

IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,034

FIRST FLORIDA BANK, N.A.,
f/k/a FIRST NATIONAL BANK
OF FLORIDA,

Petitioner,

vs.

MAX MITCHELL & CO., P.A., and :
MAX W. MITCHELL, :

Respondents. :

_____ :

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**AMICUS CURIAE BRIEF
IN SUPPORT OF PETITIONER'S POSITION**

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INTRODUCTION

This appeal arises from a summary judgment entered by the trial court and affirmed by the Second District Court of Appeal¹ in favor of the respondent accounting firm on the petitioner's claims against it for negligence and gross negligence in the preparation and dissemination of a financial statement.

This amicus curiae brief in support of the petitioner's position is submitted on behalf of a group of approximately 70 individuals who invested in a securities offering in reliance on an accountant's erroneous financial reports and who are the appellants in an appeal presently pending in the Fourth District Court of Appeal and styled Vaughn Durham, et al. v. Pannell, Kerr, Forster, case number 88-03012. They will be referred to here as "the amici."

The petitioner before this Court in the present action, First Florida Bank, N.A., will be referred to as "First Florida" or "the petitioner," and the respondent, Max Mitchell & Company, P.A., will be referred to as "the accountant."

Finally, any emphasis contained in this brief is the writer's in the absence of a contrary indication.

¹ See First Florida Bank, N.A. v. Max Mitchell & Co. 14 FLW 879 (Fla. 2d DCA April 14, 1989).

STATEMENT OF FACTS

The amici are aware that they have no standing to interject issues into this proceeding that were not raised by the parties to it. Acton v. Ft. Lauderdale Hospital, 418 So.2d 1099 (Fla. 1st DCA 1982), aff'd, 440 So.2d 1282 (Fla.1983). Consequently, they provide the following brief factual recitation solely as an explanation of the nature and source of their interest in the present appeal.

The amici are approximately 70 individuals who purchased one or more hotel interests in the Palm Court Hotel, a 66-room structure located in Palm Beach, Florida. They purchased these interests from Palm Court, Inc., a Florida corporation, pursuant to a securities offering marketed by a "Confidential Private Placement Memorandum" dated June 30, 1985, as amended by an Addendum dated October 15, 1985.

One portion of the extensive litigation that has arisen from the Palm Court offering was a counterclaim by the amici against Pannell, Kerr, Forster ("PKF"), a national accounting and consulting firm retained by Palm Court, Inc. to prepare a "Market Demand Report" and a "Financial Forecast and Financial Projection" for inclusion in the private placement memorandum used to market the Palm Court securities.

The amici's counterclaim, which sounded in negligence, gross negligence and breach of fiduciary duty, alleged that PKF knew both that its "Market Demand Report" and the "Financial Forecast and Financial Projection" were intended for dissemination to prospective investors for the express purpose

of inducing them to purchase hotel interests pursuant to the securities offering, and that those reports were unreliable and materially misleading. Nonetheless, the amici alleged, PKF took no steps to correct the inaccurate information it had provided. Finally, the amici alleged that the private placement memorandum, including the PKF reports, was submitted to them for their consideration, and that they relied on the data it contained in deciding to participate in the Palm Court offering.

PKF moved to dismiss the amici's counterclaim on the basis that no privity existed between them, and the trial court reluctantly dismissed the amici's counterclaim with prejudice. Although the trial court reasoned that the result advocated by the amici would be a logical extension of this Court's recent precedent involving other professionals, it concluded that it was bound to follow Gordon v. Etue Wardlaw & Co., P.A., 511 So.2d 384, 389 (Fla. 1st DCA 1987), which held that Florida law denies relief for a breach of due care by an accountant to a third party who is not in privity with him, even where the third party's reliance is known or anticipated.²

The amici timely noticed an appeal from the dismissal of their counterclaim against PKF to the Fourth District Court of Appeal. As of this writing, all briefs have been submitted in that proceeding, but the matter has not yet been scheduled for oral argument. The amici petitioned this Court for permission to submit the instant brief because this Court's response to the

² Gordon is the same case that controlled the trial court's decision here. See First Florida Bank, *supra*, 14 FLW at 879.

question certified by the Second District Court of Appeal here likely will control the outcome of their pending action in the Fourth District.

