ORAL ARGUMENT — 10/22/98
97-0970
MCCAMISH V. APPLING

SCHWARTZ: I would like to start today's argument by referring to two cases from out-of-state jurisdictions, because I think that these two cases illustrate the principle at issue here and the principal why the CA must be reversed under Texas law.

The first case is a 7th circuit case, written by Judge Posner applying Illinois law: *Greycas v. Proud(?)*, and it's referred in the CA's decision. The CA applies Illinois law and upholds the judgment against a lawyer on a negligence misrepresentation theory. The reasoning of the opinion is instructive here.

Judge Posner starts with the proposition that Illinois has lowered its privity bar, that Illinois has no privity bar for a claim of legal malpractice, and that Illinois would allow a claim by a non-client to sue in negligence if the primary purpose of the client/relationship was to benefit a third-party. Judge Posner then determine that there's really no difference, absolutely no difference in these circumstances between a malpractice action brought by a client, and a negligent misrepresentation case brought by a non-client. The opinion says something to the effect that a legal malpractice based on a false representation and negligent misrepresentation by a lawyer is a similar legal concept. So Judge Posner in his wonderful sort of conversational style said: Look, these are exactly the same torts, there is no privity bar in malpractice in Illinois, so we will allow a negligent misrepresentation case to proceed in Illinois. And I respectfully submit to the court that Judge Posner's case is completely consistent in its reasoning and in its logic once you accept the proposition of Illinois law.

Now in Texas, we have a strict privity rule.

ENOCH: But does Posner talk about undertaking voluntarily a duty?

SCHWARTZ: Posner refers to the Illinois law that lowers the privity bar if the primary purpose of the attorney/client relationship was to benefit or influence a third-party. This court in *Elliott*, said: the primary purpose of the legal services performed in *Elliott* was to benefit the beneficiaries of that will that went awry. The reason that Illinois accepts or lowers the privity bar is completely rejected in Texas law in the *Elliott* opinion.

ENOCH: But you're talking about within the context in the attorney/client relationship, the client is requested by some third-party to produce information from their lawyer that the client intends to rely on. That's that issue. In this case, they're doing something else: the third-party is willing to accept a settlement only on the condition that the other lawyer represents that the board that has to represent his client, that the board has the authority to settle this case. So the lawyer signs on the settlement saying: I'm representing to you that my client has the authority to do what my client

says it's doing in _____?

SCHWARTZ: The settlement agreement in this case said that: VSA and its lawyers represented the following: a, b, c, and d.

ENOCH: But your argument is, that that's not the request - the third-party didn't request the client produce proof. The third-party said: I'm not going to settle unless you, lawyer, sign on this dotted line.

SCHWARTZ: That is absolutely correct in this case. The adverse party, the Applings', demanded that McCamish make a representation to them. And McCamish unequivocally represented the adverse party and would have no duties under common law to the Applings. Indeed, everyone acknowledges that their duties are undivided loyalty to VSA only, and no duties to the Applings in the litigation context.

HANKINSON: If I understood your comment, are you basically equating the concept of a person voluntarily assuming a duty with the concept of someone intending to confer a benefit, or aren't those very different concepts?

SCHWARTZ: Indeed, I am not. I looked up the word 'volunteer' in the Oxford English dictionary before the argument, and there are two separate dictionary definitions accepted in the OED of 'volunteer'. And I respectfully submit that the respondent is using the inapposite one. The first is "a volunteer acts when he acts free of compulsion." That's one definition. But the other definition is "that a volunteer acts of his own initiative." And we certainly, unequivocally cannot - it cannot be said that the McCamish firm was a volunteer in that accepted sense of the word 'volunteer'. It was asked to give an opinion. And it would not have done so, but for the request to give that opinion.

ABBOTT: From a public policy standpoint is your position one that creates or perhaps perpetuates a perception that people cannot believe or trust lawyers?

SCHWARTZ: Unequivocally, no. Lawyers have been giving opinions to third-parties as long as lawyers have been involved in commercial transactions. The accepted proposition, the subtle law, heretofore, has been that when a lawyer gives such opinion, he must act free of fraud. He must act in a way that he cannot make a representation contrary to known fact. And other parties, adverse parties, third-parties take comfort in that. Indeed they demand it. But this is a radical departure from merely requesting that the lawyer make representations that he knows not to be untrue as opposed to devolve a responsibility on this lawyer to investigate the proof or the accuracy of the representations. So it is a completely different situation, and it's a situation that would place far greater duties on the lawyer if the court were to unequivocally accept 552 of the Restatement in the lawyer context.

