THE DEFENSE OF CONTRIBUTORY NEGLIGENCE IN ACCOUNTANT'S MALPRACTICE ACTIONS

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I. INTRODUCTION

Actions alleging an accountant's professional malpractice frequently present intriguing issues of fact and law. These include the existence of a duty to the claimant, the standard of care owed, proximate cause, and damages. Perhaps the most interesting issue presented by accountant's malpractice cases is the availability of the defense of contributory or, depending upon the jurisdiction, comparative negligence.[1] This issue is one which courts from other jurisdictions have considered with at least ostensibly varying results, using disparate reasoning to reach those results.[2] Moreover, although the commentators have answered the question uniformly, they too have adopted varied rationale. There are only two reported New Jersey decisions arising from accountant's malpractice cases.[3] Neither reported New Jersey case deals with the issue of contributory negligence. The intent of this Article, therefore, is to address the availability of the defense of contributory negligence in malpractice claims against accountants

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[1] As used hereafter, "contributory negligence" includes comparative negligence as adopted in New Jersey by N.J. STAT. ANN. § 2A: 15-5.1 to -5.3 (West Cum. Supp. 1982-1983). Under New Jersey law, no distinction is made between the defenses of contributory negligence and assumption of risk. Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90 (1959). Accordingly, as used hereafter, contributory negligence also includes assumption of risk.

[2] *Compare* Craig v. Anyon, 212 A.D. 55, 208 N.Y.S. 259 (App. Div. 1925), *aff'd*, 242 N.Y. 569, 152 N.E. 431 (1926) (contributory negligence defense successful in suit by client against accountant) *with* Shapiro v. Glekel, 380 F. Supp. 103 (S.D.N.Y. 1974) *and* National Sur. Corp. v. Lybrand, 256 A.D. 226, 9 N.Y.S.2d 554 (1939) (contributory negligence not accepted *carte blanche* as defense against accountant).

[3] H. Rosenblum, Inc. v. Adler, 183 N.J. Super. 417, 444 A.2d 66 (App. Div. 1982), is the most recently reported New Jersey decision that deals with accountant's malpractice. *Rosenblum* involved an action brought to determine if an accountant owed a duty of care to a company that merges with another company, the latter which had an audit prepared by the accountant. *Id.* at 418, 444 A.2d at 66. The trial court entered an order for partial summary judgment against the company that later merged with the accountant's client on the ground of lack of privity. *Id.* at 420, 444 A.2d at 67. The appellate division affirmed, holding that accountants are not liable to unforeseeable parties. *Id.* at 424, 444 A.2d at 70. Since no merger was contemplated at the time of the audit, the accountants owed no duty of care to the company that later merged with the defendant's client. *Id.* at 423-24, 444 A.2d at 70. Stern v. Abramson, 150 N.J. Super. 571, 376 A.2d 221 (Law Div. 1977), is the only other reported accountant's malpractice case in New Jersey. *Abramson*, however, addressed the discoverability of accountant's financial circumstances where punitive damages are claimed.

and, drawing upon New Jersey authorities arising from unrelated contexts, suggest how the issue may be treated when presented to a court applying New Jersey law.

A review of the limited number of cases which have considered to any degree the availability of the defense of contributory negligence in accountant's malpractice actions indicates that the defense has been raised in only two types of cases.[4] In one variety, the client contends that the accountant is liable for failing to discover acts of fraud by the client's employee against the client.[5] In this type of case, the defense of contributory negligence arises when the accountant asserts either that the client was itself negligent in not detecting the employee's fraud or in so conducting its business, the client has made the employee's fraud possible. In the second variety, the client contends that the accountant is liable for erroneously reporting its financial condition and that the client, as a result of the accountant's erroneous advice, enters into a course of activity which results in its financial loss.[6] In this type of case the defense of contributory negligence arises when the accountant asserts that the client was itself at fault in conducting its business in a fashion which resulted in the loss.

In both types of cases, the cause of action may be based upon one or more of several theories. These include breach of contract, negligence, or misrepresentation. While earlier authorities placed some significance on the theory of the cause of action,[7] as might be expected, more recent authorities do not recognize the cause of action theory as being determinative.[8]

II. ANALYSIS

1. *Development of Standards*

The availability of the defense of contributory negligence in an accountant's malpractice action was first discussed in *Craig v. Anyon*.[9] The client in that case, a securities broker, alleged that the

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[4] *See generally* Hawkins, *Professional Negligence Liability of Public Accountants*, 12 VAND. L. REV. 797, 798 (1959); D. CAUSEY, DUTIES AND LIABILITIES OF THE CPA 125-56 (rev. ed. 1976).

[5] *E.g.*, Craig v. Anyon, 212 A.D. 55, 208 N.Y.S. 259 (App. Div. 1925), *aff'd*, 242 N.Y. 569, 152 N.E. 431 (1926).

[6] *See* Shapiro v. Glekel, 380 F. Supp. 1053, 1054 (S.D.N.Y. 1974).

[7] Hawkins, *supra* note 4, at 800 n.16. There, Professor Hawkins notes that the earlier cases limited liability by requiring a breach of contract action. *Id.* at 800. If the action were for breach of contract, there would "be a more restricted rule as to remoteness of damage." *Id.*

[8] *See, e.g.*, Shapiro v. Glekel, 380 F. Supp. 1053, 1054 (S.D.N.Y. 1974) (court implies action can be either in tort or contract); 5 A. CORBIN, CONTRACTS § 1019, at 113-24 & n.59 (1951).