SUMMARY OF THE ARGUMENT

Recent decisions by this Court have clearly portended that Florida will align itself with the overwhelming majority of other jurisdictions which hold that the archaic and judicially-created "strict privity" barrier should no longer be used "to exempt independent public accountants from liability." Every jurisdiction that has addressed this issue in recent times has concluded that a lack of "strict privity" should not insulate professionals, including accountants, from liability to third parties whom the professionals know or reasonably should know will rely on their work product. In fact, some jurisdictions go even further and apply an unrestricted "foreseeability" rule.

This Court, following the trend it established with its recent decisions involving architects, abstractors and attorneys, should align itself with the modern authorities as to accountants as well, by concluding that the petitioner may maintain an action for negligence against the respondent notwithstanding the lack of "strict privity" between them.

ARGUMENT

THE QUESTION CERTIFIED BY THE SECOND DISTRICT COURT OF APPEAL SHOULD BE ANSWERED IN THE AFFIRMATIVE TO PERMIT A THIRD PARTY TO RECOVER AGAINST AN ACCOUNTANT WHO NEGLIGENTLY PREPARES FINANCIAL STATEMENTS HE KNOWS THE THIRD PARTY WILL RELY ON, DESPITE: A LACK OF PRIVITY BETWEEN THEM

Although the scope of an accountant's liability to third parties has been the subject of much discussion in the legal literature nationwide over the past fifty years, the issue presented by this appeal is one of first impression for this Court. The amici respectfully submit that the question that was certified by the Second District Court of Appeal as the jurisdictional basis for the instant proceeding³ should be answered in the affirmative and that, consistent with both the trend nationwide and the line of cases from this Court concerning other professional groups, an accountant should no

³ The Second District formulated the issue as follows.

WHERE AN ACCOUNTANT FAILS TO EXERCISE REASONABLE AND ORDINARY CARE IN PREPARING THE FINANCIAL STATEMENTS OF HIS CLIENT AND WHERE THAT ACCOUNTANT PERSONALLY DELIVERS AND PRESENTS THE STATEMENTS TO A THIRD PARTY TO INDUCE THAT THIRD PARTY TO LOAN TO OR INVEST IN THE CLIENT, KNOWING THAT THE STATEMENTS WILL BE RELIED UPON BY THE THIRD PARTY IN LOANING TO OR INVESTING IN THE CLIENT, IS THE ACCOUNTANT LIABLE TO THE THIRD PARTY IN NEGLIGENCE FOR THE DAMAGES THE THIRD PARTY SUFFERS AS A RESULT OF THE ACCOUNTANT'S FAILURE TO USE REASONABLE AND ORDINARY CARE IN PREPARING THE FINANCIAL STATEMENTS, DESPITE A LACK OF PRIVITY BETWEEN THE ACCOUNTANT AND THE THIRD PARTY?

14 FLW at 879.

longer be insulated from liability to third parties whom he knows will rely on his negligently-prepared financial information by the outmoded privity barrier.

No reported Florida decision directly confronted the issue of an accountant's liability to third parties until 1969, when the Second District Court of Appeal issued its opinion in Investment Corp. of Florida v. Buchman, 208 So.2d 291 (Fla. 2d DCA 1968). In Buchman, the defendants/certified public accountants had prepared a financial statement depicting the condition of a corporation in which the plaintiff desired to purchase an interest. The certified financial statement prepared by the accountants was forwarded to the plaintiff who, in reliance on the statement, elected to go through with the purchase. The company failed shortly thereafter and the shareholders, including the plaintiff, received nothing for their stock. The plaintiff sued the accountants for negligence for preparing a financial statement that grossly misstated the company's financial condition and on which the plaintiff had relied to its detriment.

At trial, the plaintiff was allowed to reach the jury only on theories of fraud and a third-party beneficiary contract. The court instructed the jurors that they could infer fraud if they found the defendants were grossly negligent in preparing the certified statement, but the jury returned a verdict for the defendants on both counts. On appeal, the plaintiff argued that the trial court had erred in dismissing its count for simple negligence. Since no Florida precedent

existed at that time, the Buchman court looked for authority to the leading New York cases of the day, including Justice Cardozo's landmark opinions in Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931), and Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922).⁴

In Glanzer, Justice Cardozo held public weighers liable to a buyer of beans for breaching their duty to weigh the beans carefully, notwithstanding the absence of strict privity. He wrote:

The plaintiffs' use of the certificates was not an indirect or collateral consequence of the action of the weighers. It was a consequence which, to the weighers' knowledge, was the end and aim of the transaction . . . [A]ssumption of the task of weighing was the assumption of a duty to weigh carefully for the benefit of all whose conduct was to be governed. We do not need to state the duty in terms of a contract, it has none the less an origin not exclusively contractual. Given the contract and the relation, the duty is imposed by law.