HANKINSON: Had there been proof in this case of knowing or reckless disregard of the truth,

could the lawyers have been held liable under a fraud theory?

SCHWARTZ: Absolutely. Unequivocally. That's why we propose that what we were doing here is that it is a false issue to say: shall the lawyers go free if they lie? That is not true. Texas and every other jurisdiction that I have researched in connection with this case recognizes a fraud cause of action.

Returning to the *Greycas* opinion by Judge Posner, Judge Posner had an opinion where the lawyer said: I have researched the lien records of Cook county, and found no lien. Judge Posner says: Well, as far as I'm concerned, that's fraud. And it is fraud, because the lawyer didn't do it. He knew he didn't research the records. He just fraudulently made that representation. And so that the lawyer in that case, as Judge Posner reports, should have been held liable in fraud. But it's a far different question under Texas law if we want to hold that lawyer liable only on negligence.

HANKINSON: Why is it different if the lawyer is aware that the third-party intends to rely upon and act in reliance upon the representation add to their detriment? Why does it matter what the mental state is, whether or not it's knowing or reckless disregard or whether it's negligence?

SCHWARTZ: This court in *Elliott* accepted and said: That that makes a difference, that it is not enough in *Elliott* to allow a third-party to have a cause of action in negligence against a lawyer even though that lawyer knew that his services were required to benefit that third-party.

HANKINSON: Yes, but that's the distinction we were talking about before, the difference between whether or not a lawyer intends to benefit and who is the intended beneficiary verses voluntarily assuming a duty. You indicated before that those are two separate concepts.

SCHWARTZ: They are two separate concepts.

HANKINSON: So why is *Elliott* the case we need to look to if we're dealing with here the question of whether or not if a lawyer voluntarily assumes a duty to a third-party, specifically that the lawyer shouldn't be responsible for the consequences of that?

SCHWARTZ: If the court allows a cause of action in this case, it has reduced *Elliott* to a pleading error case, or has reduced *Elliott* to a case in which there are fortuity of facts. I would like to draw reference to two cases: *Thompson v. Vinson & Elkins*;. Both cases involve a nonclient. Both cases involve a beneficiary. The first case, *Thompson v. Vinson & Elkins* didn't have a negligent misrepresentation case because of the fortuity that Vinson & Elkins was lucky enough never to actually sit in the same room with Thompson. If one accepts this cause of action, then the other case *Moran v. Vinson & Elkins*, the beneficiaries did sit in the room with Vinson & Elkins, and they would have a negligent misrepresentation cause of action.

So I respectfully submit that if the court recognizes this cause of action as asserted by the Applings, they will reduce *Elliott* to a pleading error, and it will turn only on the fortuity about whether the lawyer actually saw the adverse party or sat in the same room with the adverse party. And the law ought to treat classes of people alike and the cases ought not to be determined on a fortuity of whether...

OWEN: We can certainly limit this. When you are in a business transaction, and you are asked to give representation letter or opinion letter, we could certainly limit the scope of any kind of duty?

SCHWARTZ: Absolutely. Now I trade for a bright line rule. I respectfully submit that a bright line rule as adopted in *Elliott* is the correct one. But your honor is absolutely right, there is a distinction between a commercial context in which the lawyer asked to be given the opinion...

OWEN: And the client asked its own lawyer: Help me close this deal. I can't close the deal unless you give an opinion letter.

SCHWARTZ: But I want to refer to the *Crossland* case, which the CA in Texarkana relied on very heavily, which was an exposition of New York law, and in *Crossland* the court said: Now if the parties are adverse, we don't recognize a negligent misrepresentation cause of action. So, yes, I suggest that you are correct, that the court could very well distinguish between those circumstances in which a commercial case where a lawyer is asked to give a representation letter and the lawyer can take into account his or her risks and adjust the fee accordingly in that commercial arms-length sort of transaction.

BAKER: What is this kind of transaction? They were adverse to each other - arms-length weren't they during the settlement negotiations?

SCHWARTZ: By arms-length commercial transaction, I'm distinguishing between a non-litigation adversary context. And I think that is a valid distinction should the court undertake to do it, because it is a misplaced allocation of public policy resources to encourage an adversary, a disgruntled non-client to sue the other side's lawyer.

