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Drafting Attorneys' Liability to Intended Beneficiaries of a Will: A Reasonable Approach to Accrual of Statutes of Limitations

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NOTES

DRAFTING ATTORNEYS' LIABILITY TO INTENDED BENEFICIARIES OF A WILL: A REASONABLE APPROACH TO ACCRUAL OF STATUTES OF LIMITATIONS

INTRODUCTION

On July 4, 1976 John E. Jones, an unmarried lifetime Indiana resident, instructed his attorney to draft a will designating various relatives and a friend as legatees. Jones carefully outlined the distribution plan, emphasizing a specific devise of his fishing cabin on Lake Eliza to his best friend and closest confidant, Billy Baker. The attorney questioned him about this devise and reminded him that the lakefront property had a very high value. Jones responded that Billy was the sole person who could fully appreciate the cabin and that his relatives only wanted the property because of the potential rental income involved. The will was subsequently drafted and properly executed on July 7, 1976. About six months later Jones contacted his same attorney to draft a new will changing only the name of the residuary legatee and copying all other portions of the first will verbatim. Due to an oversight, the drafting attorney left out the provision regarding disposition of the lakefront property. The second will, complete with revocation clause, was properly executed on January 25, 1979. Immediately prior to the execution of the second will, Jones tore up the first will with the intent to revoke. Jones died on March 3, 1981; his final days were spent in a hospital, conversing with his only visitor, Billy Baker. In the many conversations between the two, Jones had failed to mention his planned devise of the lakefront property to Billy. Jones' relatives introduced the will into probate soon after his death, but due to much conflict regarding the residuary legatee substituted in the second will, the probate court did not render its decision until April 13, 1983. The probate court held the second will valid, upholding the change in residuary legatees.

Upon reading an account of the proceedings in the local newspaper, Billy discovered that he was an intended legatee under the first will. He consulted an attorney on the matter who suggested that he institute a legal malpractice suit against the drafting attorney. The complaint was filed on April 17, 1983, in the Superior Court of Porter County, Indiana.

The defendant has filed an answer and general demurrer to the complaint, denying liability to Billy. The demurrer states two independent arguments for non-liability in this case. The first argument advanced by the defendant states that intended beneficiaries of a will have no standing to sue the drafting attorney since they are not in privity to the contract for the attorney's services.[1] The second argument claims that the two-year statute of limitations[2] for this cause of action began to run on March 3, 1981, the date of Jones' death, and expired prior to the filing of the complaint on April 17, 1983.[3] The Superior court judge hearing the case is considering dismissal.

The possible dismissal in the above hypothetical fact situation involves the resolution of two issues. First, what is the duty owed by a drafting attorney to the legatees in a will? Second, assuming a duty is found, when should the applicable statute of limitations begin to run? This Note analyzes these issues and suggests that the Indiana courts should recognize a duty on the part of the drafting attorneys to intended beneficiaries of a will. Further, the Indiana Courts should adopt the discovery rule for accrual of the statute of limitations in this limited area of attorney liability.

RECOGNITION OF A DUTY BY DRAFTING ATTORNEYS TO INTENDED BENEFICIARIES—GENERAL DEVELOPMENT

The underlying rationale for development of a negligence theory as applied to third party plaintiffs is analytically different from the rationale for intentional torts.[4] Intentional tort theory provides liability to third parties through the doctrine of transferred intent.[5] The in-

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1. This argument is based on the common law theory that since the beneficiary was not a party to the contract for the attorney's services to draft the will, he is barred from bringing an action pursuant to that contract. *See infra* text accompanying notes 4-10.

2. The applicable statute in the hypothetical situation is IND. CODE § 34-1-2-2 (1967), which reads in pertinent part: "The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not afterwards.

> First. For injuries to person or character, for injuries to personal property and for a forfeiture of penalty given by statute, within two (2) years. . . ." *See* Shideler v. Dwyer, ___ Ind. ___, ___, 417 N.E.2d 281, 288 (1981).

3. *See infra* text accompanying notes 115-123. For a discussion regarding theories of accrual for statutes of limitations in the legal malpractice setting, see generally R. MALLEN & V. LEVIT, LEGAL MALPRACTICE, §§ 388-397, at 445-82 (1981 2d ed.) [hereinafter cited as R. MALLEN & V. LEVIT].

4. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 53, at 325 (4th ed. 1971) [hereinafter cited as W. PROSSER].

5. *Id.*

tent of the actor is assumed to transfer to anyone directly injured by his actions.[6] Negligent tort theory developed a different doctrine for liability based upon privity of contract between the negligent actor and the injured party.[7] This rule stated that unless the injured party was in privity of contract with the negligent actor, there could be no recovery for damages sustained as a result of his negligent acts.[8] The rules seemed absolute, but necessary exceptions developed.

Equity guided the courts into diminishing the severity of the rule in certain instances.[9] For example, the privity rule did not apply where the plaintiff made a showing of fraud, collusion, or special circumstances which would warrant considering it apart from the rule.[10] Further exceptions to the privity rule have since developed in the area of products liability beginning with the landmark case of *MacPherson v. Buick Motor Co.*[11] The *MacPherson* rationale, propounded by Justice Cardozo, extended liability of manufacturers to ultimate consumers[12] if the negligent manufacture of the product could *foreseeably* cause harm to the user.[13] The element of foreseeability has proven to be the primary impetus for consideration of claims asserted by injured third parties outside the product liability sphere.

State courts thereafter expanded the scope of liability beyond mere physical harm from the use of a product to include financial loss[14] from negligently administered services.[15] The California Supreme

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6. *Id.* § 8, at 32-34.
7. *Id.* § 93, at 622-27.
8. Winterbottom v. Wright, 10 H.&W. 109, 152 Eng. Rep. 402 (Ex. 1842).
9. W. PROSSER, *supra* note 4, § 93, at 622-27.
10. National Savings Bank v. Ward, 100 U.S. 195, 199-200 (1879).
11. 217 N.Y. 382, 111 N.E. 1050 (1916).
12. *Id.* at 384, 111 N.E. at 1051. The purchaser was a third party to the sales contract between the manufacturer and retail distributor. *Id.*
13. *Id.* at 390, 111 N.E. at 1053. Dean Prosser cogently summarizes the general law applicable in instances such as this:

> . . . the absence of 'privity' between the parties makes it difficult to found any duty to the plaintiff upon the contract itself. But by entering into a contract with A, the defendant may place himself in such a relation toward B that the law will impose upon him an obligation, sounding in tort and not in contract, to act in such a way that B will not be injured. The incidental fact of the existence of the contract with A does not negative the responsibility of the actor when he enters upon a course of affirmative conduct which may be expected to affect the interests of another person.

