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Annual Survey of South Carolina Law/ Tort Law: Liability of Information Suppliers Expanded

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IV. LIABILITY OF INFORMATION SUPPLIERS EXPANDED

In *South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc.*[81] the supreme court held that when a consultant undertakes to analyze and compare objectively the attributes of commercial competitors, the consultant has a duty to exercise due care with regard to the commercial competitor being critiqued.[82] *Ports Authority* expands the traditional scope of liability imposed on a professional supplier of information.[83]

The case arose when the Georgia Ports Authority contracted with the defendant, Booz-Allen and Hamilton, Inc., a consulting firm, to prepare a comparative report assessing the respective merits of the Savannah port and the Charleston port for commercial traffic. The plaintiffs charged that the consulting firm was negligent in making statements which portrayed the Charleston port as inferior, since reasonable investigation would have proven the statements to be false.[84] The plaintiffs further alleged that the resulting report was highly favorable to the Savannah port, and that when distributed to present and potential domestic and foreign customers, the report caused decreased traffic and economic damages to the Charleston Port.[85] The United States Court of Appeals for the District of Columbia certified to the South Carolina Supreme Court the question of whether any of the plaintiffs could state a valid claim for negli-

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81. 289 S.C. 373, 346 S.E.2d 324 (1986).

82. *Id.* at 376-77, 346 S.E.2d at 326. The court refused to extend this duty to individuals who relied on the shipping traffic in the Charleston port for commercial profit. *See infra* note 88 and accompanying text.

83. The scope of the traditional duty of care was stated classically and succinctly in the landmark case of Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922), in which the court held a duty of care is owed "not only to him who ordered, but to him also who relied." *Id.* at 242, 135 N.E. at 277; *see* cases cited *infra* note 90.

84. The false information allegedly included facts about dimensions of vessel turning basins, width of channels, range of tide, clearance and channels under bridges, and other technical matters. Brief of Appellant at 3.

85. *Id.*

gence against the consultant who prepared the report.[86]

The supreme court began its analysis by observing that a duty arising from a relationship between two parties must exist before liability may be imposed for negligence. The court noted that the necessary relationship may arise between one who prepares a report pursuant to a contract and third parties who the preparer knows or should know will rely on or be influenced by the information contained in the report.[87] Contrary to this general rule, however, the court held that the consultant owed a duty of due care to a subject of the report—the commercial competitor of the consultant's employer—even though that competitor was a nonreliant third party for whose use the information was not intended. The holding was limited, though, to cases in which the consultant prepares the report "for the purpose of giving one [competitor] a market advantage over the other."[88]

While the *Ports Authority* decision rests on a narrow set of facts, the holding significantly departs from the customary liability imposed on one who prepares a report.[89] The duty of a

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86. The Ports Authority, the Pilots Association, and two chapters of the Longshoremen's Association initially brought suit, alleging negligence, libel, and interference with contract, in federal district court against Booz-Allen and Hamilton, Inc. The court granted summary judgment for the defendant on all three causes of action because the defendant owed no duty to any of these plaintiffs. The plaintiffs appealed only the negligence cause of action and the appellate court certified this question to the South Carolina Supreme Court pursuant to S.C. SUP. CT. R. 46.

87. 289 S.C. at 376-77, 346 S.E.2d at 326. To support these contentions the court cited 57 AM. JUR. 2D *Negligence* § 51 (1971)(emphasis added), which states, *inter alia*, that "at least where the situation is not one fraught with such an overwhelming potential liability as to dictate a contrary result, . . . it has been held that a *reliant* user of information which is represented to be accurate may recover for the negligent misrepresentation if his ultimate use was foreseeable." The court also cited two cases which support the same proposition: Stagen v. Stewart-West Coast Title Co., 149 Cal. App. 3d 114, 196 Cal. Rptr. 732 (1983) (professional supplier of information is liable to those for whose guidance the information is supplied for harm caused them by their reliance on the information if the supplier fails to exercise care in obtaining and communicating the information); Carlotta v. T.R. Stark & Assocs., 57 Md. App. 467, 470 A.2d 838 (1984) (surveyor of disputed boundary line does not owe a duty of care to a nonreliant third-party adjacent landowner).

88. 289 S.C. at 377, 346 S.E.2d at 326. The court denied the existence of a duty owed to the Pilots Association and the chapters of the Longshoremen's Association, reasoning that the relationship between "a consultant and someone distantly affected by his work" was too attenuated. *Id.*

89. Prosser and Keeton conclude that "liability has not in fact been extended much beyond that indicated in [§ 552 of] the Second Restatement of Torts, if any. . . . The plaintiff must have been a person for whose use the representation was intended. . . . Also, if the plaintiff is not an identifiable person for whose benefit the state-

professional who supplies information has been extended previously to those who relied on the report, who were intended to benefit from its preparation, or for whose guidance the information was supplied.[90] The Charleston Ports Authority fit none of

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ment was intended, he must at least have been a member of some very small group of persons for whose guidance the representation was made." W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 107, at 747 (5th ed. 1984) [hereinafter PROSSER & KEETON] (footnotes omitted). RESTATEMENT (SECOND) OF TORTS § 552(2) (1977) states, in pertinent part, that one's liability for negligent misrepresentation

> is limited to loss suffered (a) by the person or one of the persons for whose benefit and guidance he intends to supply the information, or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction which he intends the information to influence, or knows that the recipient so intends . . . .

See Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231 (1966); *see also* cases cited *infra* note 90.

90. Negligent misrepresentation has been a dynamic area of the law since the classic case of Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922), and continuing beyond Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931). While *Glanzer* essentially permitted recovery for foreseeable plaintiffs, 233 N.Y. at 239, 135 N.E. at 276, *Ultramares* adopted the restrictive requirement of privity, acknowledging the danger of potentially limitless liability. Chief Justice Cardozo concluded:

> A different question develops when we ask whether they owed a duty to these [plaintiffs] to make [the statement] without negligence. If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class.

255 N.Y. at 179, 174 N.E. at 444. The modern trend, however, has been more of a mix of the two doctrines, allowing recovery to third persons, but to a more restricted class than all foreseeable plaintiffs. The Restatement approach, *supra* note 89, is representative of this trend toward a middle ground. *See also* Rhode Island Trust Nat'l Bank v. Swartz, Bresenoff, Yavner & Jacobs, 455 F.2d 847 (4th Cir. 1972); First Nat'l Bank v. Small Business Admin., 429 F.2d 280 (5th Cir. 1970); Demuth Dev. Corp. v. Merck & Co., 432 F. Supp. 990 (E.D.N.Y. 1977); Bonhiver v. Graff, 311 Minn. 111, 248 N.W.2d 291 (1976); Credit Alliance Corp. v. Arthur Andersen & Co., 65 N.Y.2d 536, 483 N.E.2d 110, 493 N.Y.S.2d 435 (1985); White v. Guarante, 43 N.Y.2d 356, 372 N.E.2d 315, 401 N.Y.S.2d 474 (1977). *Cf.* Hochfelder v. Ernst & Ernst, 503 F.2d 1100 (7th Cir. 1974), *rev'd on other grounds*, 425 U.S. 185 (1976) (no common-law duty of defendant accounting firm to defrauded investors of brokerage firm since investors were not of limited class of foreseen plaintiffs and did not rely on the reports prepared by accounting firm); Ingram Indus., Inc. v. Nowicki, 527 F. Supp. 683 (E.D. Ky. 1981) (court went beyond the restrictive privity requirement yet confined liability under the same general principles as those expressed in RESTATEMENT (SECOND) OF TORTS § 552); Seedkem, Inc. v. Safranek, 466 F. Supp. 340 (D. Neb. 1979) (liability of accountants extended to members of limited class whose reliance on representation is specifically foreseen even though members were not themselves foreseen); Rusch Factors, Inc. v. Levin, 284 F. Supp. 85 (D.R.I. 1968) (accountant held liable in negligence for careless financial misrepresentations relied upon by actually foreseen class of persons; court left open question of whether liability should be extended to full limits of foreseeability). For a critical analysis of various approaches, see

these categories.

In finding a duty of care, the court ignored both authority to which it explicitly referred[91] and valid arguments advanced by the defendant.[92] Since the opinion is essentially devoid of substantive analysis, it is difficult to ascertain upon what reasoning or policy the holding is based. As written, the holding is not supported by the analysis, but actually departs from it. This departure is significant because it seemingly neglects important policy concerns commonly advanced for the limitation of liability in this area.[93] Since information can reach vast numbers of individuals and businesses, the duty to use due care has been limited traditionally to the general rule previously noted.[94] Without these restrictions, liability is potentially limitless.[95]

Ports Authority is an alarming decision because it appears unsupported by either authority or settled policy principles. This expansion of a professional's liability for the negligent preparation of a report is a new cause of action of which practitioners should be aware. Those advising professional suppliers of information should also note the possibility of their clients' increased exposure to negligence liability.[96]

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Raritan River Steel Co. v. Cherry, Bekaert & Holland, 79 N.C. App. 81, 87-91, 339 S.E.2d 62, 66-69 (1986).

91. *See* cases cited *supra* note 87.

92. The defendant argued that "applying concepts of general negligence liability accepted in South Carolina and elsewhere, a non-relying [sic] third party may not sue in ordinary negligence for the preparation of a report." Brief of Respondent at 27. Indeed, the South Carolina Court of Appeals recognized this principle when it stated in dicta that "[t]he recovery of damages may be predicated upon a negligently-made false statement where a party suffers either injury or loss as a consequence of *relying* upon the misrepresentation." Winburn v. Insurance Co. of North Am., 287 S.C. 435, 441, 339 S.E.2d 142, 146 (Ct. App. 1985) (emphasis added) (citing 65 C.J.S. *Negligence* § 20, at 642 (1966)).

93. *See* 255 N.Y. at 179-80, 174 N.E. at 444.

94. *See* PROSSER & KEETON, *supra* note 89.

95. This was precisely Cardozo's concern in *Ultramares*: "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." 255 N.Y. at 179-80, 174 N.E. at 444.

96. The decision in the instant case concerned two competitors; nonetheless, it is apparent that this decision could have dangerous ramifications if applied to all cases involving market comparisons. Were a report to compare all competitors in a large industry, liability for "a thoughtless slip or blunder," 255 N.Y. at 179, 174 N.E. at 444, could be immense.