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Accountants and the Common Law: Liability to Third Parties

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ACCOUNTANTS AND THE COMMON LAW: LIABILITY TO THIRD PARTIES

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[An accountant] is a watch-dog but not a blood hound.

In re Kingston Cotton Mill Co. [1896] 2 Ch. Div. 279, 288.

I. Introduction

The consumer movement has given new impetus to the assault on the citadel of privity which had long protected the professions, particularly accounting.[1] Long secure from liability for negligence to non-client third parties, the accounting profession is becoming more anxious and concerned as this traditional protection crumbles.

The question of accountants' third party liability is a difficult one, since accounting services often benefit the public as well as a particular client. Present limitations upon the liability of the accountant to non-client third parties are derived from two general sources: the securities laws and common law. The securities laws are playing an increasing role in defining the scope and nature of accountants' legal duties and liabilities.[2] However, while the influence of the securities laws is inescapable, the focus of this article will be to trace the development of the common law liability of accountants to third parties not in privity of contract with them.

Common law liability has developed along two lines: (1) fraud and deceit, and (2) negligence. The cornerstone for the development of both branches in America was the landmark decision by the New York Court of Appeals in *Ultramares Corporation v. Touche.*[3] Although the decision still reflects the majority view, its rationale faces serious challenge today.

In tracing the development of the common law liability of accountants to non-client third parties, this article will critically examine the underlying policy of *Ultramares* and will discuss the probable future course of accountants' third party liability.

II. Historical Development of the Accountant's Role

Three important historical events and trends have contributed significantly to the development of the professional responsibility of the accountant in the

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1 "Professions once seemingly inviolate from litigation are no longer sacrosanct. The age-old axiom that physicians bury their mistakes, while attorneys and accountants file theirs away, has little relevance in modern-day America." Eizenstat & Speer, *Accountants' Professional Liability: Expanding Exposure,* 22 FED. INS. COUNSEL Q. 7 (1972).

2 *See, e.g.,* Ernst & Ernst v. Hochfelder, 96 S. Ct. 1375 (1976).

3 255 N.Y. 170, 174 N.E. 441 (1931).

American economic and business system.[4] These are: (1) the beginning of the modern capitalistic system at the turn of the twentieth century; (2) the enactment of federal securities legislation intended to implement a policy of full disclosure; and (3) the rise of public ownership of the American corporation. During each of these stages, new duties and responsibilities were imposed on the accountant which, in many respects, were not matched by a concomitant increase in legal liability.

Initially, business entities were either owned by an individual or by a small number of people and had little need for outside capital. Since the owner was both manager and investor, the accountant had only to provide an adequate report to guide the owner's decision-making. He performed a bookkeeping function. However, as the modern corporation began to emerge, the need for outside capital investment increased. "Accountants now had a consumer for their reports beyond their direct client. Further, the new consumer was likely not to be so well informed nor so sophisticated on the financial matters being reported on as was the direct client."[5]

As ownership of the corporation began to diversify, lenders and investors became more dependent upon management reports prepared by the accountant. Yet the report was still primarily considered a tool for the management, although it was being used to obtain credit and entice investors.

The stock market crash of 1929 evoked severe criticism of existing accounting practices. These practices contributed in part to the passage of the federal securities laws in 1933 and 1934. Accountants were given central responsibility in the task of implementing the mandate of the securities laws—full disclosure of corporate affairs to the public.

> Congress chose to protect the public by requiring full disclosure of relevant information in the issue of securities rather than the passage on the quality of the security. The main thrust of the federal legislation was expressed by its sponsors as being to "place the owners of securities on a parity, so far as possible, with the management of the corporations, and to place the buyer on the same plane so far as available information is concerned, with the seller."[6]

The accountant thus assumed a duty to the public investor as well as to the management of a corporation.

The growth of large public investment and diversification of corporate ownership marked the latest significant development of the accounting profession. The new small public investor, however, did not possess financial sophistication and could not be expected to develop it. The full disclosure policy of the securities law thus was intended to benefit the buying public which relied on accounting reports to guide its investment decision making. Accountants' reports therefore

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4 Causey, *Duties and Liabilities of the CPA,* in EVOLUTION OF AUDIT RESPONSIBILITY 11-27 (1973).

5 Wyatt, *Auditors' Responsibilities,* 12 ST. LOUIS U.L.J. 331, 333 (1968).

6 Marinelli, Jr., *The Expanding Scope of Accountants' Liability to Third Parties,* 23 CASE W. RES. L. REV. 113, 126-27 (1971).

began to be used not only by management and the foreseen investor or lender, but also by unknown third party investors.[7]

The central premise of the traditional common law liability as defined in *Ultramares*—that the accountants' report is primarily for the benefit of the management—has been increasingly challenged with the growth of public ownership of stock and the rise of the consumer movement. However, the primary obstacle to increasing accountants' liability has been the strong policy against allowing recovery by third parties not in privity for economic losses which are not accompanied by physical injury and harm.

III. The Privity Doctrine of Contracts

The privity doctrine, the major hurdle against establishing liability to third parties, was established in 1842 by a leading English case, *Winterbottom v. Wright*.[8] There the court denied recovery to a passenger on a stagecoach who was injured when a defectively manufactured part caused the coach to overturn.

> There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operations of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.[9]

Although this case dealt only with a plaintiff's ability to bring an action on the contract, the language may be interpreted to preclude any suit, even in tort, for negligent performance of a contract which results in the injury of a third party not in privity.

Even as the privity doctrine was becoming firmly entrenched, a basis for its abrogation was established in *Thomas v. Winchester*.[10] There the court held that the vendor was liable to a third party injured by the negligent mislabeling of a toxic drug. Liability was based on the policy that the negligence placed a human life in imminent danger and thus privity of contract should not be a bar to a suit.

A major break from the privity doctrine in the area of manufacturer's product liability occurred in *MacPherson v. Buick Motor Co.*[11] Judge Cardozo in this decision repudiated the privity doctrine when the negligence of the manufacturer resulted in physical harm either to the person or to the property of a third party.

