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Negligence: *Bradford Securities Processing Service v. Plaza Bank &(and) Trust:* Expansion of Attorneys' Professional Negligence Liability to Third Parties in Oklahoma

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Conclusion

In the near future Oklahoma courts will be faced with the issue of whether a landlord may permissibly bar children, or families with children, from apartment housing. It will be up to the courts to examine recent decisions in other jurisdictions dealing with such issues, and to evaluate Oklahoma's public accommodation statute in light of that important issue.

The courts must first determine that an apartment project is a "place of public accommodation" within the meaning of the statute. In light of the liberal language of the statute and the broad legislative intent, it would be appropriate for the courts to reach such a conclusion. The next step will be to determine if children are a protected class within the statute. Again, the broad legislative intent, along with the absurd results that would follow if the statute were interpreted otherwise, warrant the conclusion that the statute was meant to bar *all* arbitrary discrimination. The courts should also be influenced by the recent California Supreme Court decision that held that a landlord may not bar children from an apartment project under a statute very similar to Oklahoma's.

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Negligence: *Bradford Securities Processing Service v. Plaza Bank & Trust:* Expansion of Attorneys' Professional Negligence Liability to Third Parties in Oklahoma

In the past, for tort liability to arise out of a contract, the courts required privity between the parties.[1] The privity requirement was based on the premise that since the obligation arose solely out of the contractual relationship, any liability for a breach of the obligation should be limited to the contracting parties. This policy encouraged the formation of contracts by providing limits to a party's liability. Thus an attorney was liable for negligence only to his client with whom privity existed.[2] In some jurisdictions the privity requirement has been eroded,[3] but until recently only one court had completely disregarded the privity requirement in legal malpractice actions.[4]

In a recent Oklahoma case, *Bradford Securities Processing Service v. Plaza*

1. Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex 1842).

2. Savings Bank v. Ward, 100 U.S. 195 (1879).

3. 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); O'Toole v. Franklin, 279 Or. 513, 569 P.2d 561 (1977).

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

Bank & Trust,[5] the Oklahoma Supreme Court abandoned the privity requirement in attorney negligence cases. By so doing, the court has extended the potential liability of an attorney in Oklahoma beyond that of an attorney in any other state. This note will take a historical look at the law in Oklahoma, compare the Oklahoma approach to that of other jurisdictions, and predict the likely impact of the decision upon attorneys in Oklahoma.

The Oklahoma Law Before Bradford Securities

Historically, the courts have held that for tort liability to arise out of a contract there must be privity between the parties.[6] In *Savings Bank v. Ward*,[7] the United States Supreme Court held that the obligation of an attorney is to his client and not to a third party.[8]

In *Ward* an attorney was retained by the purported owner of a tract of land to examine and issue a title opinion as to the purported owner's title to the tract. The attorney certified that the purported owner's title was good and unencumbered, when in fact the latter had already conveyed the tract in fee by a duly recorded conveyance. A third party, with whom the attorney had no contract or communication, loaned money to the purported owner based upon the title opinion. The loan was secured by a deed of trust to the property. The purported owner later defaulted on the loan and was insolvent. Had the attorney exercised a reasonable amount of care, he would have discovered the prior conveyance by his employer. The third party sued the attorney, asserting that privity of contract is not necessary to enable recovery for an attorney's negligence.[9] The Supreme Court held that privity was a prerequisite to any recovery, and absent privity an attorney cannot be held liable to a third party for any negligence or want of reasonable care, skill, or diligence.[10]

The Supreme Court admitted certain situations constitute exceptions to the general rule of no liability to a third party. Where fraud and collusion are alleged and proved, a lawyer will be liable to those injured even absent privity.[11] A lawyer will also be liable to a party not in privity where the act is one imminently dangerous to the lives of others, or is an act performed in pursuance of some legal duty.[12] This liability arises not out of contract but out of the duty imposed by law to avoid acts that are imminently dangerous to human life.[13]

In *Ward* the Supreme Court felt compelled to limit liability for negligence in performance of a contractual duty to the parties to the contract:

5. 653 P.2d 188 (Okla. 1982).
6. *See* Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex 1842).
7. 100 U.S. 195 (1879).
8. *Id.* at 200.
9. *Id.* at 196.
10. *Id.* at 200.
11. *Id.* at 203.
12. *Id.* at 206.
13. *See* Loop v. Litchfield, 42 N.Y. 351, 358 (1870).