135 N.E. at 233.

In Ultramares, on the other hand, Justice Cardozo refused to impose liability on accountants where the plaintiff alleged that it had loaned money in reliance on an inaccurate balance sheet certified by the accountants. Emphasizing that the accountants had no knowledge that the balance sheet would be

⁴ Many courts likewise have concluded that "any analysis of the law regarding an accountant's liability to third parties must begin with an examination of Justice Cardozo's opinions in Glanzer and Ultramares." See, e.g., Seedkem, Inc. v. Safranek, 446 F.Supp. 340 (D. Neb. 1979); Coleco Industries, Inc. v. Berman, 423 F.Supp. 275 (E.D. Pa.1976) (noting that modern courts often begin their analysis of the privity requirement by examining Glanzer and Ultramares).

shown to the plaintiff, Justice Cardozo expressed concern over exposing accountants to liability to an "indeterminate class," and distinguished Glanzer by noting:

[T]he transmission [in Glanzer] of the certificate to another was not merely one possibility among many, but the "end and aim of the transaction," as certain and immediate and deliberately willed as if a husband were to order a gown to be delivered to his wife . . . The bond was so close as to approach that of privity, if not completely one with it. Not so in the case at hand. No one would be likely to urge that there was a contractual relation, or even one approaching it, at the root of any duty that was owing from the defendants now before us to the indeterminate class of persons who, presently or in the future, might deal with the Stern Company in reliance on the audit. 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 promise.

225 N.Y. at 182-83. The critical distinction highlighted by Justice Cardozo is particularly pertinent to the issue here, where the accountant's preparation of the audited financial statements from which the petitioner made its loan was "the end aim" of his transaction with the lendee, C.M. Systems.

Although the Buchman court recognized that Ultramares was distinguishable from the situation it was given to consider because the accountants there "had no knowledge that the statements would be shown to the plaintiff," it also looked for authority to the later opinion of State Street Trust Co. v. Ernst, 270 N.Y. 104, 15 N.E.2d 416 (1938), where a New York court denied a negligence claim against an accountant notwithstanding the accountant's knowledge that a certain third party

intended to rely on his certified statements. Based on State Street Trust, Buchman concluded that New York law imposed a "strict privity" requirement for recovery against accountants.

In addition to its review of Glanzer, Ultramares and State Street, the Buchman court placed heavy reliance on this Court's decision in Sickler v. Indian River, 142 Fla. 548, 195 So. 195 (1940). In Sickler, which concerned a title abstractor's liability to third parties with whom he was not in privity, this Court held that

{t}he negligence or unskillfulness of an abstractor does not render him liable to the alienee, devisee, or other successor in interest employing him, or other persons with whom there is no privity of contract.

195 So. at 198. Based on both this Court's language in Sickler and its own interpretation of the existing New York precedent, Buchman affirmed the lower court's dismissal of the plaintiff's negligence claim. Although the court acknowledged that its holding was contrary to Section 552 of the Restatement (Second) of Torts and that competing public policy considerations favored the positions advanced by both sides, it felt "obligated" to follow the precedent this Court set in Sickler.

Since Buchman, many courts and commentators have severely criticized the application of Ultramares to cases like the one at bar, where accountants know that a third party will rely on their work product. These critics have emphasized that such instances bear a far closer likeness to the situation in Glanzer, notwithstanding their "superficial resemblance" to Ultramares. See, e.g., Coleco Industries, Inc. v. Berman, 423

F.Supp. 275 (E.D. Pa. 1976). One court has gone so far as to call Buchman "wrong" to the extent that it failed to perceive the distinction between Ultramares and Glanzer as articulated by their common author, Justice Cardozo. Rusch Factors, Inc. v. Levin, 284 F.Supp. 85 (D.R.I. 1969).