> If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature

7 "The responsibility of a public accountant is not only to the client who pays this fee, but also to investors, creditors and others who *may* rely on the financial statements which he certifies." Touche, Niven, Bailey & Smart, 37 SEC 629, 670 (1957) (emphasis added).
8 [1842] 10 M. & W. 109, 152 Eng. Rep. 402.
9 *Id.* at 405.
10 6 N.Y. 397, 58 Am. Dec. 455 (1852).
11 217 N.Y. 382, 111 N.E. 1050 (1916).

> gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.
> . . . We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.[12]

Inroads into the privity doctrine generally centered on injuries to third parties resulting in tangible physical harm to person or to property. Mere economic loss was not considered sufficient to require the rejection of the privity doctrine. In a leading English case, *Derry v. Peck,*[13] the court held that there was no liability to a third party not in privity for negligent misrepresentation which results only in a pecuniary loss. However, the court also pointed out that lack of privity was not a valid defense to a claim of fraud, and that in order to maintain an action for deceit an intentional misrepresentation had to be proved. Also, a false statement made negligently and carelessly, without a reasonable belief in it, could be evidence of fraud. Lord Hershell summarized as follows:

> First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, carelessly whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false. Thirdly, if fraud be proved, the motive of the person guilty is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.[14]

The first imposition of liability to a third party not in privity, where only intangible economic interests were involved, was in *Glanzer v. Shepard.*[15] The court held a public weigher, contracted by the seller, liable to a buyer who overpaid when the weights were negligently overstated.

> We think the law imposes a duty toward buyer as well as seller in the situation here disclosed. 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 . . . The defendants held themselves out to the public as skilled and careful in their calling. They knew that beans had been sold, and that on the faith of their certificate payment would be made. They sent a copy to the plaintiffs for the very purpose of inducing action . . . In such circumstances, assumption of the task of weighing was the assumption of the duty

12 *Id.* at 385, 111 N.E. at 1053.
13 [1889] 14 App. Cas. 337.
14 *Id.* at 374.
15 233 N.Y. 236, 135 N.E. 275 (1922).

> 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 contract or of privity. Growing out of a contract, it has nonetheless an origin not exclusively contractual. Given the contract and the relation, the duty is imposed by law. *Cf. MacPherson v. Buick Motor Co.*[16]

Prior to the landmark decision on accountants' liability in *Ultramares,* common law liability to third parties was limited. Privity of contract was neither a defense to an action for deceit or fraud,[17] nor a defense when the negligence caused tangible physical harm to person or to property.[18] When the third party was the primary beneficiary of the transaction,[19] or the contract was a third party beneficiary contract,[20] privity of contract was not a defense even though only intangible economic interest was involved. Upon this precedent, the decision which still forms the majority view on accountants' liability to non-client third parties both for fraud and negligence was decided.

IV. The Cornerstone of Accountants' Liability: *Ultramares Corp. v. Touche*[21]

Ultramares still stands as the landmark case in defining the scope of accountants' liability to third parties under the common law. Even cases which have begun to question the underlying rationale of that decision have avoided overturning it. Instead, they usually distinguish it by relying on *Glanzer v. Shepard.*[22]

In *Ultramares,* the defendants were a firm of certified public accountants which had audited the financial books of Fred Stern & Co., Inc. The accountants provided the company with thirty-two copies of the certified balance sheet. The firm had no knowledge of any actual future creditors, but knew in a general way that the certified copies would be exhibited to banks and other creditors in order to obtain future loans. The balance sheet exhibited a net worth of $1,010,000, while in fact the corporation was insolvent due to the overevaluation of the assets through the use of fictitious and non-existent accounts receivable. The plaintiff, a factor, having lent money to the company in reliance upon the certified balance sheet, brought suit against the accounting firm after the company filed for bankruptcy. The original complaint alleged only negligence, but a second count for fraud was added at trial.

The trial court dismissed the fraud count and, on behalf of the defendants, granted a motion for judgment notwithstanding the verdict on the negligence count. The appellate division affirmed the fraud count dismissal, but reinstated the jury verdict on the negligence count. The court of appeals, speaking through Chief Judge Cardozo, reversed the appellate division. The court upheld the trial court's granting of the judgment notwithstanding the verdict on the negligence count, but reversed the fraud count dismissal and remanded it for a new trial.

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16 *Id.* at 238-39, 135 N.E. at 275-76.
17 *See* note 13, *supra* and accompanying text.
18 *See* note 11, *supra* and accompanying text.
19 *See* note 15, *supra* and accompanying text.
20 Lawrence v. Fox, 20 N.Y. 268 (1859).
21 255 N.Y. 170, 174 N.E. 441 (1931).
22 233 N.Y. 236, 135 N.E. 275 (1922).

The court of appeals perceived the role of the accountant in a narrow sense. Although classified as public accountants, they "are public only in the sense that their services are offered to anyone who chooses to employ them."[23] The court admitted that negligent performance of accounting services had been adequately shown, but held that it was a policy determination as to whether the accountants owed a duty to the plaintiff:

> To creditors and investors to whom the employer exhibited the certificate, the defendants owed a like duty to make it without fraud, since there was notice in the circumstances of its making that the employer did not intend to keep it to himself.
>
> . . . A different question develops when we ask whether they owed a duty to these to make it 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. 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 duty that exposes to these consequences.[24]

The holding in *Glanzer* was recognized, but the court carefully distinguished it.