W. PROSSER, *supra* note 4, § 93, at 622.
14. *See, e.g.*, Glanzer v. Shepard, 223 N.Y. 236, 135 N.E. 275 (1922); Doyle v. Chatham & Phenix National Bank, 253 N.Y. 369, 171 N.E. 574 (1930).
15. *See, e.g.*, Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958) (notary

Court in *Biakanja v. Irving*[16] held a notary public who drafted an invalid will, liable to the testator's intended beneficiaries.[17] The *Biakanja* court recognized the need for a balancing of factors to arrive at a determination of duty:

> The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct and the policy of preventing future harm.[18]

The court also acknowledged the distribution of the estate by a will to be the "end and aim"[19] of the transaction between the testator and the draftsman. Therefore, if the distribution is frustrated by the draftsman's negligence, he must be held responsible to the intended beneficiaries.[20] This rationale was soon extended to encompass a duty by a drafting attorney[21] to the intended legatees of a will.[22]

The six factors involved in the *Biakanja* decision are equally applicable to an attorney who drafts wills.[23] The California case of *Lucas v. Hamm*,[24] the first case to apply the *Biakanja* rationale to attorneys, balanced the interests involved and found them to weigh in favor of

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public drafting invalid will); Dickel v. Nashville Abstract Co., 89 Tenn. 431, 14 S.W. 896 (1890); Anderson v. Spriesterbach, 69 Wash. 393, 125 P. 166 (1912) (abstract defective); Western Union Telegraph Co. v. Bowman, 141 Ala. 175, 37 So. 493 (1904); McPherson v. Western Union Telegraph Co., 189 Mich. 471, 155 N.W. 557 (1915) (telegraph message not delivered).

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

17. *Id.*

18. *Id.* at 650, 320 P.2d at 19.

19. *Id.*

20. *Id.* The same result was reached in the case of Killingsworth v. Schlater, 270 So. 2d 196 (La. Ct. App. 1972) *modified on other grounds*, 292 So. 2d 536 (La. 1973).

21. For a more detailed history of the development of attorney's liability to third parties see, Note, *Attorney's Negligence and Third Parties*, 57 N.Y.U.L. REV. 126 (1982); Meiselman, *Attorney Liability to Third Parties*, 53 N.Y. ST. BAR J. 108 (Feb. 1981). *Cf.* Guy v. Liederbach____ Pa. ____, 459 A.2d 744, 755 n.1 (1983).

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

23. *Id.* at ____, 364 P.2d at 688, 15 Cal. Rptr. at 824.

24. 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821, *cert. denied*, 368 U.S. 987 (1961).

recognizing a duty.[25] The *Lucas* court addressed an additional policy consideration not specifically mentioned in the *Biakanja* decision. That policy consideration is the extra burden imposed on the legal profession as a whole by the recognition of this duty.[26] The court weighed the burden of imposing liability on the profession against the alternative that the unrecovered loss be borne by innocent beneficiaries.[27] The court found the factors to be heavily in favor of the innocent parties and held that attorneys owe a duty to the intended beneficiaries.[28]

The major problem with extending the liability for negligence to third parties not in privity to the contract for the services rendered to a client was addressed by Justice Cardozo in another landmark decision.[29] The case of *Ultramares Corporation v. Touche* presented the court with the question of whether an accounting firm should be held liable for negligence in failing to uncover an error in financial statements later relied upon by investors. The court held that the accounting firm was liable for honest mistakes only to those in privity of contract.[30] To extend liability further would subject the firm "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class."[31] An accountant has no idea to what degree his opinion will be relied upon, nor for how long it will be relied upon, nor even who specifically will rely upon it.

This reasoning is not as persuasive when applied in the limited context of wills drafted by attorneys.[32] In *Needham v. Hamil-*

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25. *Id.* at ____, 364 P.2d at 688, 15 Cal. Rptr. at 824. Specifically, the court held that:

> As in *Biakanja*, one of the main purposes which the transaction between defendant and testator intended to accomplish was to provide for the transfer of property to plaintiffs; the damage to plaintiffs in the event of invalidity of the bequest was clearly foreseeable; it became certain, upon the death of the testator without change of the will, that plaintiffs would have received the intended benefits but for the asserted negligence of defendant; and if persons such as plaintiffs are not permitted to recover for the loss resulting from negligence of the draftsman, no one would be able to do so, and the policy of preventing future harm would be impaired.

26. *Id.*

27. *Id.*

28. *Id.* *See also* Note, *supra* note 21, at 127-132.

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

30. *Id.* at 189, 174 N.E. at 448.

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

32. One recent case addressed this problem and held that it was reasonable to impose a duty on the drafting attorney, but limited the *Lucas* scope. In Guy v.

ton,[33] the District of Columbia Court of Appeals found sufficient basis to impose a duty on drafting attorneys to intended beneficiaries. The Court held, citing a pre-*Ultramares* opinion by Cardozo,[34] that where the impact upon the third party is the "end and aim" of the transaction, an exception to the privity rule may be warranted.[35] Further, because of the unique situation of the attorney as will-drafter, he is not subject to liability from an indeterminate class. The attorney is subject to liability only to the direct and intended beneficiaries of the will.[36] By keeping the narrow scope of this exception to the privity rule in mind, an harmonious and equitable balance can be reached.

The inherent fairness in finding a duty owed by drafting attorneys to legatees of a will has led many other state courts to recognize the duty.[37] Some states remain entrenched in the privity rule although a trend toward uniform recognition of a duty is evident.[38]

Liederbach, ___ Pa. ___, 459 A.2d 744 (1983), the court utilized third-party beneficiary theory of contract law to find a duty to *named* beneficiaries. However, such a holding falls short in the fact situation presented in the introductory hypothetical. To require a beneficiary to be named in the document denies a cause of action to intended beneficiaries whose names are inadvertently omitted from a will. It seems more reasonable to allow the plaintiff to prove that he was intended as a beneficiary than to deny him a chance of recovering what is rightfully his. In effect he is denied recovery because the attorney made too big of a mistake by totally omitting his name from the document.

33. 459 A.2d 1060 (D.C. Ct. App. 1983).

34. The *Needham* court cited Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922). Justice Cardozo writing the majority opinion in *Glanzer* recognized the necessity of holding weighers liable where the weight certificate they issued was the "end and aim" of the transaction and thus could be foreseeably relied upon as valid. *Glanzer*, 233 N.Y. at 238-239, 135 N.E. at 275-276.

35. *Needham*, 459 A.2d at 1062.

36. *Id.* at 1063.