BAKER: Well isn't the basis of *Elliott* privity of contract?

SCHWARTZ: Yes, it recognizes privity.

BAKER: Without privity of contract, *Elliott* says: No duty owed to a third-party?

SCHWARTZ: Right. And there is no privity of contract here.

BAKER: But didn't Mr. Ralph Lopez sign the settlement agreement?

SCHWARTZ: He signed a document, but they are not suing us for breach of contract. McCamish didn't get one penny in consideration for this. So there is absolutely no contract at issue in this case. And furthermore, what you are actually suggesting is that there's a difference between a writing in an oral statement, that distinction is not recognized...

BAKER: What I was concerned about, you had an earlier argument: Well, there's no duty to check the facts or whatever when you're not in privity with this third-party, because you're dealing with your client. But here it seems to me that the actual facts show that they were asking this lawyer to step outside his attorney/client relationship and say personally: Yes, I'll guarantee. Because that's the demand they made. And so doesn't he have a duty if he's going to guarantee it and it says so in writing, that if he made a mistake, that he should be held accountable?

SCHWARTZ: Respectfully, your honor is suggesting a distinction between whether there's a writing or not. And that is not recognized...

BAKER: Well that could be an oral contract. But privity in *Elliott* is a theory of requirement for liability. So my question is, why isn't there privity under these facts between Mr. Lopez and the firm, and the plaintiff?

SCHWARTZ: It is not suggested that there is an attorney/client relationship between VSA, and I respectfully suggest there is no privity. Indeed it's the contrary. If I'm representing Mr. McCamish, and you were suing Mr. McCamish, and I represent to you that the absolute most that Mr. McCamish will pay to settle this case is $10,000, and you, relying on my representation settle the case for $10,000, you later find out that Mr. McCamish had a reserve for $100,000. I have made a representation to you, you have relied on it, you can say that I was negligent in failing to discover that in fact Mr. McCamish had $100,000 available to settle this case. If I accept your proposition, I'm in privity with you because I have made a representation to you. And the fact is, whether the representation is orally or in writing is certainly not dispositive. The *Sloan* case itself was an oral representation. And I'm aware of no case under 552, that distinguishes between a writing and a non-writing.

HANKINSON: You mentioned a bright line rule. Is the place where you want the bright line drawn to absolutely no negligent misrepresentation cause of action, or is it with respect to the distinction that Justice Owen was talking about drawing a ling in-between those situations in which representation is made in the context of a commercial transaction verses a transaction that occurs in the context of the adversarial process?

SCHWARTZ: I respectfully submit that the better rule is an absolute one.

HANKINSON: In any context?

SCHWARTZ: In any case. But I also submit that the CA must be reversed if one adopts the

second rule, and the second rule is a completely defensible one because the Texas cases recognize the litigation process as being something different than a mere commercial one.

HANKINSON: Mr. Gunn told us the world's going to come to an end if we don't recognize it in the context of the commercial transactions that Justice Owen was referring to?

SCHWARTZ: Well actually in New York, which is probably the leading jurisdiction to adopt this sort of cause of action, very strictly limits it. It limits it in only those circumstances where the parties are close enough that there is a quasi attorney/client relationship. And even New York does not unequivocally adopt 552, neither does Illinois, and while there are some cases that refer to 552, there is no case that accepts 552 in its entirety in a lawyer situation and you must do so in order to affirm the CA in this decision.

HANKINSON: So there are no consequences that flow from or can flow from the giving of an opinion letter in the context of a commercial transaction?

SCHWARTZ: Oh, absolutely wrong. If I make a representation in a commercial case that does injury to the third-party and it is a false statement knowingly made, that is fraud. That's what Judge Posner says in *Greycas*. If I represent: I have searched the lien records of Cook county - well I've never been to Cook county - that's a lie. That's not negligence. That's fraud.

HANKINSON: What about if I just fail to use reasonable care in searching those records, then I'm not responsible?

SCHWARTZ: Yes, that is the point we want to make.

HANKINSON: And so you want lawyers to not be responsible for those representations even when they very sloppily went to review the records before they did the opinion letter?

SCHWARTZ: Well they are certainly responsible to their clients. Unquestionably responsible to their clients for their negligence. But should they be responsible...

HANKINSON: So then the third-party sues the client, and the client can go against the lawyer?