[9] 212 A.D. 55, 208 N.Y.S. 259 (App. Div. 1925), *aff'd*, 242 N.Y. 569, 152 N.E. 431 (1926).

accountants, whom plaintiff had engaged to audit its books were liable for damages caused as a result of defendants' failure to discover defalcations by Moore, the plaintiff's commodities department manager.[10] The client contended that the failure constituted a breach of contract and negligence in performing the contract.[11] The accountants asserted as defenses both the negligence of the plaintiff and the negligence and criminal acts of the plaintiff's employees.[12] The jury, answering special interrogatories, found that the accountants were negligent and awarded a verdict compensating the plaintiff for the amount of the thefts.[13] The trial court rejected defendants' motion to set aside the finding of negligence and entered a judgment for the plaintiff, but only for the amount that the accountants had charged the plaintiff for their services.[14] Both parties appealed and the appellate division affirmed.[15]

Although the appellate division had no difficulty finding that the accountants were careless and that a properly conducted audit would have uncovered the loss,[16] these findings were not dispositive of the appeal. There were, noted the court, "a number of other elements entering into this case, which show[ed] that the plaintiffs [were] not without blame and might have avoided the loss."[17] To the court, it seemed unreasonable to charge the accountants, misled by the dishon-

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[10] *Id.* at 56, 208 N.Y.S. at 260. Moore was permitted absolute control over one of plaintiff's commodity accounts without supervision by his superiors. *Id.* at 57, 208 N.Y.S. at 262.

[11] *Id.* at 56, 208 N.Y.S. at 261.

[12] *Id.* at 57, 208 N.Y.S. at 262.

[13] *Id.* at 56, 208 N.Y.S. at 261. The jury was required to answer two questions: (1) Were the accountants negligent in performing the contract with the plaintiff? and (2) If the defendants were negligent, what was the direct and proximate amount of damage to the plaintiff? *Id.* The jury returned a verdict for the plaintiff in the amount of $1,177,805.26, representing the plaintiff's proven loss. *Id.*

[14] The court found "as a matter of law [that the defendants' fee of $2000 was] the only loss which resulted directly and proximately from [the] negligence of the defendants." *Id.*

[15] *Id.* at 64, 208 N.Y.S. at 269.

[16] Basically, the audit function consists of an examination of the financial records of an entity. That leads to a collection of data, the formulation of a conclusion based on the data, and the presentation of that judgment in a report on the financial statements. Hawkins, *supra* note 4, at 803 (quoting COMMITTEE ON AUDITING PROCEDURE, AMERICAN INSTITUTE OF ACCOUNTANTS, GENERALLY ACCEPTED AUDITING STANDARDS—THEIR SIGNIFICANCE AND SCOPE 13-14 (1954)); *see* Fiflis, *Current Problems of Accountants' Responsibilities to Third Parties*, 28 VAND. L. REV. 31, 35-36 (1975).

Much has been written on the procedures and standards to be followed by accountants. *See, e.g., id.* at 41; McGuire, *Report of the Miscellaneous Malpractice Committee*, 47 INS. COUNS. J. 32 (1980). For a comprehensive comment on auditing standards and auditing procedures, see P. GRADY, INVENTORY OF GENERALLY ACCEPTED ACCOUNTING PRINCIPLES FOR BUSINESS ENTERPRISES 47-54 (1965); Savage, *New Teeth for the Watchdog*, 1980 J. BUS. L. 393, 396-403; Winters, *Avoiding Malpractice Liability Suits*, 152 J. ACCOUNTANCY 69 (1981).

[17] 212 A.D. at 57, 208 N.Y.S. at 262.

esty of the employee under the plaintiff's supervision, with liability.[18] In matters involving the commodities department, the accountants dealt only with Moore. They had no reason to question his honesty, for he was acting as the firm's exclusive representative. Further, it was he who supplied defendants with the information upon which they relied.[19] If the defendants relied on Moore's honesty, the court held, they did so to no greater extent than did the plaintiff.[20] Indeed, the court found that given the discretion accorded Moore, the client relied upon Moore to "an extent beyond all reason."[21]

While a proper accounting may have disclosed Moore's dishonesty, proper supervision by the plaintiff's management would also have disclosed the loss. In particular, the court noted that the broker never examined transactions in its most actively traded account which Moore used for his scheme.[22] Further, against the written advice of the accountants, the broker placed a certain ledger under Moore's control, thus giving Moore command of all financial materials necessary to operate his scheme.[23] With respect to the client's responsibility for the loss, the court concluded that the plaintiff "could have prevented the loss by the exercise of reasonable care and that they should not have relied exclusively on the accountants."[24] The court also intimated that the chain of causation was broken by the intervening criminal act of the client's employee which could not be reasonably foreseen by the defendants.[25]

The dissent in *Craig* relied upon a broad principle which would later be adopted by other authorities. The dissent opined that assuming the plaintiff was negligent in failing to discover the embezzlement and falsification, the defendants' failure to properly perform their contract failed to save plaintiffs from their own negligence, which was the very reason that the parties entered into the contract.[26] Accordingly, the dissent would have reinstated the jury's verdict.