37. Jurisdictions which have accepted California's doctrine of duty include: Arizona, Fickett v. Superior Court, 27 Ariz. App. 793, 558 P.2d 988 (1976); Connecticut, Licata v. Spector, 26 Conn. Supp. 378, 255 A.2d 28 (1966); Florida, McAbee v. Edwards, 340 So. 2d 1167 (Fla. Dist. Ct. App. 1976); Hawaii, Silver v. George, 618 P.2d 1157 (Hawaii Ct. App. 1980); Maryland, Clagett v. Dacy, 47 Md. App. 23, 420 A.2d 1285 (1980); Mississippi, Felts v. National Account Systems Association, Inc., 469 F. Supp. 54 (N.D. Miss. 1978); New Jersey, Stewart v. Sbarro, 142 N.J. Super, 581, 362 A.2d 581 (1976); New Mexico, Jaramillo v. Hood, 93 N.M. 433, 601 P.2d 66 (1979); New York, Baer v. Broder, 106 Misc. 2d 929, 436 N.Y.S.2d 693 (1981) (*See infra* note 44, for explanation of limited application); North Carolina, United Leasing Corp. v. Miller, 45 N.C. App. 400, 263 S.E.2d 313 (1980); Oregon, Metzker v. Slocum, 272 Or. 313, 537 P.2d 74 (1975); Pennsylvania, Guy v. Liederbach, ___ Pa. ___, 459 A.2d 744 (1983); England, Ross v. Caunters, 3 All E.R. 580 (1979).

38. New York has recognized the reasoning but has limited its application to instances where the attorney has dealt with the third party beneficiaries directly (face-to-face rule). *See, e.g.*, Schwartz v. Greenfield, Stein and Weisinger, 90 Misc. 2d 882, 396 N.Y.S.2d 582 (1977); Baer v. Broder, 106 Misc. 2d 929, 436 N.Y.S.2d 693 (1981).

Indiana is one state which has explicitly avoided the issue when presented.[39] Analysis of parallel developments in Indiana law regarding duties owed to third parties illustrates that Indiana must recognize the public policy interests which require acknowledgement of a duty owed by drafting attorneys to third party beneficiaries under a will.

PARALLEL DEVELOPMENTS IN INDIANA—A NEED TO PROGRESS FURTHER

The privity rule still retains much of its effect on third party plaintiffs in Indiana, though the number of exceptions to the rule is growing. Indiana courts have recognized a duty owed to third persons in products liability,[40] negligent service installations,[41] and even legal malpractice in a very limited manner.[42] The development of the law in Indiana illustrating advances in these areas leads to the conclusion that there is a need to expand the exceptions to the privity rule to include legal malpractice claims by third party beneficiaries under a negligently drafted will.[43]

The first major exception to the privity rule in Indiana involved utilization of the concept of foreseeability of imminent harm to third persons as a means of justifying claims by third parties.[44] This con-

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Indiana has specifically not dealt with the issue, resolving cases on other grounds. *E.g.*, Shideler v. Dwyer, ___ Ind. ___, 417 N.E.2d 281 (1981). Illinois, which implicitly recognized the duty in Byron Chamber of Commerce, Inc. v. Long, 92 Ill. App. 3d 864, 415 N.E.2d 1361 (1981), recently reversed its trend by denying a duty to intended beneficiaries of a trust. Favata v. Rosenberg, 106 Ill. App. 3d 572, 436 N.E.2d 49 (1982). For a general analysis of the trend toward uniform recognition of a duty owed by a drafting attorney to the legatees under a will, see R. MALLEN & V. LEVIT *supra* note 3, §§ 79-81, at 152-162.

39. *See* Meier v. Pearlman, ___ Ind. App. ___, 401 N.E.2d 31 (1980), *cert. denied*, 449 U.S. 1128 (1981). More specifically, the court in *Shideler* stated:

> At the outset it should be noted that the motion for summary judgment was addressed, in the main, to the issue of whether or not the action was barred by the statute of limitations and not to the issue of whether or not a named beneficiary under a will, who was disappointed by the failure of the gift occasioned by reason of the lack of professional competence of the lawyer who drafted the will, can maintain a malpractice action against the errant lawyer. Accordingly, that substantive issue is not before us, and we intimate no opinion thereon.

Shideler v. Dwyer, ___ Ind. App. at ___, 417 N.E.2d at 283.

40. *See infra* notes 50-55 and accompanying text.

41. *See infra* notes 45-49 and accompanying text.

42. *See infra* notes 58-62 and accompanying text.

43. *See infra* notes 44-49 and accompanying text.

44. Note, *Has the Rule of MacPherson v. Buick Been Adopted in Indiana?*, 38 IND. L.J. 263 (1963).

cept was first announced in *Holland Furnace Co. v. Nauracaj*,[45] a case involving a contract between a tenant and the Holland Furnace Company for the installation of a furnace in plaintiff's building.[46] The installation was negligently performed, causing a fire which damaged the building.[47] Plaintiff was awarded damages notwithstanding his lack of privity since the installation was "so negligently defective as to be imminently dangerous to third persons."[48] This "imminently dangerous" concept of foreseeability was later incorporated in the area of products liability as well.[49]

Indiana's inroads into the privity rule continued with the recognition of the products liability exception. Two important products liability cases in Indiana were *Coca Cola Bottling Works v. Williams*,[50] and *Eliot v. General Motors Corp.*[51] The *Coca Cola* case involved the manufacture and sale of a beverage containing concrete chips[52] while *Eliot* involved the negligent manufacture and design of an automobile.[53] In each case the defendant was held liable to the injured third party on the basis of the foreseeability rationale consistent with *MacPherson*.[54] That rationale holds the manufacturer liable to the ultimate consumer if the negligent manufacture of the product could foreseeably cause harm to the user.[55] These cases represent a step forward in Indiana toward recognizing the need to protect innocent third parties in other areas of tort law.[56]

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45. 105 Ind. App. 574, 14 N.E.2d 339 (1938).

46. *Id.* at ____, 14 N.E.2d at 340-342.

47. *Id.*

48. *Id.* at ____, 14 N.E.2d at 342.

49. *See supra* notes 10-12 and accompanying text. *See also infra* notes 54-55 and accompanying text.

50. 111 Ind. App. 502, 37 N.E.2d 702 (1941).

51. 296 F.2d 125 (7th Cir. 1961). *See also* Gilliam v. J.C. Penney, 193 F. Supp. 558 (S.D. Ind. 1961) (court held that an escalator installer owed a duty of due care to patrons of the contracting store notwithstanding their lack of privity).

52. 111 Ind. App. at 512, 37 N.E.2d at 706. Though this case recognized and accepted *MacPherson*, it actually held the defendant liable to the limited area of bottled goods and food which had been previously recognized in Indiana in Daugherty v. Herzog, 145 Ind. 255, 44 N.E. 457 (1896).

53. 296 F.2d at 129.

54. *See* 296 F.2d at 129; *Coca Cola*, 111 Ind. App. at 512, 37 N.E.2d at 706.

55. *See supra* notes 10-13 and accompanying text.