> Here was something more than the rendition of a service in expectation that the one who ordered the certificate would use it thereafter in the operations of his business as occasion might require. Here was a case where the transmission of the certificate to another was not merely one possibility among many, but the "end and aim of the transaction. . . ."
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> . . . In a word, the service rendered by 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 promisee. In the case at hand, the service was primarily for the benefit of the Stern Company . . . and only incidentally or collaterally for the use of those to whom Stern and his associates might exhibit it thereafter.[25]

The distinction made between *Glanzer* and *Ultramares* is highly artificial. The client directly and financially benefits from the use of the certificates when creditors and investors rely on them, much as the seller benefits from the use of the public weigher's certificate in determining the price of the goods. Often a creditor requires the financial report of the corporation before deciding to provide any loans, so that a report prepared for the corporation is almost assuredly to be used and relied upon by future creditors. Also, as in *Glanzer*, the harm which befell the plaintiff was a reasonably foreseeable risk, which the accounting firm could be expected to have foreseen would be the result of a negligently prepared report.

The main reason for creating the distinction seemed to rest on a policy determination that all the imposed or assumed risk in a profession should be reasonably calculated. Unlike *Glanzer*, where only one identified party was in-

23 255 N.Y. at 176, 174 N.E. at 448.
24 *Id.* at 179-80, 174 N.E. at 444.
25 *Id.* at 182-83, 174 N.E. at 445-46.

volved, *Ultramares* involved the danger of limitless liability to foreseen but unidentified parties. The court perceived this danger as too great a burden with which to shackle the accounting profession.

In distinguishing *Glanzer,* the court left open the possibility of liability for accountants to an identified third party who is the end and aim of the transaction. The subsequent development of the policy of *Ultramares* has ignored this distinction; instead, accountants have been virtually immune from liability for negligence to a third party not in privity. Only as recent cases begin to question the rationale of *Ultramares* has this distinction been revitalized and used as the basis for holding accountants liable without directly overruling *Ultramares.*

While *Ultramares* is primarily recognized for defining the scope of accountants' liability for negligence to third parties, it also defined the scope of their liability for fraud to third parties:

> Our holding does not emancipate accountants from the consequences of fraud. It does not relieve them if their audit has been so negligent as to justify a finding that they had no genuine belief in its adequacy, for this again is fraud. . . . The defendants certified as a fact, true to their own knowledge, that the balance sheet was in accordance with the books of account. If their statement was false, they are not to be exonerated because they believed it to be true. . . . In this connection we are to bear in mind the principle already stated that in the course of this opinion that negligence or blindness, even when not equivalent to fraud, is nonetheless evidence to sustain an inference of fraud. At least this is so if the negligence is gross.[26]

The court in effect adopted the standard for fraudulent misrepresentation established in *Derry v. Peck.*[27] A plaintiff could recover for fraudulent misrepresentation regardless of either the lack of intent of the defendant to induce reliance on the misrepresentation or the lack of privity even when only an economic loss was involved. Liability for deceit was extended to any member of an indeterminable class whose reliance on the accountant's report was reasonably foreseeable. The reason for the different standard for an intentional and a negligent wrongdoer, when only economic loss was involved, was the strong policy that an innocent party should not suffer at the hands of an intentional wrongdoer.

The more lenient standard of proof for deceit—not requiring an intention to induce reliance—was necessary in order to provide some remedy to the injured party. Under the negligence standard, the plaintiff could recover only if it was the primary beneficiary of the transaction.

Ultramares also concluded that the accountant's report was only collaterally for use of others. Thus the proof necessary to prove either fraud or negligence would be similar. The court refused to expand the duty of the accountant for negligence because "[t]he extention, if made, [would] so expand the field of liability for [negligence] as to make it nearly, if not quite, coterminous with that of liability for fraud."[28] Maintaining a rigid standard of proof for fraud would make it coterminous with negligence and effectively exclude any chance of re-

26 *Id.* at 189, 174 N.E. at 448-49.
27 [1889] 14 App. Cas. 337.
28 255 N.Y. at 176, 174 N.E. at 447.

covery for the injured plaintiff, even though privity of contract is not a valid defense in a fraud case. Thus, to provide the basis for a claim by a third party injured as a result of an accountant's negligence, an action for deceit could be maintained which would not require proof of intent to induce reliance by the third party.

In summary, *Ultramares* held: (1) an accountant would be liable to a third party not in privity for negligence if the party was actually foreseen and was the end and aim of the transaction; (2) an accountant would be liable to a third party not in privity for deceit and fraudulent misrepresentation, without proof of intent to induce reliance, if the reliance was reasonably foreseeable; and (3) gross negligence which is not equivalent to fraud would nonetheless be evidence to sustain an inference of fraud.

V. Case Development of Liability for Fraud

The first case to interpret *Ultramares* was *O'Connor v. Ludlam,*[29] decided by the Second Circuit. The court ignored the third party as a primary beneficiary distinction drawn by Cardozo in *Ultramares.*

> Since there was no contractual relationship between the plaintiffs and the defendants liability could be imposed only for fraud, a mistake in the balance sheet, even if it were the result of negligence could not be the basis of a recovery. *Ultramares Corp. v. Touche.*[30]

The court also stated some guidelines for finding fraud and holding the accountant liable to the third party on that basis:

> Fraud may be established by showing a false representation has been made either knowingly, or without belief in its truth, or in reckless disregard of whether it be true or false . . . If they did have that honest belief, whether reasonably or unreasonably, they are not liable. If they did not have an honest belief in the truth, of their statements, they are liable . . . Further, if the audit made was so superficial as to be only a pretended audit and not a real audit, then the element of knowledge of falsity of their representation is present, and they may be held liable.[31]

In *State Street Trust Co. v. Ernst,*[32] the New York Court of Appeals addressed the issue of what degree of negligence may constitute an inference of fraud to support a finding of liability against the accountants. The court held that gross negligence was sufficient to support a finding of fraud. Unlike *Ultramares,* where the accountants had failed to check the fictitious accounts receivable, here the accountants had failed to recognize the obvious overstating of the accounts receivable due to the large amount of uncollectable accounts. The court held that if this error in judgment was proven by the plaintiffs, then the accountants would be liable for fraud.

29 92 F.2d 50 (2d Cir. 1937).
30 *Id.* at 54.
31 *Id.* at 54-55.
32 278 N.Y. 104, 15 N.E.2d 416 (1938).