Commentators were quick to criticize the result and rationale of *Craig*. The first published comment questioned the court's reasons for treating the case as one in negligence rather than one in contract.[27]

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[18] *Id.*; *see supra* note 10.

[19] *Id.* at 58, 208 N.Y.S. at 263. *But cf.* Hawkins, *supra* note 4, at 802-06 (cautioning accountants to exercise care in relying upon representations of client's employees).

[20] 212 A.D. at 58, 208 N.Y.S. at 263.

[21] *Id.* at 61, 208 N.Y.S. at 266.

[22] *Id.*, 208 N.Y.S. at 267.

[23] *Id.* at 61, 208 N.Y.S. at 266-67.

[24] *Id.* at 62, 208 N.Y.S. at 268.

[25] *Id.* at 62-63, 208 N.Y.S. at 268-69.

[26] *Id.* at 63, 208 N.Y.S. at 269-70 (Clarke, J., dissenting).

[27] Comment, *The Legal Responsibility of Public Accountants*, 35 YALE L.J. 76, 78 (1925).

The commentator deemed it preferable to consider a case such as *Craig* as one for breach of contract thus stressing the element of reliance by the promisee on the promisor's agreement to perform for, "after contract, the promisee should be, and is, entitled to put the matter from his mind unless and until he is appraised that there is no intention to perform."[28] In that context, the client's suspicion of a fact collateral to the accountant's default (i.e., employee fraud) should not bar recovery unless there are suspicious circumstances indicating that the accountant did not perform. Under the latter condition, the client would have the duty to mitigate.[29]

Although this criticism was technical and grounded on the theory of the cause of action,[30] a much broader policy based primarily upon practicality was also expressed.[31] The requirements of modern business dictate that there be a delegation of authority by employer to employee. In this delegation there is inherent danger. As a check on this peril, the business community began to hire public accountants to audit its books.[32] For the check to have value, the business community must be legally safe in relying on it. Given specialization and division of labor, the businessman must be able to depend on the undertakings of others. Responsibility, therefore, ought to be placed on the accountant—the party who has the economic function and is in the best position to fend off the harm. The accountant's proper performance of his duties protects both the accountant and the businessman from loss.[33]

The commentator noted that each report by the accountants "constituted an assurance that" the client's reliance upon the employee was not misplaced.[34] The criminal acts of the employee did not constitute an intervening cause, because they were or should have been anticipated by the defendants—"they were the very thing the contract was made to detect and prevent."[35] Consequently, it was suggested that use of the doctrine of contributory negligence, in the

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[28] *Id.* at 80.

[29] *Id.*

[30] *See supra* note 7 and accompanying text.

[31] Comment, *supra* note 27, at 82-83.

[32] *Id.* at 83. The accounting profession has grown in response to the public's needs and concerns. D. CAUSEY, *supra* note 4, at 3; *see also* Adams, *Lessening the Legal Liability of Auditors*, 32 BUS. LAW. 1037, 1039 (1977).

[33] Comment, *supra* note 27, at 81-83; *see also* Rouse, *Legal Liability of the Public Accountant*, 23 KY. L.J. 1, 41 (1934); Comment, *Accountants' Liability*, 13 ST. JOHN'S L. REV. 310, 313 (1939) [hereinafter cited as Comment, *Accountants' Liability*].

[34] Comment, *supra* note 27, at 83.

[35] *Id.*

sense of active vigilance by the client, was undesirable.[36] Even if under the circumstances, the client had reason to be suspicious of his employee's dishonesty and had failed to act, the client's conduct should be viewed in the context of the accountant's assurances.[37]

Craig was also criticized by Professor Rouse[38] who found that its result was inconsistent with the realities of modern business.[39] He found it "absurd to say that unless the businessman performs the function which he employs the accountant to perform, he cannot recover from the accountant for misfeasance."[40] Although the commentator accepted in theory that contributory negligence might be a defense under appropriate circumstances in accountant's malpractice actions, those cases would be extremely rare.[41] Though not entirely clear, it seems that the commentator would recognize the defense where the client was in the position to know that the accountant's work was not done properly but nevertheless placed reliance on it.[42]

Craig was cited with approval in a Canadian case, *International Laboratories, Ltd. v. Dewar*[43] which, like its American predecessor, presented a claim by the client that the accountants were negligent in not discovering thefts by the client's employee. The accountants, like the defendants in *Craig*, contended that the losses were caused by the client's negligence. The allegedly negligent acts by the client included: signing the checks for the employee without inquiring into the purpose of withdrawing funds;[44] failing to heed the accountants' advice to maintain a small balance in the petty cash account;[45] and failing to

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[36] *Id.* at 83-84. Of course, an accountant may not be held responsible for defalcations if the accountant has followed accepted accounting practices. *See, e.g.*, Rouse, *supra* note 33, at 15-16; Comment, *Accountants' Liability*, *supra* note 33, at 313.

[37] Comment, *supra* note 27, at 84-85.

[38] *See* Rouse, *supra* note 33.

[39] *Id.* at 39, 41.

[40] *Id.* at 41.

[41] *Id.* at 42.

[42] *Id.* at 39-40. That position seems to have support from other commentators, most notably Professor Hawkins. *See* Hawkins, *supra* note 4, at 811.

[43] [1933] 3 D.L.R. 665, 41 Man. 329.