> Such a restriction on the right to sue for a want of care in the exercise of employments or the transaction of business is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect.[14]

In effect, the Supreme Court advocates contracts as desirable relationships that should not be unduly burdened by imposing liability for injury to third parties on the parties to the contracts. As burdens on these relationships become greater, parties will become more reluctant to enter into future contracts. Indeed, if a duty is imposed on an attorney to persons outside the contract who are not intended to benefit from the contract,[15] the attorney could be liable for every consequence of an action to every person affected, and the cost of practicing law would be prohibitively expensive.[16]

The question of attorney liability to a third party has had little treatment in Oklahoma since three early cases established the rule in this state.[17] The facts in each case were similar, with each involving an attorney representing his client in a legal action and each being sued by a third party for his actions. In the latest of the three cases, *Thomas Fruit Co. v. Levergood*,[18] the court summarized its position in all three cases: "[T]he public interest demands that the general rule be established and remain that attorneys at law, in the exercise of their proper functions as such, are not liable for their acts when performed in good faith for the purpose of protecting the interest of their clients."[19] The underlying reasoning seems to be that if an attorney cannot advise and act solely in his client's best interests without fear of harassment by a third party, parties could not obtain their legal rights.[20] Although the fact situations in the early cases were quite different from that of *Bradford Securities*, the law established then should still apply. Whether an attorney is drafting a legal document or making an appearance in court for his client, he must be able to act solely in his client's best interest. Public policy should not support protection of a third party from monetary loss because of his reliance on an opinion not intended for his use.

A more recent federal court case, *Franke v. Midwestern Oklahoma Development Authority*,[21] held that as a matter of law in Oklahoma an attorney could not be held liable to a third party for negligence while representing his client,

14. Savings Bank v. Ward, 100 U.S. 195, 202 (1879).

15. Reasons for allowing recovery by third party beneficiaries are discussed in the text accompanying notes 76-80, *infra*.

16. Comment, *Attorney Malpractice—A "Greenian" Analysis*, 57 NEB. L. REV. 1003, 1009 (1978) [hereinafter cited as Comment].

17. Thomas Fruit Co. v. Levergood, 135 Okla. 105, 274 P. 471 (1929); Waugh v. Dibbens, 61 Okla. 221, 160 P. 589 (1916); Anderson v. Canaday, 37 Okla. 171, 131 P. 697 (1913).

18. 135 Okla. 105, 274 P. 471 (1929).

19. *Id.*

20. Waugh v. Dibbens, 61 Okla. 221, 224, 160 P. 589, 592 (1916).

21. 428 F. Supp. 719 (W.D. Okla. 1976).

unless the attorney was in privity with that third party.[22] In *Franke* the facts were similar to those in *Bradford Securities*. The defendants were employed by the Midwestern Oklahoma Development Authority to serve as bond counsel and issue an opinion to the effect that the issuer was legally organized in the state of Oklahoma; that the bonds were lawfully authorized and were valid and binding obligations of the issuer; that payment of the bonds was secured by a first lien on, and a pledge and assignment of, specified collateral and revenue; and that interest on the bonds was tax-exempt.[23] The plaintiff invested in the bonds, which proved to be worth less than face value. Plaintiff invested based on information given him, which allegedly omitted certain key information as to the risks and value of the investment. Plaintiff brought suit alleging violations of rule 10b-5 of the Securities Exchange Act, common law fraud, negligence, and violation of the Oklahoma Securities Act. The court granted summary judgment to the defendants, holding that negligence would not lie absent privity of contract and that the requirements for statutory liability were not met.[24]

In *Franke* the court cited *Ultramares Corp. v. Touche*[25] as authority for nonliability to a third party for negligent performance of the contract. In *Ultramares*, the defendants, a firm of public accountants, were employed to prepare and certify a balance sheet exhibiting the condition of a client's business. The defendants were aware that the company borrowed large sums of money to finance its operations and that in the usual course of business the balance sheet when certified would be shown to creditors as the basis of financial dealings. Defendants certified several copies of the balance sheet, one of which was shown to the plaintiff, who lent money to the company in reliance thereupon.[26] The court found that although the audit had been negligently made, the defendant did not owe the third party plaintiff a duty to make the audit without negligence.[27]