> Accountants, however, may be liable to third parties even where there is lacking deliberate or actual fraud. A representation certified as true to the knowledge of the accountants where knowledge there is none, a reckless misstatement, or an opinion based on grounds so flimsy as to lead to the conclusion that there was no genuine belief in its truth are all sufficient upon which to base liability. A refusal to see the obvious, a failure to investigate the doubtful, if sufficiently gross, may furnish evidence leading to an inference of fraud so as to impose liability for those losses suffered by those who rely on the balance sheet.[33]

While expanding liability for fraud to gross negligence, which could include errors of judgment, the court further emasculated the primary beneficiary rule of *Ultramares:* "[I]n the absence of contractual relationship . . . accountants can not be held liable for ordinary negligence in preparing a certified balance sheet even though they are *aware* that the balance sheet will be used to obtain credit."[34]

While *State Street Trust* further closed the door on holding accountants liable for negligence, it did raise the possibility that some type of judgment errors, when sufficiently gross, could tender the accountant liable for fraud. The line between ordinary and gross negligence becomes the difference between finding the accountant liable or not. This line cannot be clearly and finely drawn; thus only after the effects of an act are developed by subsequent events can it be determined whether or not the act was grossly negligent in order to find liability. After *State Street Trust* the standard of fraud no longer depended on the scope of duty owed to the third party, but rather on the standard of gross negligence.

Duro Sportswear, Inc. v. Cogen[35] expanded the rationale of *State Street Trust* to make gross negligence a separate cause of action in itself, rather than merely an inference of fraud. "In order for Schwartz to recover damages, it would be necessary for the Court to find that Cogen was guilty of gross negligence rather than mere faulty judgment . . . Cogen's heedlessness and wanton disregard of the consequences of his incorrect financial statement takes the place of deliberate intention to defraud."[36]

In this case the plaintiff was clearly the primary beneficiary of the accountant's report, since the accountant was specifically preparing the report for the purpose of determining the purchase price of the company's stock. The court ignored *Glanzer* and held that there was no privity of contract to sustain an action for negligence. Instead the court determined that the accountant was grossly negligent and liable to the plaintiff who was not in privity.

In *C.I.T. Financial Corporation v. Glover,*[37] the Second Circuit exonerated the accountants since the plaintiffs failed to prove that the representations were false or misleading in any material respect. But the decision did approve of jury instructions which appeared to rest on the assumption that gross negligence alone was sufficient to find liability against the accountants. This case represents the

33 *Id.* at 106-07, 15 N.E.2d 418-19.
34 *Id.* at 106, 15 N.E.2d 418.
35 131 N.Y.S.2d 20 (Sup. Ct. 1954).
36 *Id.* at 25.
37 244 F.2d 44 (2d Cir. 1955).

majority view concerning the scope of accountants' liability to third parties for gross negligence. Besides fraud, gross negligence then is itself a sufficient ground to find the accountant liable to the third party. No longer is the accountant assured that a "mere thoughtless slip or blunder" will not result in liability.

A new wrinkle on the action for deceit was presented in *Fischer v. Kletz*.[38] The district court, in denying the accountant's motion to dismiss, implied that accountants may be liable to third parties for deceit by failing to disclose after-acquired information to investors who had previously relied on the certified financial statements which made the original reports misleading or false. Unlike most deceit actions which involve affirmative misrepresentation by the defendants, the theory of liability here was that the accountant's nondisclosure and silence created a misrepresentation, since the after-acquired information made the original statements misleading. The accountants had an affirmative duty to make the disclosures.

> Liability in a case of nondisclosure is based upon the breach of duty imposed by the demands of 'good faith and and common honesty.' *Loewer v. Harris*, 57 F. at 373. The imposition of the duty creates an objective standard against which to measure a defendant's action and leaves no room for an analysis of the subjective consideration inherent in the area of intent . . . [I]t can be persuasively urged that in a nondisclosure case, intent can be sensibly imputed to a defendant who, knowing that plaintiff will rely on his original representation, sits by silently when they turn out to be false.
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> . . . The common law has long required that a person who has made a representation must correct that representation if it becomes false and if he knows people are relying on it. This duty to disclose is imposed regardless of the interest of the defendant in the representation and subsequent nondisclosure.[39]

The court, in imposing a duty of "good faith and common honesty" upon the accountant, treated him as a separate and distinct party to the business transaction of preparing the financial statements for a publicly-owned company. Unlike *Ultramares*, where the subsequent use of the accountant's report was considered to be of collateral importance, the court in *Kletz* held the accountant had an independent and direct responsibility to the investing public which would rely upon financial reports prepared by him. Since the action was a deceit claim, the issue of privity was irrelevant. But the reasoning of the court substantially questioned the underlying rationale of *Ultramares* that lack of privity of contract is a valid defense to a claim for negligence by a party which used the accountant's report collaterally. While this case broadens the scope of accountants' liability to third parties, by imposing a duty to disclose after-acquired information which reveals the falsity of previously made reports, it also offered a starting point for a reexamination of the policy underlying the decision in *Ultramares*.

In summary, the present status of common law liability of an accountant for fraud is that gross negligence is sufficient to hold the accountant liable for

38 266 F. Supp. 180 (S.D.N.Y. 1967).
39 *Id.* at 188.

fraud,[40] and that the failure to disclose after-acquired information which makes the first report false, when it is known that third parties are relying on the original report, can make the accountant liable for fraud.[41]

VI. Case Development of Liability for Negligence

Landell v. Lybrand[42] was the first American case to define the scope of liability of accountants to third parties for negligence. The decision was consistent with traditional common law which denied liability to third parties when only economic loss was involved and no privity was present.