[44] *Id.* at 667, 41 Man. at 332. The dishonest employee's scheme was to deposit a legitimate check from a customer in the bank without entering the amount in the cash column of plaintiffs' books. *Id.* Then he would write a check for the same amount to a fictitious creditor. The employee would also have the bank enter the letters "CC" on the check, to signify a certified check. *Id.* The client's officers would indorse the check and the employee would then use the check for his personal expenses. *Id.* After the employee received the certified check, he would change the letters from "CC" to "EC". *Id.* The latter designation meant "error corrected," and it would be entered in the customer's account. *Id.* These actions caused the two entries to apparently neutralize each other. *Id.*

[45] *Id.* at 670, 41 Man. at 334. It should be noted, though, that the accountants made the suggestion every other year for six years but they made no further attempts to have the amount in petty cash reduced. *Id.*

operate the petty cash account on a specified accounting basis.[46] One member of the court adopted the view, representative of the court generally, that it is the client's responsibility—not the accountants'—to look after the business and to insure that it gets paid for what it sells, and does not pay for purchases not received.[47] Citing *Craig*, the justice stated that the plaintiff cannot recover for losses to which it contributed by its own negligence.[48]

Craig was obliquely rejected by another New York court in *National Surety Corp. v. Lybrand*.[49] In *National Surety*, the plaintiff was defrauded by an employee who embezzled from petty cash and covered the thefts by "kiting" checks.[50] The plaintiff contended that the accountants were liable for not uncovering the thefts.[51] The accountants were charged with failure to properly perform their contract, breach of warranty, negligence, and fraudulent misrepresentation.[52] The defendants asserted that the loss was caused by the contributory negligence of the client in not recognizing discrepancies in certain records, preparing certain memoranda in pencil thus making them easy to alter, and carelessly conducting the plaintiff's bookkeeping department.[53] The trial court ruled that plaintiff failed to establish a *prima facie* case.[54] The appellate division reversed, finding that there was evidence from which the jury could have found a

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[46] *Id.* at 666, 41 Man. at 338. The defendants urged the plaintiffs to adopt an imprest system. *Id.* That technique simply requires that a cash account be replenished in exactly the amount expended. H. BIERMAN, JR. & A. DREBIN, FINANCIAL ACCOUNTING: AN INTRODUCTION 137-39 (3d ed. 1978).

[47] 3 D.L.R. at 675-76, 41 Man. at 332.

[48] *Id.* at 681, 41 Man. at 346.

One member of the Canadian court had difficulty finding that the failure to detect a loss during the audit was the proximate cause of losses after that audit, as the chain of causation was broken by the employee's criminal acts. *Id.* at 704-06, 41 Man. at 366-68 (Robson, J., concurring).

[49] 256 A.D. 226, 9 N.Y.S.2d 554 (App. Div. 1939).

[50] *Id.* at 229, 9 N.Y.S.2d at 557. "Kiting" has been defined as:

> Writing a check on the company's account in one bank and depositing it in the company's account in another bank. Because the bank on which the check is drawn will not reduce the company's account until the check clears through the banking system, the two banks combined will temporarily show a higher balance for the company than the total deposits actually owned.

H. BIERMAN, JR. & A. DREBIN, *supra* note 46, at 136. Additionally, it has been defined as, "writing checks against bank accounts where funds are insufficient to cover them, hoping that before they are presented the necessary funds will be deposited." Sutro Bros. & Co. v. Indemnity Ins. Co. of North America, 264 F. Supp. 273, 283 (S.D.N.Y. 1967) (quoting L. WYCOFF, DICTIONARY OF STOCK MARKET TERMS 268 (1964)).

[51] 256 A.D. at 227, 9 N.Y.S.2d at 556.

[52] *Id.* at 228-29, 9 N.Y.S.2d at 557.

[53] *Id.* at 230, 9 N.Y.S.2d at 557-58.

[54] *Id.* at 229, 9 N.Y.S.2d at 555.

breach of duty on the part of the accountants.[55] Moreover, the court went on to reject the accountants' contention that no matter how negligent they might have been, the action was barred by the client's contributory negligence.[56] In so holding, the court strictly limited the defense of contributory negligence, stating that the client's negligence which makes possible the employee's theft does not necessarily excuse the accountants' breach in failing to discover and report the facts.[57] The court was unwilling to find accountants immune from their negligence because the client was negligent in conducting the business for the court noted, accountants "are commonly employed for the very purpose of detecting defalcations which the employer's negligence has made possible."[58] Contributory negligence might be a defense, the court held, where that negligence has "contributed to the accountant's failure to perform his contract and to report the truth."[59]

Although the result and rationale of *National Surety* is clearly at odds with *Craig*, the *National Surety* court did attempt to harmonize its decision with *Craig*. The *National Surety* court noted that in *Craig*, the embezzler had been "negligently represented to the accountants as a person to be trusted."[60] That type of negligence, noted the court, was not present in *National Surety*.[61]

The continued viability of *Craig* in New York following *National Surety* is at best questionable. The attempt by the *National Surety* court to harmonize its decision with *Craig* does not withstand close scrutiny. The client in *Craig* did give the employee in question unfettered control over an entire division of its company. Further, it made the employee its representative for the purpose of dealing with the accountants. There is no indication, however, that the plaintiff ever *expressly* defended the integrity of the employee to the defendants or directed the accountants to assume the employee's integrity. This

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[55] *Id.* at 236, 9 N.Y.S.2d at 563-64.