In his opinion in *Ultramares*, Justice Cardozo feared that if liability for negligence did exist, a thoughtless slip or blunder might expose a party "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."[28] *Ultramares* does admit that there can be liability to a third party if that party is the intended beneficiary of the contract. Rather than label the case of a third party beneficiary as an exception to the general rule, the opinion characterizes the bond between parties to a contract and a third party beneficiary as so close as to approach that of privity, if it is not privity itself.[29] Because *Franke* was decided in federal

22. *Id.* at 726.
23. *Id.* at 724.
24. *Id.* at 726.
25. 255 N.Y. 170, 174 N.E. 441 (1931).
26. *Id.* at 175, 174 N.E. at 442.
27. *Id.* at 179, 174 N.E. at 444.
28. *Id.*
29. *Id.* at 182-83, 174 N.E. at 446.

court and is not binding as precedent in Oklahoma, it is not an accurate statement of attorney liability to a third party in this state. It is useful, however, to show how attorney liability to third parties might have been handled in this state.

In a more recent case, *Keel v. Titan Construction Corp.*,[30] a homeowner brought suit against a contractor and an architect hired by the contractor, alleging improper design of a solar heat system the contractor had agreed to construct for the homeowner. The Oklahoma Supreme Court held that the homeowner stated a cause of action as a third party beneficiary to the contract between the contractor and the architect.[31] By statute, "a contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."[32] A third party beneficiary of a contract may thus sue for a wrong based upon negligent breach of contract. The court continued, and considered, having established that the duty of the architect to exercise ordinary professional skill and diligence is implied in the contract, whether the duty extended to the homeowner so that the architect would be liable if negligent to the homeowner.[33] The court held that this stated a cause of action based on tort and therefore the question of privity did not apply.[34] The court relied on *Lisle v. Anderson*,[35] in which the court held that whenever circumstances in a situation would cause a reasonably prudent man to reasonably apprehend that, as the natural and probable consequences of his act, another person might be in danger of receiving an injury, there arises a duty to exercise ordinary care to prevent that injury.

Although the court's holding may be acceptable where *physical* injury may result, it seems unacceptable where the only injury is monetary. Under the test applied in *Keel*, if a grocer, for example, might reasonably foresee that by lowering his prices he would drive his competitor to bankruptcy, he would be under a duty to exercise ordinary care to prevent that injury. While public policy would favor protection against physical injury, it certainly cannot support the destruction of the free enterprise system. The court must have confused duty with foreseeability. Once a duty is owed, then the foreseeability of harm should be considered. Public policy, for example, would impose a duty not to physically harm others. Once this duty is imposed, the foreseeability of harm to the plaintiff would be considered in light of the reasonable man standard.

The court in *Keel* held that whether the injury resulting from the defendant's negligence could have reasonably been foreseen was a jury question.[36] As long as the action is brought in tort and not on the contract, privity should not be an issue, although both tort and breach of contract actions could well

30. 639 P.2d 1228 (Okla. 1982).
31. *Id.* at 1231.
32. 15 OKLA. STAT. § 29 (1981).
33. Keel v. Titan Constr. Corp., 639 P.2d 1228, 1232 (Okla. 1982).
34. *Id.*
35. 61 Okla. 68, 159 P. 278 (1916).
36. Keel v. Titan Constr. Corp., 639 P.2d 1228, 1232 (Okla. 1982).

arise out of the same act. In *Keel* the architect's negligent design of the solar heat system was a breach of the contract with the builder. The homeowner, who was intended to be benefited by the performance of the contract, also had an action available based on contract against the architect. Another possible basis for recovery existed in tort. "Accompanying every contract is a common law duty to perform it with care, skill, reasonable experience and faithfulness."[37] If this duty is breached, the question is one of proximate cause. This doctrine is used to limit the tortfeasor's liability for his acts to that which is reasonable and just.[38]

Keel expanded liability to third parties in Oklahoma by ruling that the mere fact that a duty arose solely out of a contract was an insufficient basis on which to limit tort liability to parties to the contract. The case left doubts as to whether the court intended to limit liability for negligence arising from a contract to parties to the contract and others intended to be primarily benefited thereby, or whether the liability would extend beyond third party beneficiaries to anyone to whom harm could have reasonably been foreseen. It does appear that the court was not trying to overexpand tort liability and probably intended that some relationship existed between the parties of a suit, either as mutual parties to a contract or with the plaintiff being a third party beneficiary to the contract.