56. *See also* Allied Fidelity Insurance Co. v. Lamb, ____ Ind. App. ____, 361 N.E.2d 174, 180 (1977) (court held "In determining whether a duty is owed by a particular party, the nature of the relationship must be analyzed"). In Clyde E. Williams & Associates, Inc. v. Boatman, ____ Ind. App. ____, 375 N.E.2d 1138 (1978), the court held an engineering firm to a duty of overseeing safety of operations at a construction site in a suit brought by an employee of the contracting construction firm.

One area in which Indiana has not recognized a duty owed to third parties is the area of attorney malpractice.[57] The case of *Meier v. Pearlman*,[58] held that an attorney is liable to third parties only where the attorney is shown to be guilty of fraud, collusion, or malicious or tortious conduct.[59] Initially, this holding seems to generously liberalize the privity rule by recognizing liability to third parties. However, upon closer inspection it is evident that this is not the case: the "tortious conduct" on the part of the attorney must go beyond the bounds of the attorney-client relationship in order to be actionable;[60] additionally, the attorney must have asserted his own personal interest or participated with the client in a fraudulent or unlawful act.[61] The *Meier* holding does not represent an extension of the privity rule and thus does not remedy any inequities which exist regarding claims by third party plaintiffs.[62]

The *Meier* decision maintains the *status quo* as to the consequences of attorney negligence by denying many of the justified claims of third parties against attorneys. Since "tortious conduct" must be directed at the third person while the attorney is acting in his own personal interest outside the scope of the attorney-client relationship,[63] the injured party is obtaining no cause of action not otherwise in existence. If the tort occurs outside the attorney-client relationship, the third party is simply a directly injured party to that act asserting his claim against an ordinary tortfeasor who has no protected status.[64] Where negligence by the drafting attorney causes intended legatees to lose their share of the estate, the intended legatees cannot main-

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57. Meier v. Pearlman, ___ Ind. App. ___, 401 N.E.2d 31 (1980), *cert. denied*, 449 U.S. 1128 (1981).

58. *Id.*

59. *Id.* at ___, 401 N.E.2d at 40.

60. [A]n attorney acting within the scope of his employment as attorney is immune from liability to third persons for actions arising out of that professional relationship. This immunity, to be sure, may not be invoked if the attorney, exceeding the bounds of this unique agency relationship, either is dominated by his own personal interest or knowingly participates with his client in the perpetration of a fraudulent or unlawful act.

Id. at ___, 401 N.E.2d at 41 (*quoting* McDonald v. Stewart, 289 Minn. 35, ___, 182 N.W.2d at 437, 440 (1970)).

61. *Meier*, ___ Ind. App. at ___, 401 N.E.2d at 41.

62. *See infra* notes 63-65 and accompanying text.

63. *Meier*, ___ Ind. App. at ___, 401 N.E.2d at 41.

64. The third party is not really a third party in any sense if the attorney negligently injures him while not acting in his official capacity. The attorney is merely an ordinary person directly injuring another person. There is no "third party" element about the transaction.

tain a cause of action unless they make a showing of fraudulent or malicious conduct.[65] In so holding, the Indiana courts deny justifiable claims by innocent legatees and ignore the public policy demands of recognizing a duty of the drafting attorney.[66]

The public policy behind the recognition of a duty by the drafting attorney is based on the need to give intended beneficiaries a forum for redress of their losses.[67] In the fact situation presented in the introductory hypothetical, no one could raise a claim against the attorney even if both wills were held entirely invalid. Application of the privity rule in this context insulates the attorney from many repercussions of his work—it becomes a license for negligence. The most significant policy asserted in defense of the privity rule is that recognition of a duty represents too great a burden on the legal profession.[68] This burden does not prove as great when considered in the limited context advocated here. This note does not seek to abolish the privity rule in all cases of legal malpractice, rather, it expresses a need to weigh the equities in one particular area of legal practice. The legal profession is a hearty one and the imposition of this additional burden upon it merely represents a balancing of the equities involved. The dependency and trust that a testator places upon the drafting attorney requires that the attorney bear the responsibility for the outcome of the will.[69]

Once a duty has been established, a question arises as to when the statute of limitations should begin to run. Statutes of limitations bar claims that are not brought within a specified time.[70] The issue remaining unresolved is when may a claim of attorney negligence by disappointed legatees be barred by the running of the statute?

STATUTES OF LIMITATIONS—PURPOSES FOR THE STATUES AND DEFINITIONS FOR ACCRUAL

Statutes of Limitations exist in all jurisdictions to restrict the period during which a valid claim may be brought.[71] They are designed

65. *Meier*, ___ Ind. App. at ___, 401 N.E.2d at 41.

66. *See supra* notes 16-23 and accompanying text.

67. *Id.*

68. *See supra* notes 26-28 and accompanying text.

69. An additional question beyond the scope of this note is whether liability in these instances should be limited to an absolute amount, akin to the Indiana Medical Malpractice Act, IND. CODE § 16-9.5-2-2 *et. seq.* (1977), which limits a doctor's liability for malpractice to $100,000 maximum per patient.

70. *See infra* note 71-73 and accompanying text.

71. R. MALLEN & V. LEVIT, *supra* note 3, § 380, at 425.

as statutes of "repose" protecting the defendant from stale claims and unpreserved evidence.[72] The justification given for these statutes relates first to the need for defendants to be free from claims resulting from work done in the distant past, and second to the accuracy of long-term record-keeping.[73] No one wants to be haunted by past mistakes, but when is it equitable to bar an existing cause of action? This question may be answered differently depending upon the context of the claim.

The introductory hypothetical presents a scenario not uncommon in statute of limitations cases. When is it equitable to bar the claim? There are three possibilities.[74] The first accrues the statute of limitations at the date of the occurrence of the negligent act—the drafting of the will.[75] If the statute begins running at the drafting date, the claim is barred two years later[76] on January 25, 1979, which is before the testator died.[77] The second possibility accrues the statute at the date of damage,[78] which Indiana has recognized to be the date of the testator's death.[79] Under this rule Baker's claim is barred on March 3, 1983[80]—before probate determination.[81] The final possibility for accrual of the statute rests upon the discovery of a cause of action by Baker.[82] Under this rule Baker's claim receives a forum for presentation in the courts. Analysis of these three rules of accrual will yield the conclusion that the equitable considerations in this unique situa-

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72. *Id.* at 426.

73. *Id.* "Statutes of Limitations are intended to promote promptness and punctuality in business; the settlement of claims while parties are alive; before papers are lost and witnesses die; and he who will not take the hint, must take the consequences." *Id.* (quoting Glenn v. Cuttle, 2 Grant Case 273, 276, 48 Pa. 524, ____ (1853).

