaimed for damages caused by the negligent misrepresentations of the accountant in the preparation of the financial statements. The accountants asserted lack of privity and accordingly no liability under the *Ultramares* rule. The court rejected the "strict rule"[88] of *Ultramares* and denied the accountant's assertion. In embracing the analysis of *Rusch Factors, Inc.*, the court observed:

> The court there felt a refusal to allow recovery to those so situated would constitute an unwarranted inroad upon the principle that the risk reasonably to be perceived defines the duty to be obeyed. We agree. When the accountant is aware that the balance sheet to be prepared is to be used by a certain party or parties who will rely thereon in extending credit or in assuming liability for obligations of the party audited, the lack of privity should be no valid defense to a claim for damages due to the accountant's negligence. We know of no good reason why accountants should not accept the legal responsibility to known third parties who reasonably rely upon financial statements prepared and submitted by them.[89]

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expects to negotiate a bank loan, and has the X Bank in mind. B & Company is subject to liability to Y Bank.

4. The same facts as in Illustration 2, except that A informs B that he expects to negotiate a bank loan, but does not mention the name of any bank. B & Company is subject to liability to Y Bank . . . .

7. A, a certified public accountant, is employed by B Company to prepare and certify a balance sheet for the corporation. A is not informed of any intended use of the balance sheet, but A knows that such certificates are customarily used in a wide variety of financial transactions with the corporation, and that it may be relied upon by lenders, investors, shareholders, creditors, purchasers, and the like, in numerous possible kinds of transactions. In fact, B Company uses the certified balance sheet to obtain a loan from X Bank. Because of A's negligence the balance sheet presents an inaccurate picture of the finances of B Company, and through reliance upon it X Bank suffers pecuniary loss. A is not liable to X Bank. RESTATEMENT (SECOND) OF TORTS § 552, illustrations 2, 3, 4, and 7 at 24-25 (Tent. Draft No. 12, 1966).

81 Comment, *Accountant Liable to Third Party for Negligent Misrepresentation,* 53 MINN. L. REV. 1375 (1969).

82 284 F. Supp. at 90-91.

83 *Id.* at 91.

84 *Id.* at 91-92.

85 *Id.* at 93.

86 For discussion of the various interpretations of *Rusch Factors* see Comment, *Accountant Liable to Third Party for Negligent Misrepresentation,* 53 MINN. L. REV. 1375, 1383 (1969).

87 170 N.W.2d 395 (Iowa 1969).

88 *Id.* at 401.

89 *Id.* at 401.

The *Ryan* court found it unnecessary at that time to determine whether the rule of no liability should be relaxed to extend to all foreseeable persons who may rely upon the report. Rather, the rule was relaxed as to those persons actually known to the "author" as prospective users of the report, taking into consideration the end and aim of the transaction.[90] On the facts, the Iowa Supreme Court has gone no farther than *Glanzer*.[91] However, there can be discerned from *Ryan* a judicial attitude[92] of doubt as to the wisdom of the social utility rationale[93] of *Ultramares*. Whether this "doubt" will extend so far so as to overrule *Ultramares* is a question yet to be answered.

It appears at present that the scope of the public accountant's liability for negligent misrepresentations has extended not only as far as the rule of *Glanzer*, but also to foreseen limited classes. The extension is significant when viewed in the light of the strict[94] application of *Ultramares* and the reluctance to follow *Glanzer* prior to *Rusch Factors, Inc.* It is in the dicta of the most recent decisions that the potentiality for a more extensive liability—possibly to the full limits of foreseeability—exists.

IV. Development of Attorney's Liability to Third Parties for Negligence

One of the first attempts, by a third party outside the client-attorney relationship, to recover damages caused by the attorney's negligence was made before the United States Supreme Court in *Savings Bank v. Ward*[95] in 1879. The plaintiff bank loaned money to the attorney's client relying on the attorney's examination and certification of title to real estate, supposedly owned by the client, which was the security for the loan. The attorney in his examination overlooked a deed which showed that the owner-client had conveyed away the lot in fee simple. The Court, in sustaining the attorney's defense that there must be privity of contract between the parties in order to maintain an action for negligence, observed:

> [T]he general rule is that the obligation of the attorney is to his client and not to a third party, and unless there is something in the circumstances of this case to take it out of that general rule, it seems clear that the proposition of the defendant must be sustained. . . .[96]

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90 *Id.* at 403.