The Bradford Securities Holding

In *Bradford Securities Processing Service v. Plaza Bank & Trust*,[39] Fred Rausch, the defendant attorney, acted as bond counsel for the issuance of Osage Authority Industrial Revenue Bonds, issued by a public trust created under the laws of Oklahoma. In his opinion defendant made representations as to the payment of consideration, legality of the bond issue, and the tax-exempt status of the bonds.

Plaintiff was in the business of "clearing" securities transactions on behalf of its customers. Pursuant to this business, plaintiff advanced money to Tower Brokerage and National Municipals, customers of the plaintiff. This advance was secured by $2,075,000 worth of Osage Authority Industrial Revenue Bonds received by plaintiff on behalf of its customers. Plaintiff retained possession of the bonds and became a pledgee.

On or after March 27, 1974, both Tower Brokerage and National Municipals defaulted in repayment. Plaintiff subsequently foreclosed and became a forced purchaser of the revenue bonds. The bonds proved to be of little or no value.

Plaintiff brought suit in federal court alleging violation of certain provisions of the Securities Exchange Act by all defendants except defendant Rausch. Plaintiff based its claim against the bond counsel on negligence, under Oklahoma law, for representing in his bond opinion "either expressly or by

37. *Id.* The opinion also cites New Trends, Inc. v. Stafford-Lowdon Co., 537 S.W.2d 778 (Tex. Civ. App. 1976).

38. Keel v. Titan Constr. Corp., 639 P.2d 1228, 1232 (Okla. 1982).

39. 653 P.2d 188 (Okla. 1982).

necessary implication from the language used that the entire consideration for the bond issue had been paid, that the said bonds were legally issued, and that the interest . . . would be excludable from gross income under Section 103 of the Internal Revenue Code."[40]

Plaintiff's complaint against Rausch was dismissed for failure to state a claim on which relief could be granted. This was apparently on the belief that *Keel* limited recovery to those who were either a party to the contract or were intended to be benefited by the contract. An appeal followed, and the Court of Appeals for the Tenth Circuit certified the following question to the Oklahoma Supreme Court:

> Does a pledgee who forecloses on bonds state a cause of action against bond counsel for alleged negligence in preparing his opinion which made representations, inter alia, of payment of consideration, legality of the bond issue, and tax-exempt status of the bonds, where counsel allegedly knew that his legal opinion would appear on the bond certificates and be relied on by the purchasers of the bonds and where the opinion was also relied on by the pledgee?[41]

Bradford Securities provided an opportunity for the court to set guidelines as to the extension of liability in tort arising out of a contract. Instead of clarifying the scope of its expansion of liability as expressed in *Keel*, the court chose to allow the jury to determine attorney negligence by use of the following test: "[I]s the conduct of an ordinarily prudent man based upon the dangers he should reasonably foresee TO THE PLAINTIFF OR ONE IN HIS POSITION in view of all the circumstances of the case such as to bring the plaintiff within the orbit of defendant's liability?"[42] The court also held that it was not the particular injury to the plaintiff that was important, but the likelihood of some such harm, and if the defendant did not exercise the care of an ordinarily prudent person under the circumstances, he should be liable to the plaintiff for injuries suffered as a result of that negligence.[43] Thus, the pledgee had stated a cause of action.

In *Bradford Securities* the court relied heavily upon its findings in *Keel*. It relied upon four principles of law enunciated in that case to reach its decision:

(1) whether the defendant's negligent breach of contract brings the plaintiff within the scope of the defendant's liability is a proximate cause issue;

(2) an injury must have been reasonably foreseeable to a tortfeasor before liability exists;

(3) where under the circumstances an ordinarily prudent man could reasonably foresee that, as the natural and probable consequence of his act, another person is in danger of becoming injured, a duty to exercise ordinary care to prevent such injury arises; and

40. *Id.* at 190.
41. *Id.* at 189.
42. *Id.* at 191.
43. *Id.*

(4) it is a jury question of fact as to whether the injurious consequences resulting from the negligence could have been reasonably foreseen.