74. *See* R. MALLEN & V. LEVIT, *supra* note 3, §§ 388-94, at 445-78. The scope of this note precludes discussion of the continuous representation rule and concealment rule which apply to legal malpractice generally, but have infrequent application to legal malpractice involving the drafting of a will. *See* R. MALLEN & V. LEVIT, *supra* note 3, §§ 391-92 at 458-68. Note also that some writers recognize only two theories—i.e., the occurrence rule and the damage rule—by classifying any other theory as merely an exception to these rules. *See e.g.*, MacGill, *Shideler v. Dwyer: The Beginning of Protective Legal Malpractice Actions*, 14 IND. L. REV. 927 (1981) [hereinafter cited as MacGill].

75. *See infra* notes 83-90 and accompanying text.

76. *See supra* note 2 for applicable statute.

77. According to the hypothetical, Jones died on March 3, 1981. This is approximately two years and two months from the drafting of the will on January 25, 1979.

78. *See infra* notes 92-102 and accompanying text.

79. *Shideler*, ____ Ind. ____, 417 N.E.2d 281 (1981).

80. This is two years from Jones' death on March 3, 1981.

81. According to the hypothetical, the probate court issued its decision on April 13, 1983, which is two years and one month after Jones' death.

82. *See infra* notes 136-140 and accompanying text.

tion weigh in favor of the adoption of the discovery rule for accruing statutes of limitations.

The Occurrence Rule

The occurrence rule has its roots in ordinary negligence actions[83] and has proven to be poor precedent for legal malpractice applications.[84] In an occurrence rule jurisdiction the statute of limitations begins to run at the time of the negligent act.[85] Therefore, delay in either manifestation of damage or discovery by the client is not considered in the determination of when the statute accrues.[86] In an ordinary negligence setting such as products liability, the rule works well[87] because the negligence causes immediate and identifiable injuries to the victim.[88] However, in legal malpractice situations, this is rarely the case. The attorney often sets forces into motion which do not manifest themselves as damage until some future point and are not discoverable by the client for an even longer time.[89]

For example, the facts of the introductory hypothetical demonstrate how an attorney's negligence may remain undetected for years. The omission of the devise to Baker remained undetected until a fortuitous reading of a local newspaper brought the facts to the injured party's attention. Under the occurrence rule, however, Baker's claim for legal malpractice would have expired prior to Jones' death, that is, before the will even became operative.[90] Because of the unfavorable result in situations such as this, almost all jurisdictions have abandoned the occurrence rule in favor of the more modern approaches—the damage rule and the discovery rule.[91]

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83. R. MALLEN & V. LEVIT, *supra* note 3, § 389, at 446.

84. *Id.*

85. *See, e.g.*, South Burlington School District v. Goodrich, 135 Vt. 601, ____, 382 A.2d 220, 222 (1977), which held that an action against an architect for faulty design and construction of a roof was barred by the statute of limitations that accrued at the occurrence of the negligent act (here the later of the two acts was construction of the roof which became the relevant point for accrual).

86. R. MALLEN & V. LEVIT, *supra* note 3, § 389, at 449.

87. *Id.* at 450.

88. *Id.*

89. *Id.*

90. The absurdity of this application of the rule is self-evident. No claim may be brought against an attorney for legal malpractice until the instrument is operative because until then it is subject to change by the testator. Unfortunately under the assumed facts the statute bars the claim prior to the testator's death which marks the time the will becomes operative.

91. R. MALLEN & V. LEVIT, *supra* note 3, § 389, at 451.

The Damage Rule

Growing dissatisfaction with the inflexibility of the occurrence rule led many jurisdictions to adopt the damage rule for accrual of statutes of limitations in legal malpractice situations.[92] One such jurisdiction is Indiana.[93] The damage rule states that the statute of limitations accrues when the cause of action accrues, which occurs when an injury to a person manifests itself as *damage* to that person.[94] Damage is defined as an "ascertainable loss"[95] to the plaintiff and must be shown to be proximately caused by the defendant breaching a duty.[96] It was not until 1967, however, that this basic concept was applied by a court in the legal malpractice context.[97]

The initial use of the damage rule produced an equitable result by renouncing the occurrence rule for legal malpractice.[98] The first application of the damage rule in a legal malpractice setting occurred in *Fort Myers Seafood Packers, Inc. v. Steptoe & Johnson.*[99] That case involved an attorney who gave inaccurate advice regarding the need for certification of his client's boats for fishing in Venezuelan waters. Consequently, when the boats went to Venezuela to fish, they were impounded by that government.[100] The issue in the case was whether the statute of limitations accrued on the date the attorney gave the incorrect advice or the date the client's boats were impounded.[101] The court held that no damage occurred from the attorney's negligent advice until the boats were impounded, thus the plaintiff's claim was brought within the statute of limitations period.[102] Here the applica-

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92. *Id.*

93. Anderson v. Anderson, ___ Ind. App. ___, ___, 399 N.E.2d 391, 402 (1979); Montgomery v. Crum, 199 Ind. 660, 161 N.E. 251, (1928).

94. Merritt v. Economy Department Store, 125 Ind. App. 560, 564, 128 N.E.2d 279, 280-81 (1955); Essex Wire Corp. v. M.H. Hilt Co., Inc., 263 F.2d 599 (7th Cir. 1959).

95. *Anderson*, ___ Ind. App. ___, 399 N.E.2d at 402.

96. *See supra* notes 4-14 and accompanying text.

97. Fort Myers Seafood Packers, Inc. v. Steptoe and Johnson, 381 F.2d 261 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 946 (1968).

98. *Id.* at 262.

99. 381 F.2d 261 (D.C. Cir. 1967) *cert. denied*, 390 U.S. 946 (1968). Though this case was not cited in *Shideler*, the rationale of the case nevertheless was followed. Thus, the case is important for being the first case to apply the damage rule to legal malpractice. *See* R. MALLEN & V. LEVIT, *supra* note 3, § 390, at 453.

100. *Fort Myers Seafood*, 381 F.2d at 262.

101. *Id.* Note that accrual of the statute at the date of negligent advice represents the occurrence rule method. *See supra* notes 83-91 and accompanying text.

102. *Fort Myers Seafood*, 381 F.2d at 262. In this case a three-year statute of limitations was applicable. D.C. CODE ANN § 12-301 (1966). If the statute had begun to

tion of the damage rule produced a favorable result, but the question remains whether the rule represents the most equitable rule in all legal malpractice cases.

In those jurisdictions which use the damage rule as their sole benchmark for accrual, plaintiffs can experience a variety of inequities in the legal malpractice setting.[103] The main problem in many of these cases is ascertaining the date of damage.[104] This is particularly problematic in the context of invalid wills because the date of damage is either the testator's death[105] or the final determination of the will's invalidity[106] depending on where the will is probated. The Kansas and Indiana interpretations illustrate these differing views.