Moreover, many cases relied on by the Buchman court (i.e., Ultramares, State Street and Sickler), later were substantially modified in a manner which would allow the present petitioner to recover on its claims against the accountant. For example, the privity requirement imposed in Ultramares was re-examined by New York's highest court in Credit Alliance Corp. v. Arthur Andersen & Co., 65 N.Y.2d 536, 483 N.E.2d 110 (1985), where the court emphasized in reconciling Ultramares and Glanzer that the accountants' report in the former was intended primarily as a convenience for the client to use in developing its business; the report was "[o]nly incidentally or collaterally" expected to assist those to whom the client "might exhibit it thereafter." In contrast, the court noted, liability was imposed in Glanzer despite the absence of privity because the buyer's use of the public weigher's certificate was "not an indirect or collateral consequence of the action of the weighers" but rather was a consequence which was "the end aim of the transaction." Credit Alliance, supra, 43 N.E.2d at 116.5

The Credit Alliance court concluded:

5 This critical distinction was simply missed by the Buchman court. "[I]n the estimation of this court, the case is wrong insofar as it failed to either perceive or to give weight to the distinction between Ultramares and Glanzer." Rusch Factors? Inc., supra, at 85.

Upon examination of Ultramares and Glanzer and a recent affirmation of their holdings in White,⁶ certain criteria may be gleaned. Before accountants may be held liable and negligent to non-contractual parties who relied to their detriment on any accurate financial reports, certain prerequisites must be satisfied: (1) The accountants must have been aware that the financial reports were to be used for particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely; and (3) there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance.

483 N.E.2d at 118. Under this analysis, which clarifies the two New York decisions relied on in Buchman, the present petitioner has a valid cause of action against the accountant.

Additionally, and more important, this Court significantly modified its decision in Sickler in First American Title Ins. Co. v. First Title Service Co. of the Florida Keys, 457 So.2d 467 (Fla.1984). There, the defendant prepared abstracts for the seller of two lots. The plaintiff, relying on

⁶ In White v. Guarantee, 43 N.Y.2d 356, 401 N.W.2d 474 (1982), the defendants / accountants had contracted with a limited partnership to perform an audit and to prepare the partnership's tax returns. The contract made it clear that the accountants' services were obtained for the benefit of the members of the partnership who, like the plaintiff (a limited partner), were necessarily depending on the audit to prepare their own tax returns. In that case, after outlining the principles articulated in Ultramares and Glanzer, the court observed:

This plaintiff seeks redress, not as a mere member of the public, but as one of a settled and particularized class among the members of which the report would be circulated for the specific purpose of fulfilling the limited partnership agreed-upon arrangement.

43 N.Y.2d at 363. The relationship between the accountants and the plaintiffs in White thus was one "approach[ing] that of privity, if not completely one with it." Credit Alliance, supra, at 110.

those abstracts, had issued owner's and mortgagee's title insurance policies to the buyers of the two lots and their lender. The complaint alleged that the defendant abstractor failed to note the existence of a recorded judgment against the former owner of the lot; that the holder of the judgment made a demand on the new owners for payment of the judgment; and that the plaintiff, pursuant to the policies of title insurance, had been obliged to satisfy the judgment and obtain releases. Although the complaint did not allege privity between the plaintiff and the abstractor, it did state that the defendant prepared the abstracts for the sellers knowing that a person other than the person ordering the abstracts (i.e., the plaintiff) would rely on them as accurate and complete summations of all recorded instruments affecting title to the lots in question. Nonetheless, the trial court granted the defendant's motion to dismiss for failure to state a cause of action, and the District Court of Appeal affirmed on the basis of Sickler.

On review, this Court declined the plaintiff's invitation to approve a "completely open-ended kind of abstractor's liability based on a duty of care to any and all persons who might foreseeably use and rely on the abstract," even though it earlier had used such a "foreseeability" analysis to hold an architect liable for negligence which damaged a contractor with whom the architect was not in privity in A.R. Mover, Inc. v. Graham, 285 So.2d 397 (Fla. 1973). Distinguishing Mover, this Court stated:

Where a contractor is totally dependent on the plans and specifications prepared and supplied by an architect or engineer with supervisory authority over a project, the contractor is unable to take steps independently to protect itself against the consequences of the negligence of the architect or engineer. Although Mover applied products-liability tort principles to negligent provision of professional services, we find a vast difference between that situation and this one. Here there is far less compelling reason to make such an application.