91 It has been argued that is was not even necessary to go this far, because the accountant sued the defendant successor corporation for the services rendered. It is claimed this is a recognition by the accountant of privity with the successor corporation.

92 *See also* Shatterproof Glass Corporation v. James, 466 S.W.2d 873 (Tex. Civ. App. 1971), where the court in defining the accountant's scope of responsibility stated:

> We find and hold that within the scope defined in Restatement, Second, Torts, § 552 (Tent. Draft No. 12, 1966), an accountant may be held liable to third parties who rely upon financial statements, audits, etc. prepared by the accountant in cases where the latter fails to exercise ordinary care in the preparation of such statements, audits, etc., and the third party because of such reliance suffers financial loss of damage. *Id.* at 880.

93 Ryan v. Kanne, 170 N.W.2d 395, 401, 403 (1969).

94 Investment Corporation of Florida v. Buchman, 208 So. 2d 291 (Fla. Ct. App. 1968).

95 100 U.S. 195 (1879).

96 *Id.* at 200.

The circumstances mentioned by the Court, i.e., fraud,[97] collusion, or an inherently dangerous act of negligence,[98] were not present, and accordingly the Court affirmed the judgement for the attorney.

Sixteen years later, the Supreme Court of California, in *Buckley v. Gray,*[99] was faced with an action to recover for the attorney's negligence in drafting and executing a will. Because of the attorney's negligence, the plaintiff was deprived of the portion of the estate which the testator had instructed should be given to the plaintiff by the will. The court, citing *Savings Bank* and *Winterbottom,* reaffirmed the rule of privity and denied recovery to the plaintiff.

As a result of the decisions in *Savings Bank* and *Buckley v. Gray,* the general rule of non-liability of the attorney to third parties was firmly entrenched and would not be successfully challenged until 1961, some 66 years later.[100] The precedent necessary to challenge the rule of non-liability to third parties was available long before 1961. Judge Cardozo had lashed out against the privity doctrine in *MacPherson* which involved tangible, physical harm, and in 1922, in *Glanzer* where the damages were solely intangible and economic. But, similar to the courts application of *Ultramares* to public accountants,[101] Cardozo's opinion in *Ultramares* overshadowed *Glanzer* and was treated as denying non-liability to those third parties not in privity of contract with the attorney performing the services.

In 1961, the California Supreme Court, in *Lucas v. Hamm,*[102] was faced with a factual situation similar to that of *Buckley v. Gray*—i.e., the alleged[103] negligence of an attorney in drafting a will resulting in damages to the beneficiaries. The court overruled *Buckley v. Gray,* relying upon a prior 1958 California Supreme Court decision that had rejected the privity doctrine in a case involving a notary public.[104] It was recognized by the court that an extension of the attorney's liability to third parties not in privity was "a matter of policy and involves the balancing of various factors,"[105] one of which is:

> [W]hether the recognition of liability to beneficiaries of wills negligently drawn by attorney would impose an undue burden on the profession. Although in some situations liability could be large and unpredictable in amount, this is also true of an attorney's liability to his client. We are of the view that the extension of his liability to beneficiaries injured by a negligently drawn will does not place an undue burden on the profession, parti-

97 See note 32 *supra.*
98 Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (1852).
99 110 Cal. 339, 42 P. 900 (1895).
100 Averill, *Attorney's Liability to Third Persons for Negligent Malpractice,* 2 LAND & WATER L. REV. 379, 387 (1967). *See* Lucas v. Hamm, note 102 *infra.*
101 Hawkins, *supra* note 58, at 815; Levitin, *supra* note 58, at 447.
102 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied,* 368 U.S. 987 (1962). *Accord,* Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 75 Cal. Rptr. 225 (1969); Licata v. Spector, 26 Conn. Supp. 378, 225 A.2d 28 (1968); *contra,* Maneriv v. Amodeo, 238 N.Y.S.2d 302 (Sup. Ct. 1963).
103 The court held that the error of the lawyer was not negligently committed; therefore, what it said as to the scope of the duty was technically dictum. *See* Averill, *Attorney's Liability to Third Persons for Negligent Malpractice,* 2 LAND & WATER L. REV. 379, 395 n.97 (1967).
104 Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958).
105 Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 687, 15 Cal. Rptr. 821, 823 (1961).