SCHWARTZ: That's correct.

HANKINSON: That's the way the obligations would flow?

SCHWARTZ: Yes.

HANKINSON: So if you and I are in a commercial transaction, and my lawyer gives you an

opinion letter that you rely upon and the deal goes South and you think it was the opinion letter that did it, you're going to sue me and it's up to me then to collect from my lawyer?

SCHWARTZ: Right.

PHILLIPS: How do we justify this rule to the world in light of our *Pico v. Arthur Anderson* case where we put a duty on _____ to - when they are writing a letter that they know is going to very few people?

SCHWARTZ: I am a fiduciary. I owe unequivocal, undivided loyalties to my client. Accountants are independent public accountants. They are not fiduciaries. The rationale of *Elliott* recognizes the fiduciary aspect of attorneys, this special place that an attorney has in terms of his relationship or her relationship with his client. In *Arthur Anderson* an accountant gives a financial statement, which is the essence of the independent public accountant's duty. And it's very easy to square the proposition that I have proposed and the *Arthur Anderson* case. And in fact, federal courts frequently do so, I respectfully submit, in the context of securities litigation.

PHILLIPS: But nothing in the ALI's restatement and their treatment of *Barcelo* has made you think perhaps Texas was wrong to be out of line with _____?

SCHWARTZ: The ALI says *Barcelo* is wrong. That's what the ALI says. I point the court to page 37, of the American Law Institute's restatement of the law of the law governing lawyers. A tentative draft no. 8.

ABBOTT: It says *Barcelo* is wrong?

SCHWARTZ: Yes, it does. I suggest to you, that *Barcelo* is correct. And that being so, we must reverse the CA in this situation if we are to have a coherent and consistent scheme. Otherwise, *Barcelo* stands only for its limited facts, and the lucky instance in which the lawyer is not present in the adverse to the adverse client.

That's why the court should stay with *Barcelo v. Elliott*, the American Law Institute disagrees with *Barcelo*, and it disagrees with the four CA's decision that we have in this state on negligent misrepresentation. But a consistent position is a reversal of the Texarkana CA.

HECHT: So if it were a Victoria Savings' accountant who made the representation in this case, there might be liability?

SCHWARTZ: There might be liability.

HECHT: And if it were the Victoria Savings' president, same answer?

SCHWARTZ: Yes. And if it were Goldman Sax it might be the same answer as well. But Goldman Sacs adjusts its fee accordingly. Lawyers normally work by the hour and not by the risk of the fee.

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RESPONDENTS

GUNN: There is a difference between declaring open season on lawyers and simply refusing to save them from their own-self inflicted wounds. As a lawyer, I am sympathetic to the arguments I've heard, and I don't want to put lawyers in a crossfire, and I don't ask the court to do that. I just ask the court to say that if lawyers put themselves into the crossfire, let's not pretend that their bulletproof.

OWEN: Have you surveyed other jurisdictions to see where they draw these lines? Is there a majority position?

GUNN: I have. I feel confident in claiming the majority on my side, but I've got to tell you, it's a little bit muddy. Fact patterns come up differently each time, and not all 50 states in my judgment have really weighed in on it. The majority would find liability here, although they would do it under a 552 theory.

PHILLIPS: Is that true, that no state has unequivocally adopted 552?

GUNN: No, I think it's just the opposite. I would say most of the jurisdictions that have considered it have adopted 552. There may be sort of a reserve question of whether that covers lawyers. But it seems to me that 552 covers lawyers.

PHILLIPS: I misstated. I mean 552 in the context of lawyers. Mr. Schwartz mentioned New York and Illinois specifically as states that talked about it, and then erected a more restricted rule.

GUNN: I believe that I have got the majority of those. I don't mean it's more than 25 that have done that, because I don't think it's come up in all 50 states. But I think 552 is the way that most of the states would go.

OWEN: Where do they draw the line. They obviously don't say every representation by a lawyer is actionable in a commercial context? Where do they draw the line?

GUNN: The way the line is drawn as I read the cases, it is not necessarily drawn at the duty stage. It is typically handled internally within the screens that are erected in 552. First, the limitation on the class of plaintiffs, because that's the ancient problem that *Cardoza* struggled with was: Is the whole world entitled to rely on this opinion letter if the lawyer drops it on the sidewalk

and we read a lawyer's opinion letter? So 552 ratchets down on the class of plaintiffs. 552 ratches down on the damage measure that is available. It further requires a commercial context, and finally what I think is the most important it requires justifiable reliance. And that is something that the court may want to consider policing as a matter of law like you do extreme and outrageous in the infliction of emotional distress context.