457 So.2d at 471-72. However, despite its refusal to extend an abstractor's liability to all who might "foreseeably use and rely on the abstract," this Court analyzed opinions involving accountants, including Ultramares, and concluded:

When an abstract is prepared in the knowledge and under conditions in which an abstractor should reasonably expect that the employer is to provide it to third persons for purposes of inducing those third persons to rely on the abstract evidencing title, the abstractor's contractual duty to perform the service skillfully and diligently runs to the benefit of ~~such~~ such known third parties.

When an abstractor knows that his employer or customer is ordering the abstract for the use of a purchaser of the property, reliance on the abstract by the purchaser is "the end and aim of the transaction." We, therefore, hold that such a known third-party user is owed the same duty and is entitled to the same remedies as the one who order the abstract.

457 So.2d at 473.

It follows from the rationale of First American Title that, when an accountant knows both that his client is ordering financial projections for the use of a defined or limited group of persons, and that reliance on the financial projections by

those persons is "the end aim of the transaction " those known third-party users of the accountant's financial information are owed the same duty and are entitled to the same remedy as the one who ordered the information.

In many situations like the one at bar, an accountant in preparing financial material takes on a role remarkably similar to that of a "manufacturer releasing products into the commercial marketplace which the ultimate users and consumers thereof are in no position to test, examine or evaluate for design, safety or fitness." First American Title, supra, at 471. Like the contractor in Mover, the third-party recipients of such data often are "unable to take steps independently to protect [themselves] against the consequences of the negligence of the [accountant]." First American, supra, at 471-72. A strong argument thus exists for extending an accountant's liability to any and all persons who might "foreseeably use and rely" on its materials, and many courts actually have adopted that standard. However, this court need not endorse nearly so sweeping a proposal to answer the Second District's certified question in the affirmative.

Here, the opinion of the Second District reflects that the accountant knew that its work product was being obtained for the purpose of obtaining a loan from the petitioner, and it knew that a particular third party (i.e., the petitioner) would rely on the financial materials it prepared in deciding whether to make that loan. Accordingly, this court need only go so far as to extend the rationale of First American Title into the area of

accountants' liability to conclude that the summary judgment for the accountant was error. In fact, the propriety of applying First American's logic to cases involving accountants has been assumed by at least one later court. Seaboard Surety Co. v. Garrison, Webb & Stanaland, 823 F.2d 434 (11th Cir. 1987).

Additional support for the petitioner's position is provided by this Court's recent decision in Angel, Cohen and Rogovin v. Oberon Investment, N.V., 512 So.2d 192, 194 (Fla. 1987), where this Court explicitly recognized that the "rule of privity [in negligence suits against attorneys] has been relaxed . . . where it was the apparent intent of the client to benefit a third party." This Court noted that the most obvious example where this situation exists is in instances of will drafting. Although this Court concluded that the particular facts in Angel prevented the plaintiff from stating a cause of action for negligence against the attorney, it observed:

[R]espondent was not the client of the petitioner and thus lacked the requisite privity customarily required for an action sounding in negligence against an attorney. Nor does the respondent, as an incidental third party beneficiary, fit within Florida's narrowly-defined third party beneficiary exception.

512 So.2d at 194; see also, Moss v. Zafiris, Inc., 524 So.2d 1010 (Fla. 1988)(except in circumstances of intended third-party beneficiaries described in Angel, privity bars negligence claim against attorney): Arnold v. Carmichael, 524 So.2d 464 (Fla. 1st DCA 1988)(same).

At bar, it is clear that the petitioner was an "intended" and not an "incidental" third-party beneficiary of the contract between the accountant and the lende. The "end aim" of that agreement was to obtain a loan for the lende from the petitioner. 14 FLW at 879. Under this Court's rationale in Angel, then, the petitioner's claim for negligence against the accountant stated a cause of action.

The trial court here felt constrained to enter summary judgment for the accountant on the authority of Gordon v. Etue Wardlaw & Co., P.A., 511 So.2d 384 (Fla. 1st DCA 1987), which held that accountants cannot be sued by those with whom they are not in privity. First Florida Bank, 14 FLW at 879. Although the trial court may properly have deemed itself bound by the First District's decision in Gordon, this Court obviously is free to reject its rationale and to reach the opposite conclusion. Because Gordon is grounded on invalid authority and is counter to both logic and the modern trend, this Court clearly should do so.