> cularly when we take into consideration that a contrary conclusion would cause the innocent beneficiary to bear the loss. . . .[106]

The court talked in terms of "the foreseeability of harm"[107] to the plaintiff. The *Lucas* court gives indications that it would extend liability beyond *Glanzer* to those situations where the plaintiff is unknown but a member of a class of persons that the attorney knows or should know will be affected—i.e., all beneficiaries under a will, whether named or unnamed, would be able to bring an action for the attorney's negligence. The impact of the *Lucas* decision is not limited to the area of wills; it will carry over to other services performed by attorneys where there exists a potential for damages to third parties outside the attorney-client relationship. Services, such as the drafting of certain types of documents and the issuance of opinion letters, will fall within the general ambit of *Lucas*. That is, if the attorney in performing such services knows or should know that a third party will be adversely effected by the negligent performance of the service, the lack of privity will be no bar to the recovery of economic damages.

The present scope of the attorney's liability for economic damages negligently caused may be said to embrace the rule of *Glanzer*[108] and probably the rule of liability to a member of a known or foreseeable limited class.[109] It is only from the vibrations of the assault upon the rationale in *Ultramares*, which the recent decisions[110] in the accounting profession have created, that carry the potential of liability to the full limits of foreseeability for negligence in the performance of legal services.

V. Retention or Abolition of *Ultramares?*

The extension of the public accountant's and the attorney's liability for negligence to the full limits of foreseeability will necessarily involve the overrule of *Ultramares*. The *Ultramares* decision is a limitation on recovery of economic damages, denying liability to the full limits of foreseeability when the damages are attributable to negligence. Though *Ultramares* dealt with the accounting profession, it is clear that the holding and policy considerations thereof are equally applicable to numerous services performed by attorneys.[111] Suffice to say any determination of the status of *Ultramares* will affect the legal profession.

Most of the arguments, by commentators[112] or in court dicta,[113] for or against the retention of *Ultramares* have been made in the context of inquiry as to

106 364 P.2d at 688, 15 Cal. Rptr. at 824.
107 364 P.2d 687, 15 Cal. Rptr. at 823.
108 Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922).
109 In *M. Miller Co. v. Central Contra Costa Sanitary Dist.*, 198 Cal. App. 2d 305, 18 Cal. Rptr. 13 (1961), the court in formulating a rule of the foreseeable limited class, cited as authority *Biakanja* and *Lucas*.
110 Rusch Factors, Inc. v. Levin, 284 F. Supp. 85 (D. R.I. 1968); Ryan v. Kanne, 170 N.W.2d 395 (Iowa 1969); Shatterproof Glass Corporation v. James, 466 S.W.2d 873 (Tex. Civ. App. 1971).
111 Ultramares Corporation v. Touche, 255 N.Y. 170, 174 N.E. 441, 448 (1931).
112 See note 1 *supra*.
113 *See* Rusch Factors, Inc. v. Levin, 284 F. Supp. 85 (D. R.I. 1968) Ryan v. Kanne, 170 N.W.2d 395 (Iowa 1969). *See also* Texas Tunneling Company v. City of Chattanooga, Tenn., 204 F. Supp. 821 (E.D. Tenn. 1962), *rev'd*, 329 F.2d 402 (6th Cir. 1964), involving the engineering profession.

the ultimate effect on the accounting profession if *Ultramares* was to be overruled. The welfare of the accounting profession has been the main reason for the existence of the *Ultramares* doctrine. The court in *Ultramares* felt that to extend liability to all who may foreseeably rely upon certified financial statements would expose public accountants to potential financial ruin, threatening the existence of the accounting profession. The reason for a risk of such magnitude is that the primary service performed by the accounting profession—the expression of an opinion[114] as to the fairness of presentation of the financial position and results of operations of the client—is a service which is intended to be utilized and relied upon by numerous types of third parties. The scope of usage of certified financial statements is extensive, embracing groups such as banks and lending institutions, present or potential stockholders, purchasers, sellers and suppliers. Because of the broad usage of the public accountant's opinion (certificate), *Ultramares* will be overruled only when the courts are convinced that the arguments and policy considerations weigh against the "protection" of the accounting profession and in favor of the third party, who is unknown and not a member of a known or foreseen limited class but whose reliance on the accountant's certificate is generally foreseeable. The courts will give only secondary considerations to the effect of "full foreseeability" on other professions. As a general rule, other professions do not perform services of a nature that will attract reliance and use by an extensive class or classes of third parties. Extensive third party reliance is inherent in the basic service performed by public accountants. Therefore, the potential for unlimited liability, if such a potential exists, must be said to weigh heaviest over the accounting profession. When the factual circumstances afford a court the opportunity to follow or overrule *Ultramares* there are numerous arguments and policy considerations to be balanced.[115]