[56] *Id.* at 235, 9 N.Y.S.2d at 563.

[57] *Id.*

[58] *Id.* at 236, 9 N.Y.S.2d at 563.

[59] *Id.* This has become known as the *National Surety* exception. Shapiro v. Glekel, 380 F. Supp. 1053, 1056 (S.D.N.Y. 1974). The *National Surety* court noted that:

> Negligence of the employer is a defense only when it has contributed to the accountant's failure to perform his contract and to report the truth. Thus, by way of illustration, if it were found that the members of the firm of Halle & Stieglitz had been negligent in connection with the transfer of funds which occurred at about the time of each audit and that such negligence contributed to the defendants' false reports it would be a defense to the action for it could then be said that the defendants' failure to perform their contracts was attributable, in part at least, to the negligent conduct of the firm.

256 A.D. at 236, 9 N.Y.S.2d at 563.

[60] *Id.*

[61] *Id.*

being so, the *Craig* defendants would, under the *National Surety* rule, owe a duty to the plaintiff to investigate the business transactions conducted by the client's employee since, under the circumstances, the employee's honesty should not have been assumed. Moreover, the observation by the *Craig* court that the embezzler was the client's representative for purposes of dealing with the accountants seems to have hardly played a significant role in the *Craig* court's decision.

One commentator[62] in discussing both *Craig* and *National Surety* criticized the *Craig* case as one based on a "questionable conception of contract rules respecting remoteness of damage" and presenting a "curious confusion of tort and contract principles."[63] The holding in *National Surety* was characterized by Professor Hawkins as "probably . . . the right idea."[64] He observed that some might argue that if the tort action were instead one for contract, contributory negligence would not be a defense and that a different result should not be reached simply because the action is styled as one in tort.[65] Although finding this argument persuasive, Professor Hawkins rejected it as going "too far in trying to establish contract as the basis of duty."[66] Rather, he reasoned that since contributory negligence is the "failure to use reasonable care in looking after one's interest"[67] and one of the reasons an accountant is hired is to protect a client's interests, there is nothing unreasonable about a client's reliance upon the defendant's proper performance.[68] In this situation, the client is conducting his affairs with the assumption that the defendant will perform properly. The commentator echoed the holding in *National Surety*: While contributory negligence must be accepted in theory as being a valid defense, "it applies only if the plaintiff's conduct goes beyond passive reliance and actually affects defendant's ability to do his job with reasonable care."[69]

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[62] *See* Hawkins, *supra* note 4.

[63] *Id.* at 809-10.

[64] *Id.* at 811.

[65] *Id.* at 810; *see* Rouse, *supra* note 33, at 41-42.

[66] Hawkins, *supra* note 4, at 811.

[67] *Id.*

[68] *Id.* But as one court has held: "[a]n auditor is not bound to be a detective or to approach his work with the foregone conclusion that something is wrong. He is a watchdog but not a bloodhound." *In re* Kingston Cotton Mills Co., 74 L.T.R. 568, 571 (1895).

The accountant is not an insurer, and does not have an absolute duty to detect discrepancies. His duty is to exercise reasonable care and even the exercise of reasonable care may not detect every fraud. Indeed, the discovery of defalcations is often described as an accountant's secondary function. *See, e.g.*, Kurland, *Accountant's Legal Liability:* Ultramares *to* Bar Chris, 25 BUS. LAW. 155, 157 (1969).

[69] Hawkins, *supra* note 4, at 811.

The *National Surety* exception, which requires that the plaintiff must have interfered with the accountant's performance of its contract to be held contributorily negligent, is a rigid one. It would be inappropriate to strictly apply the *National Surety* test under certain circumstances. These circumstances are present when, as was true in both *Craig* and *International Laboratories*,[70] the accountants suggest that the client follow certain procedures which would have prevented the exact type of theft that later took place.[71] Under *National Surety*, if it were determined that the accountants had the responsibility to discover acts of fraud perpetrated by the client's employees, failure to implement the accountants' recommendations would not be a defense since that failure does not interfere with the accountants' performance of their engagement. If the accountants breach their duty to the client in not discovering employee fraud, but nevertheless recommend procedures that would prevent further employee fraud and the client unreasonably fails to heed that advice, some adjustment of the *National Surety* rule is required.

The conflicting authorities were discussed by a federal district court in *Shapiro v. Glekel*.[72] In *Shapiro*, the plaintiff, a trustee in the client's bankruptcy, contended that the defendant accountants negligently performed their engagement with the client, thus resulting in the overstatement of earnings and financial condition, and consequently the client's financial demise.[73] The accountant asserted in defense the client's contributory negligence, claiming that the client's two highest officials knew, or should have known, that the client's financial condition was materially worse than that reflected in the financial statements prepared by the defendants.[74] After discussing *Craig* and *National Surety*, and noting their conflicting analyses, the

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[70] In *International Laboratories*, the client failed to set up a recommended and improved internal control system. 3 D.L.R. at 666, 41 Man. at 338. Further, the plaintiff had instructed the auditor to limit the scope of future examinations. *Id.* at 674, 41 Man. at 331. When the client sued the auditor for negligence in failing to detect fraud, the court held that contributory negligence was a valid defense. *Id.* at 681, 41 Man. at 346; *see supra* notes 43-48 and accompanying text.

[71] The *National Surety* court found no evidence to support the proposition that the defendants had ever suggested changing procedures. 256 A.D. at 235, 9 N.Y.S.2d at 558.