In Gordon, the plaintiffs were solicited to invest in a limited partnership and received various materials in that connection through the mail, including an offering memorandum containing financial statements. The defendant accounting firm certified the erroneous financial statements as complying with generally accepted auditing standards and fairly representing the financial condition of the depicted company. The plaintiffs

sued the accountants for negligence, but the trial court dismissed the claims for lack of privity. The First District affirmed that result.

Even a cursory analysis of the First District's opinion in Gordon reveals the source of its error. It is plain that the ~~Gordon~~ court blindly relied on Buchman without re-evaluating its dubious precedential basis, and it distinguished First American Title Insurance on the illogical basis that its holding was limited to abstractors.

In the instant case . . . appellees knew that the financial statements and reports were delivered and relied upon by those who were considering investing in A.T. Bliss & Co. Had appellees been abstractors, that allegation might have been sufficient to withstand a motion to dismiss on the basis of First American Title, but we deal here with accountants, and the specter of worldwide liability for that professional group compels us to adhere to the rules set forth in Investment Corp. of Florida v. Buchman, that an accountant is not liable to persons with whom there is no privity of contract.

511 So.2d at **389**.

With due respect to the Gordon court, its refusal to extend the analysis of First American Insurance to a case involving accountants, and its decision instead blindly to rely on Buchman, is illogical. What the court obviously failed to consider was that First American Insurance effectively overruled Sickler, which in turn was the basis of the Buchman court's decision. It thus makes no sense to rely on Buchman for the proposition that "strict privity" is required to sue an accountant, since accountants thereby would be treated differently than other "professional groups" like architects

(Mover), abstractors (First American) and lawyers (Ansel), which demonstrably have managed to withstand "the spectre of worldwide liability" the Gordon court feared.⁷ As Justice Irvin noted in his well-reasoned dissent in Gordon:

I fail to understand any compelling policy reason why a public accountant, not in contractual privity with the injured party, should any more be exempted from liability and negligence than should an abstractor, a manufacturer of defective product, Webster v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976), or an architect, A.R. Mover, Inc. v. Graham, 285 So.2d 397 (Fla. 1973). As was observed in International Mortgage Co.: It is only reasonable that the same judicial criteria govern the imposition of negligence liability, regardless of the defendant's profession." 223 Cal. Rptr. at 226.

511 So.2d 392-393.⁸

In addition to this Court's opinions involving abstractors, architects and attorneys, support for the petitioner's position can be found in numerous cases from other

⁷ In concluding that "strict privity" is no longer required in suits against accountants, other courts have accepted decisions concerning abstractors' liability as authority. See, e.g., Seedkem, Inc. v. Safranek, supra, at 344 n. 4 (neither Nebraska nor Indiana would require "strict privity" in claims against accountants since both abandoned that requirement in suits against abstractors).

⁸ It should be emphasized that Gordon was decided before this Court issued its opinion in Oberon; in fact, the court noted in Gordon that the issue of whether an attorney may be sued for negligence absent privity was pending before the supreme court at the time of its decision. See Gordon, supra, at 389 n. 4. Since Oberon clearly indicates that "intended" as opposed to "incidental" beneficiaries of a professional's work product have standing to sue for negligence, there is no reason why accountants should be treated differently. To the contrary, since the recipients of financial data occupy a position similar to consumers of a manufactured product in the sense that they must rely solely on the professionalism of the accountant who prepared it, a "foreseeability" analysis in suits such as that at bar would be appropriate. Moyer, supra. At the very least, an accountant should be responsible to those in a class whom he knows will receive and rely on his work product.

jurisdictions which have addressed the exact issue presented in this appeal. For example, in Rusch Factors, Inc. v. Levin, supra, the plaintiff relied on certified financial statements that had been prepared by the defendant accountant in measuring the stability of a corporate borrower. In addressing the defendant's motion to dismiss for lack of privity, the court concluded:

The wisdom of the decision in Ultramares has been doubted, e.g., Levitin, Accountants Scope of Liability for Defective Financial Reports, 15 Hastings L.J. 436, 445 (1964); Seavey, Mr. Justice Cardozo and the Law of Torts, 52 Harv.L. Rev. 372, 400 (1939). Note, The Accountant's Liability--For What and To Whom, 36 Iowa L.Rev. 319, 327-28 (1951), 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 cautionary 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." Palsgraf v. Long Island R.R., 248 N.Y. 339, 344, 162 N.E. 99, 100, 59 A.L.R. 1253.