HECHT: That's not a good example, because we are not able to do that yet. But how would we do it here. That's the trouble. You're briefing is a little vague on this. You say, well it's so obvious that a statement: My client will not pay more than $100,000 to settle this - is just lawyer talk - negotiating talk. And there's even a disciplinary rule that indicates that. But very similar examples would not be so close.

GUNN: I quite agree, and in fact, this case more than any I've ever seen lends itself to a 100,000 hypotheticals, and I think that's a legitimate concern. And let me preface my answer to that by saying, I've got more than one theory here, more than one approach to get to affirmance. And I want to ask you explicitly to consider affirming on the alternate ground on the undertaking theory that the CA didn't. I think we'd be most responsible to spend our time talking about the broader policy questions, but I just want it to be clear up front, I can avoid the fist fight over 552 by saying: whatever else you think, we win on the unique quirky narrow facts of this case.

ENOCH: Let me ask you about unique quirky facts. What happens if you take the $100,000 limit, that's a far as my client will go, and we say: Well, you obviously couldn't justifiably rely on that because that's just negotiating going on. But in the circumstances of this case with this opinion written why wouldn't every adverse party walk in saying: Okay, I'll settle, based on what you tell me they have as long as you, the lawyer, sign this settlement. Why wouldn't the lawyer be put in the impossible position of either having to sign it when the lawyer knows there may be a higher limit out there, or refusing to sign it in which event revealing the client's decision that I've got more out there, so that the lawyer now can no longer negotiate freely on behalf of the client because the lawyer could always be put in a conflict with his or her own lawyer by simply following the facts of this case and say: we've got a deal but only lawyer if you sign-off and put your own assets behind the _____?

GUNN: And behind what kind of representation are you envisioning there, the lawyer making, that x dollars is the maximum?

ENOCH: Or that this gentleman will sign this agreement, or that he has the authority from his principal to sign this agreement, or whatever representation the adverse party is relying on for settling the agreement can he put the opposing party's lawyer in a conflict by requiring the lawyer to sign, just like this one, as a part of the settlement?

GUNN: Yes. Absolutely he can ask and the Nancy Reagan rule applies here: If the lawyer doesn't want to do it, he can just say no, and he does not have to do it.

ENOCH: But then doesn't that send the signal to the opposing party that the posture of the lawyer's client is something other than what the client lawyer's been negotiating at this point?

GUNN: I don't think so. I think we can ask for anything from opposing counsel, and say: I want you to sign on that you will guarantee payment, that you will co-sign on the note, or whatever it is, and the lawyer steps out of the lawyering role and volunteers it's an undertaking to do something beyond just representations particularly where it's in writing. I realize analytically the oral verses writing distinction probably doesn't hold up, but there sure is something solemn about putting things in writing. And we see that here. It takes me back to Justice Hecht's question in a sense: How do we deal with some of these harder cases? The mental anguish area is the one we see in sufficiency problems all the time. And the court has imposed some particularized proof requirements.

HECHT: But the trouble here is that adversaries are not expected to be candid. They may be required not to cheat or lie, but they certainly are not expected to be forthcoming, or maybe even completely truthful short of fraud.

GUNN: I would hope that the lawyers have the good sense to say: I don't sign on to those deals, I'm not a participant in this commercial transaction.

HECHT: Well that's a fairly clear case on one side. But the harder case on the other side is overstating your position.

GUNN: Yes, that's right. And 552, it's obvious to me the court understands the undertaking theory, that's in the briefs, the 552 argument is different because that is a socially imposed duty that the lawyer doesn't volunteer for. It comes with 552. It seems to me those are legitimate questions and I don't have perfect answers for them except to say, I think that 8 years ago, that bridge was crossed. And that when *Sloan* adopted 552 by a near unanimous court, that we went with that with all the pluses and minuses that it entails. And every tort has some.

HECHT: But *Greycas* suggests that the bridge was crossed when they wrote *Barcelo*?