[72] 380 F. Supp. 1053 (S.D.N.Y. 1974).

[73] *Id.* at 1054. The trustee argued that the accountants failed to detect errors in the client's financial reports. *Id.* The client allegedly relied upon the false reports in making financially unwise acquisitions. *Id.* Those acquisitions led to the financial failure and the client's petition for reorganization under chapter 10 of the Bankruptcy Act. *Id.*

[74] *Id.* More specifically, the defendant alleged that because the trustee "stands in the shoes" of the client, the negligence of the client's senior officials precluded recovery by the trustee. *Id.* The defendants also argued that their alleged negligence was not the proximate cause of the plaintiff's losses. *Id.*

court, apparently applying New York law, adopted the *National Surety* rule: Client negligence is only a defense when it contributes to the failure of the accountant to fulfill his responsibilities.[75] The court found what it termed significant policy considerations which provided additional support for this result: Accountants should not be able to avoid liability for their own negligence absent substantial fault on the part of the employer "—the *Lybrand [National Surety]* showing at least."[76] Furthermore, the court found the involvement of public investors and the retainment of the accountants because of their expertise to be important considerations.[77] Applying the adopted rule, the court, therefore, found that the conduct of the officials did not interfere with the accountant's performance, and accordingly, denied the accountant's summary judgment motion.[78]

A number of other decisions less directly discuss the availability of the defense of contributory negligence in accountant's malpractice actions. In *Cereal Byproducts Co. v. Hall*,[79] the accountants were charged with breach of contract and negligence in performing audits which did not disclose embezzlements by plaintiff's bookkeeper.[80] The accountants asserted a defense of contributory negligence.[81] The trial court rejected the accountants' defense but found that they were not negligent in the performance of the audits.[82] The appellate court reversed and directed that a finding of negligence be entered against the accountants.[83] In doing so, the court also rejected the defense of

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[75] *Id.* at 1058. In deciding to adopt the *National Surety* rule, the court adopted Professor Hawkins' analysis. 380 F. Supp. at 1056-58; *see supra* note 4 and accompanying text.

[76] 380 F. Supp. at 1058.

[77] *Id.* The court's reliance on the asserted policy considerations is questionable. The first "policy," that an accountant should not avoid liability unless the client is guilty of substantial fault, is conclusory and actually states no policy at all. With respect to the second policy involving public investors, one wonders why an accountant's liability, in terms of the defense of contributory negligence, should vary depending upon the extent which the client is a publicly held company. Moreover, retainment of the accountant because of his expertise does not provide additional policy support beyond that already stated in *National Surety*.

[78] *Id.* The court also noted that defendants' contention that their negligence was not the proximate cause of plaintiff's injury was an issue for trial. *Id.* at 1059.

[79] 8 Ill. App. 2d 331, 132 N.E.2d 27 (App. Ct. 1956).

[80] *Id.* at 333, 132 N.E.2d at 28. In 1943-1946 audits, the accountants, at the request of plaintiff's management, had not confirmed certain accounts receivable. *Id.* at 335, 132 N.E.2d at 29. In the 1947 audit, the accountants were allegedly negligent for failing to confirm certain accounts at the request of the bookkeeper without proper authorization from management. *Id.* A check of those accounts would have disclosed the embezzlement scheme. *Id.*

[81] *Id.* at 333, 132 N.E.2d at 28. No details of this defense were reported in the decision. *See id.*

[82] *Id.*

[83] *See id.* at 336, 132 N.E.2d at 29. The appellate court held that the auditor's acceptance of the bookkeeper's unconfirmed list of accounts was "inexcusable negligence." *Id.*; *cf.* State St.

contributory negligence.[84] Citing *National Surety*, the court found that there were no circumstances indicating that the plaintiff contributed to the negligence of the defendants in making the audit.[85]

A case that also discusses contributory negligence in accountant's malpractice actions is *Social Security Administration Baltimore Federal Credit Union v. United States*.[86] In that case, a federal credit union brought suit against the United States contending that accountants employed by the United States who examined records of the credit union were negligent in not discovering embezzlements by the credit union's office manager.[87] The court found that no breach of duty by the Government had been established, therefore, the plaintiff could not recover.[88] In addition, the court found that actions by the credit union "made it difficult for the examiners to do their job

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Trust Co. v. Ernst, 278 N.Y. 104, 118, 15 N.E.2d 416, 421 (1938) (accountant found negligent for accepting statement by officer of audited company that accounts were secure); 1136 Tenants' Corp. v. Max Rothenberg & Co., 36 A.D.2d 804, 805, 319 N.Y.S.2d 1007, 1008 (App. Div. 1971), *aff'd*, 30 N.Y.2d 585, 281 N.E.2d 846, 330 N.Y.S.2d 800 (1972) (accountant held negligent for ignoring building manager's missing invoices). *But cf.* O'Neill v. Atlas Auto. Fin. Corp., 139 Pa. Super. 346, 351, 356, 11 A.2d 782, 784, 786 (Super. Ct. 1940) (accountants not negligent in accepting figures from client's bookkeeper without close examination).

[84] 8 Ill. App. 2d at 336, 132 N.E.2d at 29-30.