284 F.Supp. at 90-91. The court went on to distinguish Ultramares:

There, the plaintiff was a member of an undefined, unlimited class of remote lenders and potential equity holders not actually foreseen but only foreseeable. Here, the plaintiff is a single party whose reliance was actually foreseen by the defendant. The case at bar is, in fact, more akin to the case of Glanzer v. Shephard, 233 N.Y. 236, 135 N.E. 275, 23 A.L.R. 1425, another

Cardozo opinion and the first case to extend to persons not in privity, liability for negligent misrepresentation causing pecuniary loss. * * *

With respect, then to the plaintiff's negligent theory, this Court holds that an accountant should be liable in negligence for careless financial misrepresentations relied upon by actually foreseen and limited classes of persons.

284 F.Supp. at 92-93.

Numerous later decisions, citing Rusch Factors v. Levin, supra, also have embraced the principle that "strict privity" should not exempt accountants from liability to those whom they know or have reason to know will rely on their work product.

Commenting on Rusch Factors, one court has stated:

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.

Ryan v. Kanne, 170 N.W. 2d 395, 401 (Iowa 1969); see also, Coleco Industries, Inc. v. Berman, supra, at 309-310 ("We agree with the courts in Rusch Factors and Aluma Kraft that Glanzer and Ultramares are, as Justice Cardozo stated, distinguishable We also agree with the Rusch Factors court that regardless of whether Glanzer and Ultramares are distinguish-

able, the view more consonant with present notions of equitable loss distribution is that which holds accountants liable in negligence for careless financial misrepresentations relied upon by actual foreseen and limited classes of persons.").⁹ In the same fashion, the petitioner's use of the accountant's audited financial statement "was not merely one possibility among many," but rather was the "end and aim" of the transaction. 14 FLW at 879. The Supreme Court of Mississippi has cogently explained the salutary policy considerations that favor the imposition of liability in such situation notwithstanding an absence of "strict privity."

[A]n independent auditor is liable to reasonably foreseeable users of the audit, who request and receive a financial statement from the audited entity for a proper business purpose, and who then detrimentally rely on the financial statement, suffering a loss, proximately caused by the auditor's negligence. Such a rule protects third parties, who request, receive and rely on a financial statement, while it also protects the auditor from an unlimited number of

⁹ Seedkem, Inc. v. Safranek, *supra*, 466 F.Supp. at 342-343 ("[I]n recent years, significant inroads have been made on the reach of the Ultramares decision and the rule of Ultramares has been weakened. . . Those courts which have diminished the impact of Ultramares have extended 'the accountant's liability for negligence to those who, although not themselves foreseen, are members of a limited class whose reliance on the representation is specifically foreseen.'"); *cf.*, Aluma Kraft Manufacturing Co. v. Elmer Fox & Co., 493 S.W.2d 378, 382 (Mo. 1973) ("We also reject the privity requirement when, as alleged in the petition, the accountant knows the audit is to be used by the plaintiff for its benefit and guidance, or knows the recipient intends to supply the information to prospective users, such as the plaintiff here. Therefore, we hold that a third party in such situations, although not in privity, has a claim for the alleged negligence of an accountant who renders an unqualified opinion upon which the third person relies to its detriment."); Citizens State Bank v. Timm Schmidt & Co., 335 N.W.2d 361 (Wis. 1983) (Supreme Court of Wisconsin adopted the reasonable foreseeability test set forth in § 552 of the Restatement to suits against accountants by third parties, citing Rusch Factors with approval); Blue Bell Inc. v. Peat Marwick & Mitchell, 715 S.W.2d 408 (Tex. Ct. App. 1986) (accountant liable if he knows or should know members of a limited class will rely on his work product).

potential users, who may otherwise read the financial statement, once published. Of course, the auditor remains free to limit the dissemination of his opinion through a separate agreement with the audited entity. We believe the rule announced here is fair to all concerned and gives ample protection not only to national firms, based in Jackson, such as the appellant, but also to solo practitioners in the smaller communities of this state, while simultaneously demanding of them high professional standards.