> [T]here was no contractual relation between the plaintiff and defendants, and, if there is any liability from them to him, it must arise out of some breach of duty, for there is no averment that they made the report with intent to deceive him. The averment in the statement of claim is that the defendants were careless and negligent in making their report; but the plaintiff was a stranger to them and to it, and, as no duty rested upon them to him, they can not be guilty of any negligence of which he can complain.[43]

This reflects the same view that was taken in *Ultramares;* unless a duty is owed to the third party to provide a report without negligence, then no liability for negligence will exist. *Glanzer v. Shepard,*[44] a case dealing with public weighers rather than accountants, developed the primary beneficiary rule to allow recovery for economic loss even when privity of contract did not exist. There the court, finding that a duty existed to the third party who was the primary beneficiary of the contract, held that the defendant was liable for negligence.

> We state the defendants' obligation, therefore in terms, not of contract merely, but of duty . . . We may see here, if we please, a phase or extension of the rule in *Lawrence v. Fox.* If we fix our gaze upon that aspect, we shall stress the element of contract, and treat the defendants' promise as embracing the rendition of a service, which, though ordered and paid for by one, was either wholly or in part for the benefit of another . . . The defendants, acting, not casually nor as mere servants, but in the pursuit of an independent calling weighed and certified at the order of one with the very end and aim of shaping the conduct of another. Diligence was owing, not only to him who ordered, but to him also who relied.[45]

Ultramares, as earlier noted,[46] distinguished *Glanzer* and held the accountant had no duty to third parties who relied on the prepared reports when the accountant had only general knowledge of the expected users of the certified balance sheets. *Ultramares* was interpreted subsequently to exempt the accountant almost totally from liability for negligence to third parties.

40 *See* note 35, *supra* and accompanying text.
41 *See* note 38, *supra* and accompanying text.
42 264 Pa. 406, 197 A. 783 (1919).
43 *Id.*
44 233 N.Y. 236, 135 N.E. 275 (1922).
45 *Id.* at 241, 135 N.E. at 277.
46 *See* text accompanying notes 21-28, *supra.*

A. *English Construction*

Two major English cases reflect the development of common law liability for negligence. *Candler v. Crane, Christmas & Co.*,[47] relying on *Ultramares*, held that an accountant could not be liable for negligent misrepresentation to third parties not in privity. The factual pattern of the case was similar to that of *Glanzer;* the defendants had been expressly told that their financial reports would be exhibited to a prospective investor. The court admitted that the action of the defendants had been negligent, but nevertheless held that the defendants owed no duty to the plaintiffs.

The dissent of Lord Denning was the first thorough discussion of the scope of accountants' liability for negligence since *Ultramares*. Lord Denning acknowledged the danger of indeterminate liability that led to the decision in *Ultramares* on the issue of negligence, but concluded that the rule that the accountant owes a duty to no one but his client ignores the reality of the use of the accountant's report in the modern business community. The scope of liability should be defined by the accountant's knowledge of the intended use of the report.

> [Accountants] make reports on which other people—other than their clients—rely [on] in the ordinary course of business . . . [T]hey are, in my opinion, in proper cases, apart from any contract in the matter, under a duty to use reasonable care in the preparation of their accounts and in the making of their reports.
>
> . . . They owe the duty . . . to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts, so as to induce him to invest money or take some other action on them. But I do not think the duty can be extended still further so as to include strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to show their accounts.
>
> . . . [W]here the accountants know all the time, even before they present their accounts, that their employer requires the accounts to show a third person so as to induce him to act on them . . . I am of opinion that the accountants owe a duty of care to the third person.[48]

The standard used by Lord Denning expanded the *Glanzer* primary beneficiary rule to include a limited class of foreseen third parties. "Accountants owe a duty of care . . . to all those whom they know will rely on their accounts in transaction for which those accounts are prepared."[49] Denning's dissent was subsequently adopted by the English House of Lords in *Hedley Byrne & Co. v. Hellner & Partners*.[50]

Hedley Byrne involved a banker's report, rather than an accountant's report, to a third party on the financial responsibility of one of its customers. The language used in the case, however, refers to all persons possessed of a special skill whom third parties rely on, when the professional person knows or could be expected to know of the reliance being placed by the third party on the services

47 [1951] 2 K.B. 164, 1 All E.R. 426.
48 *Id.* at 179-81.
49 *Id.* at 185.
50 [1964] 2 All E.R. 575.

performed.[51] The court rejected the immunity of accountants for liability to third parties for negligence. This decision revitalized *Glanzer's* definition of the scope of accountants' liability to include actually foreseen parties, and helped lead to the subsequent reexamination of *Ultramares* by several American courts.

B. *Reconsideration of* Ultramares

Few American cases until recently have faced the issue of the scope of accountants' liability to third parties for negligence. The cases which have done so have addressed the issue only tangentially while focusing on liability for fraud.[52] Several cases which have reexamined *Ultramares* have reaffirmed the view that an accountant is not liable for negligence to a third party not in privity.[53]

However, decisions may be found which challenge traditional assumptions and ideas concerning the accountant's immunity from liability. *Fischer v. Kletz*[54] recognized the reality of the use of financial reports and held that the accountant is a full participant in a business transaction in which his financial reports are used. This view of the accountant as a full participant in the business transaction departs from *Ultramares,* which treated the subsequent use of a financial report as only collateral to the main transaction between the client and the accountant.

Recognizing the challenge to *Ultramares* presented in *Kletz* and in the English case, *Hedley Byrne,* the District Court of Rhode Island in *Rusch*

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51 The rule enunciated in *Hedley Byrne* would impose on accountants a duty of care owed to persons other than those with whom the accountant is in a contractual or fiduciary relationship. He may be liable for neglect of duty if, but only if, he knows or ought to know what that a financial report, account or statement prepared by him has been prepared for a specific purpose of transaction, will be shown to a particular person or class of persons, and may be relied on by that person or class of persons in that particular connection.

Accountants' Liability to Third Parties — The Hedley Byrne Decision, 120 J. ACCOUNTANCY 66-67 (1965).