Only where one reasonable conclusion can be drawn from the facts does foreseeability become a question of law for the court.[44]

The court distinguished *Keel* from the case at bar only on the basis that in *Keel* only one plaintiff was trying to be brought within the scope of the defendant's liability, whereas in *Bradford Securities* the class of potential plaintiffs was a potentially large class of persons.[45] The court apparently found no distinction on the basis that *Keel* involved a party intended to be benefited by the actions, whereas *Bradford Securities* involved a potential plaintiff not primarily intended to benefit from the contractual relationship. Had the court drawn this distinction, it could have maintained the privity requirement and limited liability to parties to the contract and others intended to be benefited thereby. Instead, the distinction drawn by the court allowed a broadening of the scope of liability in Oklahoma.

At least some consideration was given by the court to Justice Cardozo's concern in *Ultramares*[46] about extending "a liability in an indeterminate amount for an indeterminate time to an indeterminate class."[47] The court refused to apply the law set out in *Ultramares* because it limited liability to those in contractual privity with the defendant and privity is not applicable to tort law in Oklahoma. The Oklahoma Supreme Court found that although the fears expressed by Justice Cardozo might provide a basis for an argument as to whether the harm to the plaintiff was foreseeable to the defendant, the argument could only be considered as it relates to proximate cause.[48] Thus, the fear of extending liability to this extent is not a consideration in determining whether a duty is owed to a party because the court held that once a duty is assumed by contract, that duty is extended to anyone to whom harm might be foreseeable. The jury makes the determination as to whether the harm was foreseeable based upon the circumstances of the case. Thus, it seems that any distinction is gone as to the rights of a third party beneficiary and a third party relying on an opinion, except to the extent that a jury chooses to consider the point in view of the circumstances of the case. Using this standard a jury is free to find that an attorney is liable to a third party who was never intended to benefit from the attorney's work product. In the present case, a jury may decide that in light of all the circumstances, the attorney should reasonably have foreseen the dangers to the pledgee such that the attorney should be liable for the damages resulting to the pledgee as a result of his negligent opinion.

Analysis

The implication of the *Bradford Securities* decision is that an attorney may

44. *Id.* at 190.
45. *Id.*
46. Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931).
47. *Id.* at 179, 174 N.E. at 444.
48. 653 P.2d 188, 191 (Okla. 1982).

now be liable for his negligence in performing a contract to third parties regardless of whether the third parties were intended to benefit from performance of the contract. This extension of liability seems to be a more liberal approach than any similar extension in other jurisdictions. Just as in Oklahoma, other courts have historically maintained that in order for there to be general tort liability there must also be privity.[49] The requirement, established in *Savings Bank v. Ward*,[50] has been consistently followed, and most courts still require privity in legal malpractice actions.[51]

The privity requirement was first abandoned in products liability cases in *MacPherson v. Buick Motor Co.*[52] Permitting recovery by a consumer for an injury caused by a defective product against the manufacturer was based partially on the theory that the person most likely to be injured by the product is the ultimate consumer, not the retailer, and the consumer is the least able to protect against the injury.[53]

Only six years after privity was first abandoned in *MacPherson*, the New York Court of Appeals allowed recovery to a third party outside of the products liability area. In *Glanzer v. Shepard*,[54] the defendant, a public weigher, was hired by a merchant to weigh 905 bags of beans he sold to the plaintiff. The defendant weighed the beans and certified the weight, and the plaintiff relied upon the certification when he purchased the beans. When the actual weight turned out to be less than the amount certified, the purchaser sued the defendant for the amount of overpayment. Justice Cardozo imposed a duty on the defendant that would extend to all who relied upon his certifications, not just those in privity with him.[55]

When viewed with Justice Cardozo's subsequent opinion in *Ultramares Corp. v. Touche*,[56] one might reasonably infer that Justice Cardozo was willing to extend liability to protect only those that must necessarily rely upon the opinion and who are in fact intended to benefit from the opinion that is the product of the contract. This is a more workable approach than that of *Bradford Securities* because it minimizes the outside burdens placed on contracting parties, while still protecting those third parties that should be protected. It is clear that Cardozo used the primary intent of the contracting parties to limit liability to third parties.[57]

One factor possibly used as a basis for limiting the scope of the defendant's liability was consideration of public policy.[58] The court recognized that

49. Note, *Guy v. Liederbach: Expanding the Attorney's Duties Beyond the Limits of the Privity Requirement*, 11 CAP. U.L. REV. 643 (1982).

50. 100 U.S. 195 (1879). See *supra* text accompanying notes 9-15.

51. Comment, *supra* note 16, at 1009.

52. 217 N.Y. 382, 111 N.E. 1050 (1916).

53. *Id.* at 391, 111 N.E. at 1053.