The Kansas Interpretation

The Kansas Supreme Court holds that the statute of limitations barring a beneficiary's legal malpractice claim is tolled during the pendency of proceedings on the validity of the will.[107] Regarding the damage requirement, the Kansas court in *Price v. Holmes*[108] maintained that no cause of action accrued until the will was declared invalid, therefore the statute of limitations did not begin to run until that point.[109] To achieve this conclusion the court analogized to a case involving the negligent installation of a pipe which eventually led to an explosion.[110] In that case no cause of action accrued until two years after the installation when the explosion caused damage.[111] The court reasoned that the contest of the will was analogous to the negligent installation of the pipe since both actions set forces in motion which ultimately led to damage.[112] If the contest of the will had been unsuccessful, the beneficiary would not have lost the legacy and there would be no damage to claim.[113] Therefore, the contest of the will did not

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run at the date the negligent advise was given, the claim would have been barred. *Fort Myers Seafood*, 381 F.2d at 262.

103. R. MALLEN & V. LEVIT, *supra* note 3 § 380, at 426-27.

104. *See* Price v. Holmes, 198 Kan. 100, 422 P.2d 976 (1967). *But cf., Shideler*, ___ Ind. at ___, 417 N.E.2d at 288-89 (Indiana explicitly rejected the Kansas Court analysis in *Price*).

105. *Shideler*, ___ Ind. ___, 417 N.E.2d 281.

106. *Price*, 198 Kan. 100, 422 P.2d 976.

107. *Id.*

108. *Id.*

109. *Id.* at ___, 422 P.2d at 980-81.

110. *Id.* at ___, 422 P.2d at 980.

111. *Id.* at ___, 422 P.2d at 981.

112. *Id.*

113. *Id.* Prior to the Kansas Supreme Court ruling, the will had been held valid by both lower courts. *Id.* at ___, 422 P.2d at 980.

cause damage to the beneficiaries until it ultimately became successful.[114] This approach to the damage rule was not well accepted in Indiana.

The Indiana Interpretation

The Indiana Supreme Court renounced the *Price* decision by holding that damage occurs at the testator's death.[115] The Indiana case of *Shideler v. Dwyer*[116] involved a provision in a will which was declared void.[117] The *Shideler* court analogized the situation to a case involving a bridge collapse in order to facilitate criticism of the Kansas approach.[118] In the analogy a bridge was built in 1871 and collapsed in 1884 causing injury to the user.[119] In that case the court held that the statute of limitations did not commence to run until the cause of action accrued, i.e. upon collapse of the bridge.[120] The *Shideler* court reasoned that the drafting of the will was similar to the construction of the bridge and that the death of the testator was similar to the collapse of the bridge.[121] The damage occurred to the beneficiaries when the testator died because it was at that point that the will had its dispositive effect and became irremediable.[122]

This holding was subject to a vigorous dissent.[123] The dissenting justices felt that the decision was fatally lacking in reason and equity. Chief Justice Givan reasoned that the analogy was not complete: if a parallel is to be drawn, the construction of the bridge parallels the drafting of the will; the opening of the bridge to traffic parallels the probate of the will; and, the collapse of the bridge parallels the determination of validity by the court.[124] Thus, the only practical time to

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114. *Id.*

115. *Shideler*, ___ Ind. at ___, 417 N.E.2d at 281.

116. *Id.*

117. *Id.*

118. *Id.* at ___, 417 N.E.2d at 289, (*citing*, Bd. of Comm'ns of Wabash County v. Pearson, 120 Ind. 426, 22 N.E. 134 (1889)).

119. *Id.* at ___, 417 N.E.2d at 289.

120. *Id.*

121. *Id.* at ___, 417 N.E.2d at 290.

122. When did damage to Plaintiff result from Defendant's alleged negligence? Not when the Will was drafted or executed, because it had to await the death of Moore [testator] before it could have any dispositive effect. But at his death, the instrument was operative; and, just as the negligent construction of the bridge in *Pearson* [*see supra* note 118] became irremediable with its collapse under Pearson's weight, the wrong, if any, set in motion with the drafting of Moore's Will became irremediable with his death.

Id.

123. *Id.* at ___, 417 N.E.2d at 294.

accrue the damage is at the point that the beneficiary loses his interest by court decision.[125]

Analysis of the Indiana and Kansas Approaches

The Indiana majority analysis is fatally defective for several reasons. First, a will is presumed valid until proven otherwise.[126] Therefore, no ascertainable loss[127] is sustained by the beneficiaries until the court strikes down its provisions. This is precisely what the *Price* court held since prior to review by the Supreme Court of Kansas, the will was upheld by two courts.[128] The beneficiaries under a will which is upheld by a court cannot be said to have incurred an "ascertainable loss." This is self-evident. Damage cannot be incurred until a court determines that some provisions are invalid.[129]

The second defect in the *Shideler* court's analysis is the emphasis placed on irremediability as a determining factor in damage.[130] The fact that the will is irremediable at the testator's death only marks the point in time after which the attorney is unable to correct his error; it says nothing about the manifestation of damage to persons under the will.[131] The court is of the opinion that the only uncertainty existing at the time of the testator's death is the *amount* of damages.[132] But of equal uncertainty at that time is whether or not there will be damage *at all.* The irremediability of the will is of no probative value in determining the date of damage because the court may uphold the will upon probate or contest. If the will is upheld, there will be no damage because the beneficiaries will take under its provisions.

The Indiana interpretation is equally deficient because of the defensive position in which it places beneficiaries. Effectively, the

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124. *Id.* at ____, 417 N.E.2d at 294-95 (Givan, J., dissenting).

125. *Id.* at ____, 417 N.E.2d at 295 (Givan, J., dissenting). The dissenting justices went further, deciding on equity grounds that the discovery rule should be adopted. *Id.*

126. Ind. Code Ann § 29-1-7-20 (Burns 1976). "In any suit to resist probate, or to test the validity of any will after probate . . . the burden of proof shall be on the contestor." *Id.* Indiana does, however, place the burden of due execution and testator capacity upon the proponents of the will. *See* IND. CODE ANN. § 29-1-7-17 (Burns 1976) and accompanying annotated cases. Note, however, that after the prima facie case for validity by execution and capacity has been made, the burden is on the contestants as in most jurisdictions.

127. *Anderson*, ____ Ind. App. at ____, 399 N.E.2d at 391.

128. *Price*, 198 Kan. at ____, 422 P.2d at 981.

129. *Id.* at ____, 422 P.2d at 980.

130. MacGill, *supra* note 74, at 940-41.

131. *Id.*

132. ____ Ind. at ____, 417 N.E.2d at 291.

Shideler decision forces prospective beneficiaries to file protective legal malpractice suits against a drafting attorney prior to probate determination in order to insure their claim in the event the will is declared invalid.[133] The absurdity of this result is that the beneficiaries will in effect argue for the validity of the will while in probate court and simultaneously argue against its validity in order to sustain their malpractice claim.[134] Since the Kansas approach recognizes damage at the determination of the will's invalidity, these protective suits are unnecessary.