GUNN: One of the lovely things about Judge Posner's opinions is that they decide many cases which are not before the court. And I think his commentary is always provocative. I like the result. Ssometimes negligence I think does melt into negligent misrepresentation. Clearly in the pure opinion letter context it would. It need not do that in all cases. And I do not deny the difficulty in policing some of these harder cases under 552, but that I think goes with *Sloan*. And I think we are there. I must say, that the restatement in 552 contemplates application of the lawyers as you see from the example in one of the comments. The new restatement does the same. I would recognize it's not fully adopted, but I think it's going to be. Comment C of Section 73 agrees that a lawyer has no duty of care to the opposing party except, "In unusual situations, such as when a litigant is provided an opinion letter from opposing counsel as part of a settlement." This is not a pure opinion

letter case, but clearly the restatement would go there. That makes sense to me. As a policy matter you may recall the old quote from _____ that a great deal of the practice of a good lawyer is telling clients 'no', and saying that the clients are damn fools and should stop. And that applies to us as well. I think we have to have the good sense to stop and to say: I'm not going to do that.

I would like to take head-on the amicus brief from Fulbright and Jaworsky which you may or may not have gotten a chance to read yet. But the examples in that brief are hypothetical memos from the managing partner down to the younger lawyers in the firm. It seems to me those memos first of all might have been better directed to the hiring committee to say: Let's hire people with some good sense not to sign these deals. But assuming the legitimacy of the problem, which I do, because I see these cases through the prism of a lawyer's eyes, you, your honors, get a chance to write that memo in this case, and you get to say exactly what the boundaries should be and tell the lawyers of this state that they should have the backbone, which I think most of them already have, the sky will not fall if the court goes either way. But you see from the 5th circuit case that just came out with the bad title opinion that there's a bank that already has hard out-of-pocket losses. And when I wrote my brief, we predicted that was going to happen and then it came out of the blue. That is something that is a lot more real to me than the hypothetical parade of horribles, some of which I don't find that horrible.

When you were in private practice, you honors, you probably represented publicly traded companies from time to time, and you would get that annual audit letter from Coopers & _____, or Arther Anderson saying: Dear Counsel, please update us on the status of the litigation, tell us if you're going to win the appeal so we know how much to reserve and we can report it to the SEC so we don't get thrown in jail. We my reaction is, my heart rate always goes up and I get a little bit tentative when I start drafting that thing, and I am very careful to qualify it or to say in most of my letters about appeals: I do not predict the outcome of appeals, and I'm not going to tell you whether we are going to win or not. If the client doesn't like that, they can hire somebody else, but I'm not willing to go on the hook the way some do and say: Sure, we're going to win the appeal. Because make no mistake under their theory, the lawyer can just send a standard letter that says: Oh, yeah, we've got a good appeal, no problem. I think fraud is not enough to police that.

We briefed this fairly comprehensibly and I just say we don't want an activist rule - no expansion - just apply the old traditional undertaking rule that's been the law since the days of *Cardoza*.

HANKINSON: What's wrong with drawing the line between the commercial transaction and the representations that may be made in the context of the adversarial process?

GUNN: I'm not sure the line would hold, because I don't think it's always clear when you have an adversary and when you don't. That sort of has shades of the _____ vs, *Godby* problem of a joint defense agreement: Are co-defendants, are they allies or are they adversaries? I'm afraid it wouldn't hold. I don't think you can have one rule for the lawyers on the transaction floor of the

building, and another rule for those in litigation. We flirted with that in the assignment problem in *Moran* of having a different rule for assignability of legal malpractice for transaction lawyers or probate lawyers as opposed to litigation, and if that didn't hold there, I don't think it will hold here.

PHILLIPS: Was *Barcelo* wrong or is it right, but it just has no application for this situation?

GUNN: We're agnostic on *Barcelo*. We take *Barcelo* as the law and I have no attack on that. One way for us to win would be to overturn *Barcelo* but that's not a hill I want to climb. I don't need to climb *Barcelo's* hill. It seems to me that is different because you have neither an undertaking - well you have no undertaking there in *Barcelo* and no detrimental reliance by the beneficiaries. That to me is the crucial difference. Beneficiaries - they've lost a windfall in a sense, but it's not hard out-of-pocket harm like our people have or like the bank has in the oil and gas case. *Barcelo* need not get in the way of affirming the CA here. Really the question for the court is: which way to go? Do we go 552? Do we go undertaking? You might want to reserve the 552 question for another day.