54. 233 N.Y. 236, 135 N.E. 275 (1922).

55. *Id.*

56. 255 N.Y. 170, 174 N.E. 441 (1931). See *supra* text accompanying notes 25-29.

57. *Id.* at 183, 174 N.E. at 446.

58. See discussion in Comment, *supra* note 16, at 1011 n.46.

it should not impose a duty that would place too substantial a burden upon the parties to a contract.

An example of public policy consideration is found in *Biakanja v. Irving*.[59] In that case, a notary public agreed to prepare a valid will for the testator. The will proved to be invalid because the defendant negligently failed to have the will properly attested. This negligence resulted in harm to the plaintiff, the sole beneficiary under the will, who received only a one-eighth interest by intestate succession. The court held that the case-by-case determination of liability to a third party not in privity is a matter of public policy.[60] The determination was based upon a balancing of various factors, including

> the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct and the policy of preventing future harm.[61]

The importance of *Biakanja* is not simply that it extended liability of a negligent party beyond parties in privity to the contract. It clearly defined the factors to be used in determining whether the defendant is liable.[62] *Bradford Securities* does not provide similar guidelines for a jury to consider.

The California Supreme Court reaffirmed its intentions in *Lucas v. Hamm*[63] by holding that an attorney may be held liable to beneficiaries under a will for negligence in drafting the instrument, despite the fact that no privity exists. Because the defendant was an attorney, the court added one factor to those set forth in *Biakanja*.[64] The court considered whether the recognition of liability to beneficiaries under negligently drafted wills would impose an undue burden on the profession.[65]

The balancing test as expressed in both *Biakanja* and *Lucas* allows for a meaningful basis upon which to evaluate all the circumstances in determining liability to third parties. A jury can determine liability based upon consideration of all the factors, whereas the Oklahoma decision considers only one factor: the foreseeability of harm. Consideration of the other factors allows for a more equitable result. It is unclear as to whether *Bradford Securities* will evolve into a balancing test through judicial interpretation of the phrase, "in view of all the circumstances of the case,"[66] although such an interpretation would be a desirable modification. It is not suggested that abandonment

59. 49 Cal. 2d 647, 320 P.2d 16 (1958).

60. *Id.*, 320 P.2d at 19.

61. *Id.*

62. Comment, *supra* note 16, at 1012. *See also* Note, *Torts: Liability for Negligent Performance of a Contract to Persons Not in Privity*, 11 OKLA. L. REV. 473 (1958).

63. 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962).

64. See *supra* text accompanying note 61.

65. Lucas v. Hamm, 56 Cal. 2d 583, 589, 364 P.2d 685, 688, 15 Cal. Rptr. 821, 824 (1961).

66. Bradford Securities Processing Serv. v. Plaza Bank & Trust, 653 P.2d 188, 191 (Okla. 1982).

of the privity requirement is undesirable. The expansion of liability beyond the parameters of *Ultramares*[67] is, however, questioned.

Alternative Approaches

The Oklahoma Supreme Court had four options available for dealing with attorney liability to third parties. It could:

(1) maintain the privity requirement stated in *Franke*;[68]

(2) allow recovery by parties to a contract and third parties that were intended beneficiaries to the contract;[69]

(3) require a balancing of factors test such as the *Biakanja-Lucas* test; or

(4) extend liability by requiring conduct of a reasonably prudent man based upon the dangers he should reasonably foresee to the plaintiff or one in his position in view of all the circumstances of the case.

In the discussion following, each option will be examined in light of various third party situations. Third parties bringing malpractice suits generally fall into three categories: persons who suffer loss because of the lawyer's role as advocate for his client; persons whom the client intends the lawyer's work to benefit; and persons who rely on opinions the lawyer prepares for the client.[70]

Third Party Suits Arising From the Lawyer's Role as an Advocate

Where an attorney is acting as an advocate, he has a duty "to represent his client zealously within the bounds of the law. . . ."[71] "Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."[72] To permit liability to a third party to a contract would frustrate the ethical policy behind the duty of zeal owed to a client.[73] Thus, special considerations must be taken into account where the attorney is in an adversarial situation. If a duty to a third party is imposed upon the attorney, his effectiveness to his client may be compromised.