The Kansas approach yields an equitable result in most circumstances. However, under the fact situation of the introductory hypothetical the result is unclear. There the negligence of the attorney was omission of a provision from the second will. The Kansas court would be hard pressed to hold that the subsequent court decision rendering the will valid marks the point of damage accrual. Baker's lost legacy was unaffected by the court determination since his provision was entirely omitted from the will. If this is the case, the Indiana decision is more favorable to him. Yet, even under the Indiana approach Baker's claim fails, since the statute of limitations has run by the time he realized he had a claim against the attorney.

The Discovery Rule

In recognition of the inequities resulting from application of the damage rule for statute accrual, many state courts are utilizing the discovery rule to alleviate those inequities.[135] The discovery rule tolls the statute of limitations until the injured party either discovers or

133. MacGill, *supra* note 74 at 927.

134. *Id.*

135. *Shideler*, ___ Ind. at ___, 417 N.E.2d at 297 (Givan, J., dissenting). Those jurisdictions which adopted the discovery rule are as follows: Alaska, Van Home Lodge, Inc. v. White, 627 P.2d 641 (Alaska 1981); Arizona, Yazzie v. Olney, Levy, Kaplan & Tenner, 593 F.2d 100 (9th Cir. 1979); California, Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971); Delaware, Pioneer National Title Insurance Co. v. Sabo, 432 F. Supp. 76 (D. Del. 1977); Florida, Downing v. Vaine, 228 So. 2d 622 (Fla. Dist. Ct. App. 1969); Illinois, Kohler v. Woollen, Brown & Hawkins, 115 Ill. App. 3d 455, 304 N.E.2d 677 (1973); Iowa, Cameron v. Montgomery, 255 N.W.2d 154 (Iowa 1975); Maine, Anderson v. Neal, 428 A.2d 1189 (Me. 1981); Maryland, Mumford v. Staton, Whaley & Price, 254 Md. 697, 255 A.2d 359 (1969); Massachusetts, Hendrickson v. Sears, 365 Mass. 83, 310 N.E.2d 131 (1974); Michigan, Sam v. Balardo, 85 Mich. App. 20, 270 N.W.2d 522 (1978); Nevada, Jewett v. Patt, 95 Nev. 246, 591 P.2d 1151 (1979); New Hampshire, McKee v. Riordan, 116 N.H. 429, 366 A.2d 472 (1976); New Mexico, Jaramillo v. Hood, 93 N.M. 433, 601 P.2d 66 (1979); North Carolina, Troy's Stereo Center, Inc. v. Hodson, 39 N.C. App. 591, 251 S.E.2d 673 (1979); North Dakota, Johnson v. Haugland, 303 N.W.2d 533 (N.D. 1981); Oregon, United States National Bank of Oregon v. Davies, 274 Or. 663, 548 P.2d 966 (1976);

with reasonable diligence should discover his injury.[136] In the situation of a negligently drafted will, the rule has the effect of extending the statute of limitations to a date when the intended beneficiary has an opportunity to discover that he has lost his legacy.[137] California is one state which hesitated to adopt the discovery rule,[138] until a pair of cases allowed it to set forth the rule with precision.[139]

The California Supreme Court brought forth the discovery rule as a means of circumventing the harsh effect of the damage rule[140] upon the unknowing injured party by tolling operation of the statute until he has an opportunity to discover his injury.[141] Justice Tobriner's opinion in *Neel v. Magana, Olney, Levy, Cathcart and Gelfand*[142] noted the extensive legal history in California regarding the traditional rule, but concluded that the time had arrived for the legal profession to become subject to the same standard as other professions.[143] A significant justification for the discovery rule lies in the fact that as the work of the attorney becomes more specialized and complex, the client becomes more unable to comprehend the effectiveness and quality of the attorney's work.[144] Thus, where the burden remains on the client

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South Carolina, Mills v. Killian, 273 S.C. 66, 254 S.E.2d 556 (1979); Tennessee, Woodruff v. Tomlin, 511 F.2d 1019 (6th Cir. 1975); Washington, Peters v. Simmons, 87 Wash. 2d 400, 552 P.2d 1053 (1976); West Virginia, Family Savings & Loan, Inc. v. Ciccerello, 157 W. Va. 983, 207 S.E.2d 157 (1974). Some aberrations of the rule have surfaced also. *See, e.g.*, Lincoln County v. Fidelity & Deposit Co. of Maryland, 102 Idaho 489, 632 P.2d 678 (1981) (court adopted the discovery rule where fraud or mistake is involved); Jepson v. Stubbs, 555 S.W.2d 307 (Mo. 1977) (court distinguished statutory wording "capable of ascertainment" to exclude application of the discovery rule).

136. *Neel*, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837.

137. *Jaramillo*, 93 N.M. 433, ___, 601 P.2d 66, 67 (1979).

138. For a detailed history of California's struggle with the accrual of the statute of limitations for legal malpractice, see Justice Tobriner's majority opinion in *Neel*. 6 Cal. 3d at 183-88, 491 P.2d at 424-27, 98 Cal. Rptr. at 840-44.

139. *Neel* and its companion case, Budd v. Nixen, 6 Cal. 3d 195, 491 P.2d 433, Cal. Rptr. 849 (1971), established the rule in California. For further analysis of California's history concerning the discovery rule see Comment, *Accrual of Statutes of Limitations: California's Discovery Exceptions Swallow the Rule*, 68 CAL. L. REV. 106 (1980); Note, *The Commencement of the Statute of Limitations in Legal Malpractice Actions—The Need for Re-evaluation: Eckert v. Schaal*, 15 U.C.L.A. L. REV. 230 (1967); Note, *Legal Malpractice—Is the Discovery Rule the Final Solution?*, 24 HASTINGS L.J. 795 (1973).

140. Though the court refers to the damage rule as an exception to the traditional occurrence rule, the damage rule was nevertheless the relevant rule in effect for the accrual of the statute of limitations regarding negligently-drafted wills. Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969).

141. *Neel*, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837.

142. *Id.*

143. *Id.* at 179, 491 P.2d at 422, 98 Cal. Rptr. at 838.