52 *See, e.g.,* State Street Trust Co. v. Ernst, 278 N.Y. 104, 15 N.E.2d 416 (1938); Duro Sportswear, Inc. v. Cogen, 131 N.Y.S.2d 20 (Sup. Ct. 1954).

53 The Florida Appellate Court in Investment Corp. v. Buchman, 208 So.2d 291 (Fla. Dist. Ct. App. 1968), relying on *State Street Trust* interpretation of *Ultramares,* held that an accountant was not liable for negligence to a third party, whom the accountant knew was relying on the report. The court acknowledged that public policy argument against granting almost total immunity to the accountants for negligence, but nevertheless decided to adhere to the existing majority view.

The Tenth Circuit in Stephens Indus., Inc. v. Haskins & Sells, 438 F.2d 357 (10th Cir. 1971), interpreted Colorado law as granting immunity to accountants from liability for negligence to third parties not in privity. "[A]s to third parties — even those who the accountant knew or should have known were relying on his audit — liability can be founded only upon fraudulent conduct, and proof of mere negligence will not suffice." *Id.* at 359.

In MacNerland v. Barnes, 129 Ga. App. 367, 199 S.E.2d 564 (1973), the Georgia Appellate Court held that "[t]he general rule is that in the absence of intentional misrepresentation or fraud, an accountant is not liable for negligence to a third party who is not in privity with the accountant." *Id.* at 565. *See* Ultramares Corp. v. Touche, *supra* note 3, at 266. The court acknowledged that increasing attack upon the policy of *Ultramares* by the commentators and a number of judicial decisions, but nevertheless concluded that there was no persuasive argument to justify a shift from the majority rule which adhered to the rationale of *Ultramares.*

The majority view that an accountant will not be held liable to a third party for negligence when privity of contract is absent is a misinterpretation of *Ultramares.* By granting almost absolute immunity to the accountant for negligence, it ignores the primary beneficiary rule announced therein and reaffirmed in *Glanzer,* the nature of the accountant's role in the transaction, and the business reality of the use of financial reports.

54 266 F. Supp. 180 (S.D.N.Y. 1967).

Factors, Inc. v. Levin[55] held that an accountant could be liable for a negligent misrepresentation to a relying third party not in privity. The court, applying Rhode Island law, seriously questioned the continuing wisdom of *Ultramares,* but found it unnecessary to overrule it since it could rely on *Glanzer* to allow recovery.

The court discussed the scope of duty owed to a third party by an accountant. "An accountant should be liable in negligence for careless financial misrepresentations relied upon by actually foreseen and limited class of persons."[56] The court found that the principle of *Glanzer* had been effectively adopted in the tentative draft of the Restatement (Second) of Torts[57] and that it was applicable to accountants in determining the scope of their liability for negligence.

> The reluctance of the courts to hold the accounting profession to an obligation of care which extends to all reasonably foreseeable reliant parties is predicated upon the social utility rationale first articulated by Judge Cardozo in the *Ultramares* case.
>
> . . . [T]he wisdom of the decision in *Ultramares* has been doubted . . . 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 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.*[58]

The actually foreseen and limited class test announced in this decision is broader than the primary beneficiary rule of *Glanzer. Rusch Factors,* however, did not extend recovery to a third party who was not foreseen. The court "[left] open for reconsideration in light of trial development, the question of whether an accountant's liability for negligent misrepresentation ought to extend to the full limits of foreseeability."[59] The court did respond to the fact that increased

55 284 F. Supp. 85 (D.R.I. 1968).

56 *Id.* at 93.

57 *See* Restatement (Second) of Torts § 552 (Tent. Draft No. 12, 1966).

> (1) One who, in the course of his business, profession or employment, or in a transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transaction, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
> (2) Except as stated in subsection (3), the liability stated in subsection (1) 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, or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

58 284 F. Supp. 90-91.

59 *Id.* at 93.

reliance was being placed on the financial reports by the public such that the need for greater legal responsibility of the accountant for the preparation of its report would become necessary.

Ryan v. Kanne[60] was the first state court decision to follow *Rusch Factors*. The Iowa court found an accountant liable for negligence to a third party not in privity.

> 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.[61]

The court expressly adopted the actually foreseen and member of a limited class of person test enunciated in *Rusch Factors*. Again the factual pattern of the case was analogous to *Glanzer*, so the court was able to avoid a direct repudiation of *Ultramares:*

> It is unnecessary at this time to determine whether the rule of no liability should be relaxed to extend to all foreseeable persons who may rely upon the report, but we do hold it should be relaxed as to those who were actually known to the author as prospective users of the report and take into consideration the end and aim of the transaction. In other words, we believe the position announced in the Restatement proposed draft may be accepted to the extent that it extends the right to recover for negligence to persons for whose benefit and guidance the accountant *knows* the information is intended, especially when the party to be benefitted is identified before the statement or report is submitted by the accountant.[62]

The court, having no need to go beyond the actually foreseen standard since the third party was expressly known, did leave open the possibility of a duty being owed to third parties.

Shatterproof Glass Corporation v. James[63] extended the liability of an accountant beyond an actually foreseen party. The Texas Civil Appeals Court did not limit itself to relying on *Glanzer* to allow recovery; rather the court expressly adopted the Restatement position:

> We find and hold that within the scope defined in Restatement, Second, Torts, Section 552 (Tent. Draft No. 12, 1966), an accountant may be held liable to third parties who rely upon financial statements, audits, etc., prepared by the accountant in cases where the latter fails to exercise ordinary care in the preparation of such statements, audits, etc., and the third party because of such reliance suffers financial loss or damage.[64]

60 170 N.W.2d 395 (Iowa 1969).
61 *Id.* at 401.
62 *Id.* at 403.
63 466 S.W.2d 872 873 (Tex. Civ. App. 1971).
64 *Id.* at 880.