Those who advocate the retention of a rule that would deny recovery to the full limits of foreseeability where the accountant has negligently misrepresented the financial affairs of the client would argue that to extend liability for negli-

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114 The short-form report of the auditor (also referred to as the auditor's certificate or opinion) is customarily used in connection with the basic financial statements. It is also often included as part of a long-form report. The usual short-form report consists of a representation as to the work performed, expressed in an opening or "scope" paragraph, and a representation as to the independent auditor's conclusions usually in a closing or "opinion" paragraph.

Because of the weight which the independent auditor's opinion carries with the investing and lending public and the responsibilities he assumes in expressing it, reasonable uniformity in the manner of stating the opinion is important both to the auditor and to those who rely on his findings.

The profession in general has adopted the following short form of independent auditor's report:

> We have examined the balance sheet of X Company as of June 30, 19— and the related statement (s) of income and retained earnings for the year then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.
>
> In our opinion, the accompanying balance sheet and statement (s) of income and retained earnings present fairly the financial position of X Company at June 30, 19—, and the results of its operations for the year ended, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

STATEMENTS ON AUDITING PROCEDURE No. 33 at 57.

115 The arguments have been continuously made from the *Ultramares* decision in 1931 to the present. See note 1 *supra*, for those recent arguments which take into consideration the accounting profession's surgence within the last fifteen years.

gence to the full limits of foreseeability would make negligence coterminous with fraud[116] or collusion, the more flagrant impositions on the rights of others. The potential liability[117] could be indefinite because of the extensive use of the certificate in terms of the number of users and in terms of the dollar value of transactions generated by reliance on the public accountant's certificate. Also, the potential liability could be out of proportion to the fault, as in *Jaillet v. Cashman,*[118] where the defendant, Dow Jones & Co., had accidentally published on its tickers that the Supreme Court had decided that stock dividends were taxable income. The plaintiff, a customer in his broker's office, relying on the ticker report and believing that such a holding would depress the value of his securities, sold his stock. The defendant corrected its mistake within forty-five minutes, but the stock market had reacted unfavorably with numerous sales made in reliance upon the ticker report. The court denied liability for the unintentional mistake in the report. A mistake, as simple as this could and did affect countless investors; the same could happen in the accounting profession.

The accounting profession is relatively young and has not had the time to fully develop exactness in the standards of investigation and in the principles of presentation. Accordingly, the high degree of disclosure demanded by many of the critics is not presently obtainable.[119]

If liability extended to the full limits of foreseeability, the availability of accountant's professional liability insurance would be questionable.[120] Likewise, public accountants should not be insurers against corporate mismanagement or poor investment and credit decisions.

The benefit to society from the numerous audits performed without error outweighs the benefits to society derived from extension of liability for the infrequent audit which may be negligent, an extension which has the potential to financially destroy an accounting firm because of one negligent audit.

Those who argue for extension of liability to the full limits of foreseeability, i.e., the overrule of *Ultramares,* would challenge the premise that the scope of liability for negligence causing only intangible, economic damages (monetary loss) should be more limited than the scope of liability for negligence causing tangible, physical damages (physical injury to person or property).[121] One who

116 Note 32 *supra.*

117 The potential liability can be great as evidenced by the settlement in the *Mill Factors* case for $4,950,000. *See* Wall Street Journal, Sept. 24, 1970 at 8.

118 235 N.Y. 511, 139 N.E. 714 (1923).