144. *Id.* at 187, 491 P.2d at 427-28, 98 Cal. Rptr. at 843-44.

to bring a malpractice suit within a prescribed period after the damage, he must enlist the services of another attorney to review the work of the first attorney to see if any damage has occurred.[145] This is duplicative and costly as well as detrimental to the overall attorney-client relationship.[146] Given the complexity of the attorney's work, it is grossly unfair to expect the injured party to file suit within the statutory period commencing at the date of damage when he has no reasonable means to discover his loss during that period.[147]

The extent to which the discovery rule eliminated other approaches was refined by the California court. The case of *Budd v. Nixen*[148] narrowly interpreted the application of the discovery rule. The fact situation in *Budd* represented the opposite of the *Neel* facts: the plaintiff in *Budd* discovered the malpractice by his attorney prior to manifestation of damage.[149] The plaintiff's discovery was due to a fortuitous change in attorneys prior to trial.[150] Although the second attorney was able to inform the plaintiff of the error, he was unable to provide him with a remedy.[151] The court held that the statute of limitations did not begin to run until damage occurred even though the injured party had discovered the negligence of the first attorney prior to any manifestation of damage.[152] The practical effect of this holding is to apply the damage rule simultaneously with the discovery rule: the statute of limitations begins to run at the point of damage or discovery, whichever occurs later.[153]

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145. *Id.* at 188, 491 P.2d at 428, 98 Cal. Rptr. at 844. The problems affecting the testator of the will as client ultimately affect the beneficiary of the will also, because the beneficiary loses if there is negligence in the drafting; also, the beneficiary often has contact with the attorney if acting as attorney for the estate. *Heyer*, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969).

146. *Neel*, 6 Cal. 3d at 188, 491 P.2d at 428, 98 Cal. Rptr. at 844.

147. Legal malpractice, however is not ordinary negligence. Frequently, the client did not know and usually *could not have known* he had a cause of action because of his attorney's negligence. Unlike plaintiffs in an ordinary negligence action . . . the client usually lacks the special skills and knowledge necessary to recognize the difference between competence and negligence. [emphasis in original]

R. MALLEN & V. LEVIT, *supra* note 3, § 380, at 426-27.

148. 6 Cal. 3d at 195, 491 P.2d at 433, 98 Cal. Rptr. at 849.

149. *Id.* at 198, 491 P.2d at 435, 98 Cal. Rptr. at 851.

150. *Id.*

151. *Id.*

152. *Id.* at 201, 491 P.2d at 436-37, 98 Cal. Rptr. at 852-53.

153. R. MALLEN & V. LEVIT, *supra* note 3, § 393, at 471. Some writers have thus called the discovery rule merely an exception to the damage rule. *See* MacGill, *supra* note 74, at 943.

The holdings of *Neel* and *Budd* greatly enhance the chances of an injured party obtaining redress against the negligent attorney. Where damage has occurred, the statute of limitations is prevented from running until the injured party discovers or should discover his injury.[154] In many instances such as the introductory hypothetical, claims are allowed which would otherwise be barred by the statute of limitations' accrual at the point of damage.[155] Under the damage rule Baker's claim expired before he knew of its existence, since more than two years elapsed between Jones' death and Baker's discovery of an intended devise.[156] Even under the Kansas approach Baker receives no redress,[157] since no court determination was contrary to the submitted will, there is no damage upon probate decision. Thus, only application of the discovery rule will save Baker's claim from summary dismissal.

The discovery rule also better maintains the legal profession's integrity because the injured party is not forced into additional protective measures. One example previously mentioned as a safeguard under the damage rule was checking the attorney's work with another attorney. The discovery rule eliminates this need by giving the injured party the opportunity to discover his injury on his own before allowing the statute to run. The need for protective legal malpractice actions is eliminated as well since the injured party can wait to see the outcome of the probate court before filing his action. Indeed, if their provision is upheld they will not have a cause of action.[158] If it is struck down, the time spent in probate will not be held against them, but they will now be deemed to have discovered their cause of action.[159] The inherent fairness of the rule has led to its growing acceptance, but the rule is not beyond criticism.

The main criticism of the discovery rule concerns its potentially unlimited time extension for attorneys' liability, thus negating the purpose behind the statute of limitations.[160] While this criticism may be valid, the discovery rule is justifiable on other grounds. What the court must do is balance the interests involved.[161] The interests on the side of the attorney are essentially evidentiary and reposeful in

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154. *See supra* note 136-37 and accompanying text.

155. *See* 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 832. *See also supra* text accompanying note 140.

156. *See supra* note 112 and accompanying text.

157. *See supra* text accompanying notes 132-34.

158. *See supra* notes 108-09 and accompanying text.

159. *See generally* Comment, *supra* note 140.

160. *Id.*

161. *See supra* notes 71-73 and accompanying text.

nature.[162] Attorneys cannot be expected to save records forever and they do deserve to be free from the consequences of their mistakes after passage of time.[163] However, these interests pale in light of the need for redress of a lost legacy by an intended beneficiary. The evidentiary interest is usually fulfilled by the presence of the will—the negligence of the attorney is often evident on its face. The need for a time of repose by the attorney is outweighed by the need for a time of discovery by the losing legatee. Certainly, the additional time involved is better allowed as a time of discovery of loss than as a time for peace of mind. Examined from these perspectives, the question becomes simply who should bear the cost of the lost legacy? It must clearly be borne by the negligent attorney, provided there are limits on the period of liability. The discovery rule is self-limiting by invoking elements of reasonableness at two stages of its application.[164]

The objective standard of reasonableness appears in the discovery rule by the use of the words *discovers* or *should discover* to limit the operation of the rule.[165] First, this gives the attorney additional security by providing him an affirmative defense of failure by the plaintiff to exercise reasonable diligence to discover his claim.[166] If this were found to be true, the question of when reasonable diligence would have rendered discovery is an issue for jury decision. Second, the court can impose the burden of justifying non-discovery on the plaintiff. In so doing, the court will relieve much of the burden on the profession while still permitting the court to allow the justifiably ignorant beneficiaries a means of redressing their losses. The combination of these two aspects gives the courts an element of reasonableness which affords the most equity for parties involved in the negligent drafting of a will.

CONCLUSION

Presently, the Indiana courts afford beneficiaries of a will little protection against negligence by drafting attorneys. The courts must recognize a duty of reasonable care on the part of drafting attorneys in order to give the beneficiaries this necessary protection. Once this

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162. *See supra* note 73 and accompanying text.

163. *See* Comment, *supra* note 140, at 116-18.

164. *See generally* Smith v. Knight, 598 S.W.2d 720 (Tex. Civ. App. 1980) (plaintiff has burden of pleading and proving facts explaining the lack of discovery); Valerio v. Boise Cascade Corp., 80 F.R.D. 626 (N.D. Cal. 1978) (necessary pleading of circumstances justifying point of discovery).

165. *See supra* note 165.

166. *Id.*

duty is established, the courts must press further to balance the equities in deciding when statutes of limitations begin to run. Often the equities will balance in favor of the innocent beneficiary. When this is the case, the Indiana courts must accept the responsibility of recognizing the justification for delay. The utilization of the discovery rule with its judicially narrowed self-limitations for reasonableness is the most favorable choice for deciding the accrual point of statutes of limitations in legal malpractice actions by intended beneficiaries of a negligently drafted will.

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