The opinion extended accountant's liability "to all those whom he should reasonably expect to rely on his certification of financial statements."[65] No longer did the court limit the liability to a primary beneficiary as in *Glanzer* or to an actually foreseen class as in *Rusch Factors;* rather liability was extended to include any person reasonably foreseeable who would rely on the report. This greatly increases the number of persons to whom the accountant owes a duty of reasonable care in preparing financial reports. The actual scope of the expansion, however, was not tested in the case, since the plaintiff was actually foreseen by the accountant.

Although no intervening state court decision had passed on the issue, the Fourth Circuit, applying Rhode Island law in *Rhode Island Hospital Trust National Bank v. Swartz, Bresenoff, Yavner & Jacobs,*[66] reaffirmed the holding of *Rusch Factors:*

> "An accountant should be liable in negligence for careless financial misrepresentations relied upon by actually foreseen and limited class of persons." *Rusch Factors, Inc. v. Levin.* 284 F. Supp. 85, 93 (D.R.I. 1968). Since the evidence here is uncontroverted that Accountants not only knew but acknowledged that Bank sought Borrower's financial statements in connection with loans, that is the rule which will be applied.[67]

This case is also significant because of its interpretation of the disclaimer, placed on the certification by the accountants, that they could not express an opinion on the fairness of the financial statement. The court rejected the broad inclusive interpretation of the disclaimer urged by the accountants. However, the court did not establish new standards since it felt the standards adopted by the American Institute of Certified Public Accountants were sufficient to find the disclaimer ineffective to protect the accountant from liability for negligence.[68]

The court concluded that as a matter of law a general disclaimer would be insufficient to exclude the accountant from all liability for negligence in making a financial report to be relied upon by a foreseen party.

The Missouri Court of Appeals in *Aluma Kraft Manufacturing Co. v. Elmer Fox & Co.*[69] presented a coherent discussion of the policy underlying the privity doctrine and of the need for placing greater legal responsibility on accountants in the modern business community. Accountants must bear greater

65 *Id.* at 879.
66 455 F.2d 847 (4th Cir. 1972).
67 *Id.* at 851.
68 Our conclusion with respect to the report and disclosure is reinforced by reference to industry standards of what should have been done in these circumstances. While industry standards may not always be the maximum test of liability, certainly they should be deemed the minimum standard by which liability should be determined. Brief references to American Institute of Certified Public Accountants, Statements on Auditing Procedure No. 33 (1963) are sufficient to prove the point.

Chapter 10 Para. 1 . . . reads . . . "when an overall opinion can not be expressed, the reasons therefor should be stated. . . . Para. 9 reads . . . [w]hen a qualified opinion is intended by the independent auditor, the opinion paragraph . . . should be modified in a way that makes clear the nature of the qualification. It should refer specifically to the subject of the qualification and should give a clear explanation of the reasons for the qualification and of the effect on financial position and results of operation, if reasonably determinable."

455 F.2d at 852 (emphasis deleted).
69 493 S.W.2d 378 (Mo. Ct. App. 1973).

legal responsibility because of the increased public reliance placed on their financial reports. The opinion intepreted recent cases and the Restatement as "extending liability to third parties for whose benefit and guidance the accountant supplies the information, or to such third persons, although not identified, who the accountant knows the recipient of the audits intends to supply such information."[70] The standard which the court felt was necessary to protect the investing public from harm due to the accountant's negligence was the reasonably foreseeable standard previously adopted in *Shatterproof Glass.*

The possibility of unlimited liability is a major argument against extending the accountant's duty to third parties who rely on his reports. *Aluma Kraft,* however, adopted some guidelines in determining whether liability in a particular circumstance would be extended to the third party.

> While not abandoning the doctrine of privity in all circumstances . . . the extension of limits of liability should be done on a case-to-case basis . . . . . . The determination of whether in a specific case the (accountant) will be held liable to a third person not in privity is a matter of policy and involves the balancing of several factors: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to him; (3) the degree of certainty that plaintiff suffered injury; and (4) the closeness of the connection between the (accountant's) conduct and the injury suffered.[71]

Under *Aluma Kraft,* accountants have a duty to use reasonable care in preparing financial reports. This result was based on the greatly increased use of, and reliance upon, accountants' financial reports. The use of financial statements by third parties was deemed not to be a collateral matter, but rather the *raison d'être* of such reports.

> Our rejection of the requirement of the strict rule of privity . . . comports with the concepts of the functions and duties of the modern public accountant, the purpose of a modern audit is consistent with the development of the liability of an accountant under the securities laws and is consistent with the recent development in England where the doctrine of privity was born.[72]

Milliner v. Elmer Fox and Co.[73] also extended liability to a reasonably foreseeable party, and the accountant was not found liable. The court held that a future investor and purchaser of stock was not a reasonably foreseeable party.

> [L]ack of privity is not a defense where an accountant is aware of the fact that his work will be relied on by a party or parties who may extend credit to his client or assume his client's obligation. A future purchaser of shares of stock of a corporation, however, belongs to an unlimited class of equity holders who could not be reasonably foreseen as a third party who would be expected to rely on a financial statement prepared by an accountant for the corporation.[74]

70 *Id.* at 383.
71 *Id.* at 382-83.
72 *Id.* at 383-84.
73 529 P.2d 806 (Utah 1974).
74 *Id.* at 808.

The rationale for the distinction drawn by the court between an investor and a creditor is not made clear, but it seemingly rests on a policy consideration that to include the investor as a reasonably foreseeable party would leave the accountant open to unlimited and indefinite liability. The court believed that other factors in addition to financial reports form the basis for an investor's decision to purchase stock, while a creditor heavily relies on the reports to guide his decision to lend money. The net result of this decision is that a future investor must be actually known before the accountant will owe a duty of reasonable care to him, while a creditor need only be reasonably foreseeable to be owed the same duty.

In summary, the majority view of an accountant's common law liability for negligence is that the accountant owes no duty to a third party not in privity for negligence.[75] Two minority trends are: (1) the accountant owes a duty of reasonable care to an actually foreseen and limited class of third parties;[76] and (2) the accountant owes a duty of reasonable care to all reasonably foreseeable third parties who rely on the report.[77]

VII. Policy Considerations

While legal precedent is helpful in defining the scope of accountants' liability, a policy determination which is responsive to changed conditions must also be made. *Ultramares* rested on a policy determination that an expansion of the accountants' liability would be too burdensome in relationship to the benefits derived.