Where the privity requirement is maintained, no question of liability arises in the adversarial situation. Likewise, if persons intended to benefit under

67. In Ultramares v. Touche, 255 N.Y. 170, 189, 174 N.E. 441, 448 (1931), the court held that the decision does not relieve a defendant if his act

> has been so negligent as to justify a finding that they had no genuine belief in its adequacy, for this again is fraud. It does no more than say that, if less than this is proved, if there has been neither reckless misstatement nor insincere profession of an opinion, but only honest blunder, the ensuing liability for negligence is one that is bounded by the contract, and is to be enforced between the parties by whom the contract has been made.

68. Franke v. Midwestern Oklahoma Dev. Auth., 428 F. Supp. 719 (W.D. Okla. 1976).

69. For a general discussion, *see* 7a C.J.S. *Attorney and Client* § 142 (1980).

70. Comment: *Liability of Lawyers to Third Parties for Professional Negligence in Oregon*, 60 OR. L. REV. 375, 383 (1981) [hereinafter cited as Comment, *Liability*].

71. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1977).

72. *Id.* EC 5-1.

73. *See* Comment, *Liability, supra* note 70, at 383 n.50.

the contract are allowed recovery for negligence, no conflict of interest arises because the aim of the contract involves furthering the interests of the beneficiary.

Applying a balancing of factors test, the extent the contract was intended to benefit the plaintiff and the burden that a contrary result would place on the legal profession should outweigh all other considerations. As a result, no liability should be found in an adversarial situation.

Applying the Oklahoma test, it seems that a reasonably prudent man under the circumstances would recognize his duty to his client to be paramount, but *with foreseeability as the sole test of liability*, a duty would be recognized to third parties even when inconsistent with the duty owed the client.[74] An attorney might have a duty to a doctor, based on foreseeability of the loss of reputation to the physician from filing of a medical malpractice suit based on inadequate investigation by the plaintiff's attorney.[75] This interest is in direct conflict with the attorney's duty to his client and should not be recognized in such a case. It seems that under the Oklahoma test set out in *Bradford Securities*, if the attorney fails to exercise the care that an ordinarily prudent man should have exercised under the circumstances, he will be liable. Whether the court will rationalize this situation and find a reasonably prudent person would balance the alternatives, or whether a reasonably prudent person would ignore the possible harm to the doctor to protect the lawyer-client relationship, is unclear.

Third-Party Intended Beneficiaries

If a beneficiary under a will is disallowed his inheritance because of negligent drafting of the instrument, a clearly inequitable result will occur if no recovery is permitted. Application of the strict privity requirement would not serve the interests of the client, the beneficiary, or the legal profession. The client, who paid the attorney to draft a valid will to effect his wishes, has not received his bargain. He is dead, so he cannot bring an action or correct the situation. The beneficiary, although clearly intended to receive under the will, gets nothing and is denied recovery from the guilty party. There would be little or no sanction against the attorney and thus no incentive to avoid the mistake in the future.[76] Indeed, maintenance of the privity requirement in attorney malpractice cases indicates a bias toward the legal profession that has an adverse impact on public opinion about the profession.[77]

Using any of the remaining approaches: allowing recovery to third party beneficiaries, balancing the factors under the *Biakanja-Lucas* test, or applying the Oklahoma test, a third party intended to be a beneficiary should be allowed to recover for attorney negligence. Because the lawyer's first duty is to use due care in carrying out his client's intentions,[78] failure to carry

74. *Id.* at 396.
75. *Id.* at 392.
76. Comment, *supra* note 16, at 1014.
77. *Id.* See discussion at 1014 n.63.
78. Comment, *Liability, supra* note 70, at 385.

out that duty should result in attorney liability. This is entirely consistent with a lawyer's ethical duties.[79] Further, it seems appropriate to place the cost of the attorney's error on the party best prepared to absorb it—the attorney, who can protect himself by purchasing malpractice insurance.[80] He can then pass this cost along to his clients.