119 For an extensive discussion on the inability to provide greater disclosure and an argument that more disclosure is not needed see Comment, *Auditors' Third Party Liability: An Ill-Considered Extension of the Law,* 46 WASH. L. REV. 675 (1971).

120 *See* Weyrich, *Exposure to Professional Liability,* THE NEW YORK C.P.A. 556-64 (July 1970) where the author, in describing the effect of current litigation on accountants' liability insurance, states:

> In some instances, premium costs have tripled over the past several years, while self-insurance, or the deductible portion under the policies, has grown over 50 times. This enormous insurance cost, despite the increasing amount of self-insurance risk being assumed by the accountants, clearly reflects the insurance underwriters' evaluation of the problem. Moreover, it is becoming apparent that insurance underwriters are losing interest in this type of coverage — at any price.

See also note 119; Comment, *Auditors' Third Party Liability: An Ill-Considered Extension of the Law,* 46 WASH. L. REV. 675, 682 (1971).

121 *See* Seavey, *Candler v. Crane, Christmas & Co. — Negligent Misrepresentation by Accountants,* 67 L.Q. REV. 466, 478 (1951); New York Title & Mortgage Co. v. Hutton, 71 F.2d 989, 996 (D.C. Cir. 1934).

invests and loses his life savings as a result of reliance on a negligently certified financial statement is no different than one who is physically incapacitated by another's negligence and subsequently compensated for the "life savings" he will not be able to earn. The rules of negligence should be the same regardless of the type of damages involved.

Between the innocent reliant party and the negligent public accountant, the accountant should bear the burden of his negligence.[122] The reliance placed upon the public accountant's independent[123] and professional opinion, stated in his "certificate of opinion," as to the fairness of presentation of financial statements has elevated the accountant to the respected position he commands today in the financial community. Without third party reliance, the value of the accountant's certificate to his client is slight, if any. To maintain this reliance, the public accountant need only adhere to the standards of the profession, upgrading professional practices when necessary; and on failing, he should not be heard to say that there was "over-reliance" upon his certificate. The job of the public accountant is to ascertain the material facts and present them in a manner that will not be materially misleading; if he has done so without negligence, there will be no liability. Even if the public accountant was negligent, the nature of the accountant's services itself will prevent or limit liability because the plaintiff must prove reliance—i.e., he would not have loaned or invested but for the accountant's certificate.[124] Also, if the accountant was negligent, but there has in fact been over-reliance on the certificate and accompanying financial statements, i.e., unreasonable reliance, the contributory negligence of the plaintiff will be a bar to liability. The person allegedly injured, however, should not be prevented from proving the one thing the public accountant wants—reasonable reliance.

The extension of liability to the full limits of foreseeability will not spell the end of the accounting profession. If the courts adhere to strict rules of proof of causation, foreseeability, and reliance, the profession will not face ruin. Situations such as that in *Jaillet v. Cashman*—fault out of proportion to liability—are doubtful. The sophistication of modern auditing procedures and programs and the pyramid of responsibility and review[125] make it highly unlikely that a "thoughtless slip or blunder,"[126] a minor mistake, or slight negligence, would generate catastrophic consequences. Only when the actions of the accountant are seriously out of line with the accepted professional practices will there be a poten-

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

123 The independence of the public accountant is the basic reason for the success and growth of the accounting profession. Independence is tied to public reliance upon the accountant's certificate. Without independence there would be no reliance and consequently no use for the accountant's service. The public accountant holds himself out to the public as independent and non-biased. His status is not that of an advocate, but, rather, approaches the status of a quasi-public agent. It has been argued that extension of the scope of responsibility would be consistent with the accountant's claim of independence and with his quasi-public status.

124 Solomon, *supra* note 1, at 81.

125 In the bigger accounting firms, on a large audit engagement (size measured on the basis of hours required to complete) the typical pyramid of responsibility and review is composed of the following groups of individuals: juniors, semi-seniors, seniors, supervisor, manager, partner, and a report review consisting of partners and managers.

126 See text accompanying note 33 *supra*.

tiality for large damages.[127] The public accountant does not verify and could not verify the correctness of the financial statements to the penny. Rather, through statistical sampling techniques, he verifies enough of the financial transactions to express an opinion. If the accountant is not negligent in the selection or execution of the chosen sampling techniques, he has a sufficient and mathematically denominated basis to express an opinion on the financial position and results of operations of the company audited. Negligent selection or execution of audit sampling techniques cannot be considered minor mistakes.