HECHT: It seems to me that it's hard to carry the undertaking line all the way through, because here in this case there does seem to be some formality about the request for and a formal response, but in a less formal context the party who is aware that that might make a difference would simply request a formality _____?

GUNN: Sure. Then the good thing thing about the undertaking votes is that it leaves the lawyer's fate in his own hand, and he can just say: No, I'm not going to sign this contract with an express negligence clause, or I'm not going to go forward and put this in writing and be stuck with it. I will let you deal with it on your own. I think that's not an unreasonable request, and it has the virtue of keeping lawyers treated the same as everybody else.

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REBUTTAL

ENOCH: How do you respond to Judge Reavley's opinion in that 5th circuit case?

SCHWARTZ: I respond by directing the court's attention to the dissent where Judge Jones says: It is impossible to square the rule of *Barcelo* with recognition of negligent misrepresentation. In this very case, if Victoria Savings had sued the McCamish firm for its opinion, the standard of care would be reasonableness, the standard of care would be negligence. In the proposition alluded to by the petitioner, we are trying the same case only from a non-client. The same standard is negligence. Should we open up lawyer liability in negligence to non-clients?

HANKINSON: But you want to put the client in the line of fire and let the client take the hit?

SCHWARTZ: With respect, I am an agent. I am not an insurer. I am an agent for a disclosed principle. I owe fiduciary duties under the code of professional responsibility to do the very best job I know how for my client. I should not be put in the position of having the other side say: Look, this is a terrific way of getting cheap insurance; Schwartz, makes this representation, or I'm not going to do the deal. My own client says: Please, please make this representation; I'm willing to make it. This very case is a good example of that.

HANKINSON: Mr. Gunn says you can say, no.

SCHWARTZ: This case is a very good example of it. We can say no in the sense that only death and taxes are compelled. Of course, that's right. But in this case there was a question about whether the board of directors agreed to this settlement. There is a document in the record in this case that is the board's approval of this settlement. Mr. Lopez, who made this representation saw it with his own eyes. Now what he didn't know was all of this collateral information that was litigated for 2 years in federal court about whether the board actually had authority to make the agreement. But Mr. Lopez saw the agreement with his own eyes.

HANKINSON: Yeah, but that's a fact question.

SCHWARTZ: Of course. But I'm just saying that look at the position lawyers are put in. As I understand, with respect and to allow the advocacy's rule of hyperbole my opponent's position is affirm the CA's, and I leave you with Pandora's box.

OWEN: Have you looked at the other states where is there a majority view on when lawyers will be liable for written representations to third-parties or when they're not?

SCHWARTZ: There are other states that have actively considered it. I direct your attention most closely to the *Prudential* case in the New York CA's, which is the highest court in the state of New York, and that analysis there is not 552 analysis. The analysis there is whether the relationship between the parties, ie., the lawyer and the person receiving the opinion, is sufficiently close. Now if you adopt the New York analysis, the CA must be reversed here.

OWEN: You directed us to *Prudential*, but I am asking is New York a majority view or not, or is there a majority view?

SCHWARTZ: I think that if one were to carefully canvass the 50 states, the state of the law at this very moment is that my side represents the majority view. The trend of the recent cases has been two-fold: 1) to reject privity in a legal malpractice case, ie, as this court recognized in *Barcelo v. Elliot*, we went against the trend. This court went against the trend. So, the trend is going against us, but we've already crossed the _____in *Elliott*.

OWENS: In terms of states where do they draw the lines on these types of situations

where there is a request that an attorney puts a representation in writing? Do they draw any lines?

SCHWARTZ: I would suggest that New York at least would say that I win because this is an adversary context. There is no case that I know of from another jurisdiction precisely on all fours. But Mr. Gunn is quite candid, and what I try to be emphatic about in this very argument is that there are a thousand million unanswered questions that will have to be litigated.

OWEN: What about the commercial context? What's the majority view on a commercial non-adversarial context where an attorney is requested by his client and the other side to put them in an opinion letter?

SCHWARTZ: If it were a strict enumeration of the exiting law, I think the Texas rule represents the majority. That is, requires privity. The four cases that we have: *Bell v. Manning*, *Blankenship*, *Vinson & Elkins v. Moran*, *Vinson & Elkins*...

OWEN: I'm talking about outside of Texas.

SCHWARTZ: Yes, but I think that that view represents the majority. But most of those cases are - this issue hasn't come up in every state simultaneously. But the common law rule is our rule.