Cereal Byproducts was cited in Cenco, Inc. v. Seidman & Seidman, [Pamphlet No. 962] Fed. Sec. L. Rep. (CCH) ¶ 98,615 (7th Cir. 1982). In *Cenco*, a corporation contended that its auditors were liable for failing to discover a scheme in which the corporation's highest management were participants in inflating inventory. *Id.* at 93,051. The court denied the claim primarily on the ground that the wrongdoers were not stealing from the corporation, but rather had acted to the detriment of outsiders. *Id.* at 93,056. The court did observe that Illinois, in *Cereal Byproducts*, had rejected the position that "employee's fraud is always attributed to the corporation by the principle of respondeat superior." *Id.* at 93,054.

[85] Curiously, *Cereal Byproducts* was included by the *Shapiro* court as being among the group of cases that "apparently" embraces the *Craig* rationale. 380 F. Supp. at 1055. Query whether *Cereal Byproducts* does not come within the *National Surety* exception. *See* 256 A.D. at 236, 9 N.Y.S. at 563. The direction from the bookkeeper (who was also a stockholder) not to confirm certain accounts receivable apparently did interfere with the defendant's performance of its exam. 8 Ill. App. 2d at 336, 132 N.E.2d at 29. It seems that he was, like the embezzler in *Craig*, the person who acted as the company's representative in dealing with the accountants.

[86] 138 F. Supp. 639 (D. Md. 1956).

[87] *Id.* at 642. The action was brought under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674 (1976).

The purpose of the inspections was to provide information to the Government; they were not conducted as a service to the credit union. 138 F. Supp. at 646. Further, the audits were not performed by certified public accountants. *Id.* at 643. The inspections performed were superficial, as dictated by the limited resources of the Bureau of Federal Credit Unions. *Id.* at 643. The individual credit unions were responsible, under statute, for conducting audits. *Id.* at 644; *see* Federal Credit Union Act, ch. 750, § 11(e), 48 Stat. 1216, 1220-21 (1934) (current version at 12 U.S.C. § 1761(d) (1976)).

[88] 138 F. Supp. at 661. The court found that there was neither a duty imposed by statute, nor was one assumed. *Id.* at 660. The court also found that Government examinations and reports did not constitute a "trap" that would decoy credit union officials into neglecting their obligations. *Id.*

properly."[89] Citing both *Craig* and *National Surety*, the court held the credit union to be contributorily negligent and that this negligence precluded recovery on the claim.[90]

The court's finding that the action of the credit union interfered with the Government's examinations is a strained one. The court would have been on firmer ground had it rested its decision on a rationale to which it alluded when it noted the credit union's lack of reliance on the examiner's performance.[91] The reasoning of authorities which have adopted a narrowing of the usual application of the contributory negligence defense is that the client has delegated his duty to the accountant and the accountant cannot complain that the client has not done that which the accountant has undertaken to do.[92] In *Social Security Administration*, the delegation of authority never occurred. The applicable statute placed on the credit union certain duties which the credit union could not delegate, and which it ignored.[93] The examinations performed by the Government examiners were not intended to be a service to the credit union. Further, the credit union could not reasonably have believed that the examinations were in fulfillment of the credit union's responsibilities, particularly when the credit union ignored the examiner's recommendations. So viewed, *Social Security Administration* is consistent with those authorities critical of *Craig*.[94]

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[89] *Id.* The credit union officials objected to and ignored Government recommendations. *Id.* at 654, 660. Instead, they relied upon the corrupt office manager, holding her out to the examiners as a trustworthy person. *Id.*

[90] *Id.* at 661.

The defendant in *Shapiro* cited *Social Security Administration* as a case which embraced the *Craig* rationale and the *Shapiro* court apparently agreed. 380 F. Supp. at 1054-55. The *Social Security Administration* court's finding that the credit union "made it difficult for the examiners to do their job properly," however, appears to place the case within the *National Surety* exception. 138 F. Supp. at 660; *see* 256 A.D. at 236, 9 N.Y.S.2d at 563; Hawkins, *supra* note 4, at 811. Thus, the *Shapiro* defendant's reliance on *Social Security Administration* was probably misplaced.

[91] 138 F. Supp. at 660.

[92] *See* Hawkins, *supra* note 4, at 800.

[93] *See supra* notes 87 & 90.

[94] The court in *Shapiro* also cited Delmar Vineyard v. Timmons, 486 S.W.2d 914 (Tex. Civ. App. 1972), as apparently following the *Craig* rationale. 380 F. Supp. at 1055. In *Delmar*, it was contended that the plaintiff sustained financial losses because of audits negligently conducted by the defendant accountants. 486 S.W.2d at 916. The accountants allegedly understated accounts payable and overstated inventory. *Id.* at 915. Plaintiff recovered damages at the trial level and the defendants appealed. *Id.* at 916. In reversing the lower court's decision, the appellate court found that while the accountants had carelessly reported accounts payable, those errors were not the cause of the plaintiff's losses. *Id.* at 916-17, 921. The court held that the losses sustained by the plaintiffs were caused by undercapitalization and the manner of liquidation of inventory following the closing of the store. *Id.* at 919. The *Delmar* court then cited *Craig* as most closely

2. *The* Restatement *Approach*

For accountant's malpractice actions brought on the theory of negligent misrepresentation, the *Restatement (Second) of Torts*[95] specifies the type of negligence on the client's part which will be a defense to such a claim. The *Restatement* would limit the defense of contributory negligence to unreasonable reliance upon the misrepresentation.[96] Application of that principle in the context of accountant's malpractice would preclude as a defense the negligence of a client in managing his business in a way that enables employee fraud to occur. If the client knew, or should have known, however, that the accountant's examination did not include procedures which would have disclosed the loss, the defense of contributory negligence would be a valid one.[97] In this regard, the *Restatement* position is not unlike the position of earlier commentators who analyzed the problem in terms

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on point and standing for the proposition that a plaintiff cannot " 'recover for losses which they could have avoided by the exercise of reasonable care.' " *Id.* at 920 (quoting *Craig*, 212 A.D. at 64, 208 N.Y.S. at 268).