The increase of risk of liability, if any, could be insured against. Professional liability insurance will always be available,[128] and additionally, there are various forms of self-insurance which may be initiated. The accounting profession could pass the the cost of such insurance to the client.[129] The client would accept the increase in cost because the certificate would be of more value to the client. The certificate would increase in value because of greater reliance and response placed upon it by the financial community. The result of the extension of the scope of responsibility would be increased confidence in, and importance of, the accountant's certificate to the financial community. Increasing the cost of the service would not reduce the demand for the service. Rather, the increased cost would appear to be in line with the increased value of the service.

Extending liability to the full limits of foreseeability would elevate the cautionary techniques of the accounting profession.[130] That is, increasing the scope of liability would force the constant adherence to acceptable professional standards. Also, an extension of liability would result in upgrading those professional standards that are not in line with the needs of the financial and business community. This does not mean the public accountant is to be a guarantor of financial success. Likewise, the accountant is not a guarantor of total accuracy of the financial statements. Rather, the full foreseeability rule would tend to make the accountant conscious not only of his professional obligation to third parties, but also of his legal obligation. This "consciousness" would be a major factor in the successful performance of professional services and the consequential avoidance of liability.

It is in the recent decisions that the criticism of *Ultramares* has been accepted and the stronghold of *Ultramares* loosened.[131] These decisions, in rejecting or disapproving the *Ultramares* policy considerations, have extended the accountant's scope of liability as far as the known limited or foreseeable class. The decisions give indications that the courts may go further in the not too distant future.

Even if extension of liability to the full limits of foreseeability is not in the contemplation of the courts when they determine that members of foreseen or

127 *See* Meek, *Liability of the Accountant to Parties Other than His Employer for Negligent Misrepresentation,* 1942 Wis. L. Rev. 371, 389.
128 The cogency of this argument presents a close question which ultimately will be decided by the insurance market. However, partners in two of the leading international public accounting firms did not foresee the unavailability of insurance in the future even if the present legal climate was to continue. Letters from international public accounting firms on file with the *Notre Dame Lawyer.*
129 Rusch Factors, Inc. v. Levin, 284 F. Supp. 85, 91 (D. R.I. 1968).
130 *Id.* at 91.
131 Rusch Factors, Inc. v. Levin, 284 F. Supp. 85 (D. R.I. 1968); Ryan v. Kanne, 170 N.W.2d 395 (Iowa 1969).

known limited classes may recover, it has been argued that liability must be extended to the "full limits" and not just to a known limited or foreseeable class. The rationale being, the known or foreseen limited class will likely be made up of powerful and sophisticated institutions such as lenders and businesses. These institutions, through their legal counsel and personnel, will make their reliance foreseen to the public accountant, while the less sophisticated and less powerful individual or institution, not a member of a limited class that has made its reliance foreseeable, will be denied recovery. The sophisticated lender or business creditor, if a member of a foreseen limited class, will be granted yet another preferential status to the exclusion of individuals such as investors.[132]

The certified financial statements are relied upon by various classes of institutions and individuals comprising the financial and business community. Yet, recovery would only be allowed to foreseen limited classes and not to those foreseeable classes that fail to meet the nebulous requirements of the "foreseen limited class." From the viewpoint of the entire financial and business community, this rule, allowing recovery to certain classes to the exclusion of others, would produce unacceptable results.

A criterion which allows a powerful lending institution to recover solely because it is a member of a limited class that was foreseen, is a questionable policy. Rather, it would appear that the only acceptable and equitable solution is to extend liability to the full limits of foreseeability.

VI. Erosion and Overrule of *Ultramares*—Effect on the Legal Profession

The extension of liability to foreseen limited classes or eventually to the full limits of foreseeability for negligence causing economic damages will obviously effect the legal profession as well as other professions. This does not mean, however, that every type of professional service performed by the attorney will fall within the scope of potential liability to third parties. When the attorney can reasonably expect reliance by a third party upon the service performed, or reasonably should know that the consequences of the negligent performance of his services might affect directly and materially the interests of a third party, only then would the service be said to be of such a nature as to fall within the scope of potential liability to third parties.