However, a reexamination of the assumptions and basis for *Ultramares* reveals that the decision is no longer valid, and its result is that accountants today generally do not have legal responsibility for their professional conduct to match their significant role in the modern business community. The accounting profession is not a new and developing profession in need of judicial protection, nor are the standards of the profession in their formative years. Also, ownership of stock is not confined today to a few well-informed investors. Finally, the use of financial reports by third parties who are expected to rely on them is no longer a collateral matter to the preparation of the report for the client.

The accountant today has a role of central responsibility in the business community. This is recognized in the policy of full disclosure under the federal securities laws, where the accountant is expected to provide financial information to help guide the investing decisions of the public. Moreover, with the great increase in public ownership of stock, more and more investors, with little knowledge of the complexity of the business community, are relying on the accountant's report. This new circumstance, not present when *Ultramares* was decided, makes it clear that "between the innocent reliant party and the negligent public accountant, the accountant should bear the burden of his negligence."[78] The

75 MacNerland v. Barnes, 129 Ga. App. 367, 199 S.E.2d 564 (1973).
76 Rusch Factors, Inc. v. Levin, 284 F. Supp. 85 (D.R.I. 1968).
77 Aluma Kraft Mfg. Co. v. Elmer Fox & Co., 493 S.W.2d 378 (Mo. Ct. App. 1973).
78 Note, *Public Accountants and Attorneys: Negligence and the Third Party,* 47 NOTRE DAME LAW. 588, 605 (1972).

accountant then must accept the burdens of legal responsibility that go along with the benefits derived from his important role in the modern business community.

The chief argument asserted against increased liability for accountants echoes the same social utility argument that won recognition in *Ultramares:* the burden on the accountant outweighs any possible increase in public benefit.

> The benefits to society derived from the numerous audits performed without error outweigh the benefits to society derived from extension of liability for the infrequent audit which may be negligent, an extension which has the potential to financially destroy an accounting firm because of one negligent audit.[79]

This status quo argument is based on the fear that a broadening of the standard of care owned by accountants would subject them to unlimited liability, and foreshadow the demise of the profession. However, the expansion of liability should enhance and strengthen the accounting profession rather than destroy it.

> If the courts adhere to strict rules of proof of causation, foreseeability and reliance, the profession will not face ruin. . . . The sophistication of modern audit procedures and programs and the pyramid of responsibility and review make it highly unlikely that a "thoughtless slip or blunder," a minor mistake, or slight negligence, would generate catastrophic consequences. Only when actions of the accountants are seriously out of line with the accepted professional practices will there be a potentiality for large damages.[80]

Moreover, the accounting profession has several ways to protect itself from increased liability: liability insurance, uniform accounting standards, and greater independence in auditing. While insurance is becoming difficult to obtain and expensive to maintain, the cost of the insurance can be effectively spread over a large segment of the public. The accounting firm would charge the cost of such insurance to the client, who would then allocate that cost to the consuming public as a part of the cost of doing business.

Uniform accounting standards are another protective option available to accountants. The present flexible standards often give courts the opportunity to find accounting reports misleading even when generally accepted accounting principles have been followed. By establishing uniform standards, the accounting profession will be in a better position to set the criteria by which its action and conduct will be judged. Acceptance of these standards by the courts as guides to acceptable conduct would increase the prestige of the profession, the authority of the standards themselves, and the quality of professional services.[81] "Acceptance by the judiciary of accounting profession's standards as the primary criteria in deciding the negligence issue of third party action should eventually bring about a uniform, high degree of quality service rendered by accountants."[82]

79 *Id.* at 604.
80 *Id.* at 605-06.
81 Salmonson, *CPA's Negligence, Third Party and the Future,* 34 ACCOUNTING REV. 91, 95 (1959).
82 *Id.* at 95-96.

Traditionally, financial statements have been the responsibility of the client, not the accountant. "These statements are the report of management on its stewardship of the financial entity."[83] Thus, since the accountant does not control the report, it has been agreed that he should not bear the legal responsibility for its errors. However, placing greater responsibility for reports on the accountant, and increasing correspondingly the independence and legal responsibility of the accountant, would increase the reliability of the reports. By increasing the accountants' control over the format and preparation of the reports, a fuller and more accurate report might result. Such control would make the accountant truly independent and, as such, a real trustee for the investing public, with the responsibility to present a true financial picture of the client.

VIII. Conclusion

The time for reexamination and change with regard to accountants' liability to third parties has come. Although *Ultramares* remains the majority rule, the assumptions which underlie that decision are no longer valid, since the accountant's role in the modern business context has changed substantially from what it was when *Ultramares* was decided. The accountant now plays a major role in the business community, and a central role in the operation of the federal securities laws; yet his legal responsibility has not evolved to an equal state.

This situation has encouraged several courts to reexamine their policies toward accountants' legal responsibility and to adopt newer standards of care commensurate with the economic role that accountants play. Two tests have resulted from this reexamination: the reasonably foreseeable test, and the actually foreseen test. The latter test fails to provide sufficient protection to parties that may be expected to rely on the accountant's report but are unknown to the accountant when the report is prepared. While it protects larger investors and creditors, it continues to leave the general investing public without an effective remedy against the negligence of the accountant.

The reasonably foreseeable test, which is best reflected in the Restatement,[84] provides the best protection for relying third parties. This test recognizes the necessary reliance placed on the accountant's report by the public. It also offers the best opportunity for accountants to improve their professional standards for the benefit of themselves, the business community, and the public.

83 Dawson, *Auditors' Third Party Liability: An Ill-Considered Extension of the Law,* 46 WASH. L. REV. 675, 690 (1971).
84 *See* note 57, *supra.*