Third Parties Who Rely on Opinions Prepared for the Client

In a case like *Bradford Securities* where a third party relies upon an opinion prepared for a client, it is much more difficult to determine the most equitable allocation of liability. If a strict privity requirement is imposed, the attorney cannot be held liable to a third party. If third party beneficiaries are also allowed to recover, the question of liability will turn upon whether an intent primarily to benefit the third party can be found.[81]

Under the facts of *Bradford Securities*,[82] it is doubtful that a court would find that a pledgee loaning money on the basis of an attorney's opinion was intended to be a primary beneficiary. At best, it might be argued that the opinion was prepared primarily for the benefit of the original purchasers of the bonds who would rely upon the attorney's opinion in deciding to invest in the bonds. Any subsequent purchasers of the bonds were not intended beneficiaries because the attorney's original client, the issuer of the bonds, has no interest in whether bonds are subsequently sold on the open market by the original purchasers. The primary interest of the bond issuer was raising capital. Once this was done by the original issuance, further dealings in the bonds are of secondary interest to him. Limiting liability to third party beneficiaries would preclude recovery in a situation similar to the one in *Bradford Securities*.

Application of the *Biakanja-Lucas* balancing factors test might allow a different result. The court would consider first the extent to which the parties intended that the transaction benefit the plaintiff. Under a *Bradford Securities* situation very little intent to benefit would be inferred, as benefit to the plaintiff was of little concern to the attorney or his client, the public trust. Second, the court would consider the foreseeability of harm to the plaintiff. Third, the court would take into account the degree of certainty that the plaintiff would suffer injury. Next, the closeness of the connection between the defendant's conduct and the injury suffered would be examined. Here, a forced purchaser is a second generation purchaser of the bonds. The court should consider this in light of Justice Cardozo's fear that the assumption of one relation will mean the involuntary assumption of a chain of new relations.[83] Moral

79. See *supra* text accompanying notes 71-72.

80. Comment, *supra* note 16, at 1014.

81. Although most Oklahoma cases require a contract be made expressly for the benefit of the third party, it is clear that incidental benefit to a third party is insufficient. It must appear that the parties intended to recognize the party as the primary beneficiary. Apex Siding & Roofing Co. v. First Fed. Sav. & Loan Ass'n, 301 P.2d 352 (Okla. 1956).

82. See *supra* text accompanying notes 39-43.

83. Ultramares Corp. v. Touche, 255 N.Y. 170, 189, 174 N.E. 441, 448 (1931).

blame attached is probably not a major consideration under these facts, although the policy of preventing future harm could well be important. The final consideration—whether extending liability will be an undue burden on the profession—should not be too important here. The attorney who acts as a reasonable attorney will not be held liable. The negligent attorney will still be able to protect himself by purchasing malpractice insurance, although premiums may be higher.

The net result of this balancing of factors would permit the court to reach an equitable result under the facts of the case by weighing the appropriate factors. The factors provide sufficient guidelines while allowing more freedom than provided under the Oklahoma test. One problem with the balancing of factors test is that there is no way to predict how the various factors will be weighted, so it is difficult to determine potential liability in advance.

Application of the Oklahoma standard at first glance seems to preclude the equitable considerations allowed under the *Biakanja-Lucas* test. If it appears that an ordinarily prudent man would have foreseen the harm to the plaintiff or one in his position, and if the defendant fails to exercise the care an ordinarily prudent man should have exercised, the defendant will be liable to the injured party. Thus, if a reasonably prudent man would have foreseen injury to the forced purchaser if he failed to meet the standard of care of a reasonably competent attorney, then the attorney would be liable if his acts were negligent.[84] Upon closer examination, it seems that the court may permit a balancing of factors in determining whether the harm was foreseeable to the plaintiff. The court indicates that the apprehensions expressed by Justice Cardozo in *Ultramares*[85] may be a telling argument as to whether the harm was indeed foreseeable.[86] Thus, although at least theoretically the holding in *Bradford Securities* seems to expand liability to third parties farther than other states, in practice the standard may work much like the *Biakanja-Lucas* balancing of factors test.

Conclusion

In *Bradford Securities* the Oklahoma Supreme Court has expanded the liability of an attorney in Oklahoma for negligent performance of his contractual obligations. Although it is desirable to extend liability from the former privity limitation, the court's holding may have expanded liability too far, rendering an attorney liable to anyone relying upon his work product under the contract.

The court has imposed a duty on an attorney to anyone to whom harm is reasonably foreseeable. This duty places an undue burden on the contractual relationship between an attorney and his client and could result in serious conflicts between interests of the client and of third parties. Judicial inter-

84. Bradford Securities Processing Serv. v. Plaza Bank & Trust, 653 P.2d 188, 191 (Okla. 1982).
85. See *supra* text accompanying note 28.
86. Bradford Securities Processing Serv. v. Plaza Bank & Trust, 653 P.2d 188, 191 (Okla. 1982).