The examination of legal services that will fall within the scope of potential liability to third parties is a matter best left to "plaintiffs' attorneys." However, there is one area worthy of note—opinion letters.

It is in the issuance of opinion letters that the functions of lawyers and accountants are most analogous. If and when *Ultramares* falls, the resultant consequences to lawyers is no better stated than by Judge Cardozo in *Ultramares* when he observed:

> Liability for negligence if adjudged in this case will extend to many callings other than an auditor's. Lawyers who certify their opinion as to

132 There are other legal means of granting preferential status to the creditors to the exclusion of investors, i.e., bankruptcy laws.

> the validity of municipal or corporate bonds, with knowledge that the opinion will be brought to the notice of the public, will become liable to the investors, if they have overlooked a statute or decision, to the same extent as if the controversy were one between client and adviser.[133]

Similarly, in a factual circumstance like that of *Savings Bank*,[134] where the attorney issued an opinion as to the status of the title to real estate, if it is to be reasonably expected that the client would use the opinion to induce some type of third party reliance or action, i.e., granting a loan secured by the real estate, then the attorney must answer for his negligence.

In recent years, a survey was made of various law firms asking assorted questions on the issuance of opinions and the responsibilities therewith.[135] The author in summarizing the results of the survey stated:

> [T]he frank assertion is that lawyers, as a group, do not as a rule expect to be held strictly accountable for their written advice.[136]

The author concluded with the warning:

> For those who feel that the whole idea of an attorney being held responsible for less-than-adequate advice or complete failure of advice is unworthy of serious concern, the time is fast approaching when these heads had better come out of the sand.[137]

The current value of this survey made four years ago may be questioned. However, the warning issued is presently valid. The potential liability in the area of opinion letters could be extensive. Obviously, it is not a matter to be taken lightly by the legal profession.

VII. Conclusion

The strict interpretation and application of *Ultramares*, i.e., no liability to third parties for negligence, has given way to a rule that will allow members of foreseen limited classes to recover for negligent misrepresentations by the public accountant. The application of a rule of "foreseen limited classes" will lead to judicial confusion and inconsistency in addition to inequitable results. Accordingly, the scope of the accountant's responsibility for negligent misrepresentation should be extended to the full limits of foreseeability, i.e., liability to those individuals or institutions whose reliance was reasonably foreseeable.

An extension of the accountant's liability to "full foreseeability" will, as Judge Cardozo observed, affect "many callings other than an auditor's,"[138] the legal profession being no exception. At the present time the scope of the attor-

133 Ultramares Corporation v. Touche, 255 N.Y. 170, 188, 174 N.E. 441, 448 (1931).
134 Savings Bank v. Ward, 100 U.S. 195 (1879).
135 Corso, *Opinions of Counsel: Responsibilities and Liabilities*, 17 CLEVE.-MAR. L. REV. 375 (1968).
136 *Id.* at 375.
137 *Id.* at 387.
138 Ultramares Corporation v. Touche, 255 N.Y. 170, 188, 174 N.E. 441, 448 (1931).

ney's responsibility to third parties for negligence is limited. However, in light of the expansion of liability in the analogous profession of public accounting and the eventual recognition of parity of intangible, economic damages with tangible, physical damages, the attorney's third party liability should and will be extended to the full limits of foreseeability.

Society accords public accountants and attorneys their status as professionals. To retain this "professional status," the accounting and legal professions must maintain the public's confidence and trust. Indirectly, this will be accomplished by accepting responsibility for conduct that falls below professional standards and injures third persons outside the client-professional relationship. This does not mean that public trust and confidence will be maintained as long as there is a pocket from which to collect. Rather, the recovery of damages is only a secondary objective of increasing the scope of professional responsibility. The prime objective would be to create "active" awareness or consciousness of the professional obligations owed to society and particularly to that segment or community of society that will rely upon the services of the professional.

It must be recognized, however, that there will always be those who fail to conform to professional standards of skill and knowledge. Nevertheless, the time has come for shifting the burden of loss from the innocent reliant third party to the negligent professional. Increasing professional responsibility will not destroy the accounting and legal professions. Rather, increasing professional responsibility will maintain the public confidence and trust and thereby solidify the existence of the accounting and legal professions.

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