Touche Ross & Co. v. Commercial Union Ins. Co., 514 So.2d 315, 322-23 (Miss. 1987).

From a reading of the recent authority in this area, it becomes apparent that the Ultramares rationale "has been rejected by several modern courts and commentators." Larson v. United Federal Savings & Loan Ass'n of Des Moines, 300 N.W.2d 281, 286 n. 1 (Iowa 1981). It also is apparent that virtually every court faced with a situation akin to that at bar has distinguished Ultramares and has held an accountant liable for negligence to those whom he knows, or reasonably should know, will rely on its work product. The sound public policy supporting this result was best articulated by California's Fourth District Court of Appeal in International Mortgage Co. v. Butler, 177 Cal. App. 3d 790, 223 Cal.Rptr. 218 (1986):

An independent auditor (as opposed to an in-house accountant) is employed to analyze a client's financial status and make public the ultimate findings in accord with recognized accounting principles. Such an undertaking is imbued with considerations of public trust, for the accountant must well realize the finished product, the unqualified financial statement, will be relied upon by creditors, stockholders, investors, lenders or anyone else involved in the financial concerns of the audited client. As stated in the AICPA (American Institute

of Certified Public Accountants), Professional Standards, Code of Professional Ethics (CCH 1984) ET section 51.04 (1981), "The ethical Code of the American Institute [of Certified Public Accountants] emphasizes the profession's responsibility to the public, a responsibility that has grown as the number of investors has grown, as the relationship between corporate managers and stockholders has become more impersonal, and as government increasingly relies on accounting information."

223 Cal.Rptr. at 224-25.

In sum, there are three standards that courts generally apply in actions against accountants by a third party: "strict privity," the "reasonably foreseeable" standard adopted in many of the cases above, and the position that has been described as the "middle ground" of Section 552 of the Restatement (Second) of Torts, which recognizes that a cause of action exists in the absence of privity

[b]y the person or one of a limited group of persons for whose benefit and guidance [an accountant] intends to supply the information or knows that the recipient intends to supply it.

Restatement (Second) of Torts § 552 (1977). In the light of this Court's decisions in Mover (foreseeability analysis used in suit against an architect) and First American Title (intended beneficiary analysis used in suit against an abstractor), there is no valid reason why this Court should insulate accountants from liability to anyone other than their immediate clients by erecting an artificial "strict privity" barrier. There is no public policy which warrants insulating accountants from liability under circumstances where they prepare financial projections and know that those projections will be included in

offering materials which will be used to sell an investment to the public. Certainly it is not unfair or inappropriate to hold the accountant responsible to those whom he knows are intended to and in fact will rely on his work product.

As Judge Ervin has succinctly observed:

Since Justice Cardozo's seminal decision in McPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), was announced, the foundation supporting the citadel of privity has been seriously eroded. It is now time to re-examine carefully all privity barriers, particularly those judicially erected to exempt independent public accountants from liability.

Gordon, supra, at 393 (Ervin, J., dissenting).

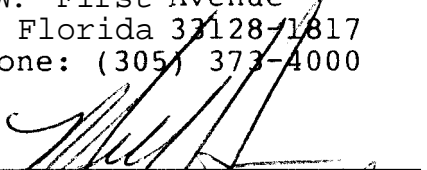
The amici curiae respectfully urge this Court to reject the application of the outmoded and illogical privity barrier in the situation at bar.

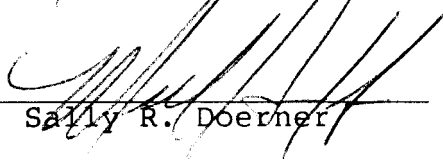
CONCLUSION

The question certified by the Second District Court of Appeals as being of great public importance should be answered in the affirmative.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by served by mail this 19th day of May, 1989 to Robert W. Clark, Esquire, Counsel for the Petitioner, Macfarlane, Ferguson, Allison & Kelly, P.O. Box 1531, Tampa, Florida 33601-4888; and John N. Jenkins, Esquire, Counsel for the Respondent, Marlow, Shofi, Smith, Hennen, Smith & Jenkins, P.A., P.O. Box 10430, Tampa, Florida 33679.


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