It is submitted that the result reached in *Delmar* was a correct one but that the court erred in unnecessarily confusing and combining the elements of proximate cause and contributory negligence. In a case such as *Delmar*, where it is contended that the client sustained losses because it conducted its affairs in reliance on erroneous reports supplied by the accountant, the element of reliance becomes a focal point, and proximate cause can and should be separated from contributory negligence. *See, e.g., Shapiro*, 380 F. Supp. at 1058-59.

The court could have simply determined that the erroneous reports supplied by the accountants had no relationship to the course of conduct followed by the client which resulted in the client's financial demise, and therefore, the element of proximate cause was missing. *See* Vernon J. Rockler & Co. v. Glickman, 273 N.W.2d 647, 652 (Minn. 1978) (reliance by plaintiff on accountant's advice held not to be cause of plaintiff's injury); Kemmerlin v. Wingate, 274 S.C. 62, 63, 261 S.E.2d 50, 51 (1979) (accountant's alleged negligence found not to be proximate cause of plaintiff's injury).

[95] RESTATEMENT (SECOND) OF TORTS § 552 (1977) provides in relevant part:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, 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.

Id.

Many courts have followed the *Restatement* approach in connection with an accountant's negligent misrepresentation. *See, e.g.*, Rhode Island Hosp. Trust Nat'l Bank v. Swartz-Bresenoff, Yavner & Jacobs, 455 F.2d 847, 851 (4th Cir. 1972); Bunge Corp. v. Eide, 372 F. Supp. 1058, 1062-63 (D.N.D. 1974); Bonhiver v. Graff, 311 Minn. 111, 128, 248 N.W.2d 291, 298-99 (1976); Shatterproof Glass Corp. v. James, 466 S.W.2d 873, 880 (Tex. Civ. App. 1971). James, 466 S.W.2d 873, 880 (Tex. Civ. App. 1971).

[96] RESTATEMENT (SECOND) OF TORTS § 552A provides: "The recipient of a negligent misrepresentation is barred from recovery for pecuniary loss suffered in reliance upon it if he is negligent in so relying."

[97] *See id.*

of contract, with an emphasis on the element of reliance, and who characterized negligent reliance as failure to mitigate.[98]

III. The Defense Under New Jersey Law

New Jersey courts have been silent as to the defense of contributory negligence in accountant's malpractice cases. The weight of authority favors a *National Surety* approach to the contributory negligence problem, and the New Jersey courts would probably follow *National Surety*. Moreover, expressions of policy by the New Jersey Supreme Court, although contained in cases far different from accountant's malpractice, strongly suggest that New Jersey, when given

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[98] *Cf.* Comment, *supra* note 27, at 80 (distinguishing contract and negligence actions on basis of reliance). The *Restatement* questions the extension of comparative negligence where the loss is pecuniary as opposed to physical. *See* Restatement (Second) of Torts § 552A comment b. There is no apparent basis for a distinction which depends on the type of harm resulting. In any event, under the provisions of the New Jersey Comparative Negligence Statute there is no room to draw the suggested distinction. *See generally* N.J. Stat. Ann. § 2A:15-5.2 (West Cum. Supp. 1982-1983).

An accountants' negligent misrepresentation to his client, as defined by the *Restatement*, was at issue in Bonhiver v. Graff, 311 Minn. 111, 248 N.W.2d 291 (1976). There, the court obliquely discussed the issue of contributory negligence although it did not refer in that discussion to the applicable *Restatement* provision. In *Bonhiver*, a receiver for an insolvent insurance company brought an action against the insurance company's accountants. *Id.* at 116, 248 N.W.2d at 296. The accountants had been hired to update the insurance company's books. *Id.* at 115, 248 N.W.2d at 295. The accountants had failed to discover that company owners had been embezzling funds and additionally had negligently made entries which falsely showed the company to be solvent. *Id.* State examiners relied upon the entries in allowing the company to stay in business and the embezzlements continued. *Id.* The examiners were from the State Department of Insurance and their reliance on representations of insurance company accountants was standard practice. *Id.* After insolvency and appointment of a receiver, the receiver instituted the action against the accountants and was awarded damages. *Id.* at 111, 248 N.W.2d at 291. The defendants appealed. *Id.*

The Minnesota Supreme Court rejected the contention that the suit was barred by the fraud of the company's officers noting that the rights of creditors, represented by the receiver, were not affected by the acts of the former officers. *Id.* at 118, 248 N.W.2d at 297. The court also questioned, however, whether "simply" failing to discover the fraud committed by the company's officers would bar the action since the company was the victim and not the perpetrator of the fraud. *Id.* Moreover, the court found that the intervening negligence of the Commissioner of Insurance in not heeding warnings of the insurance company's insolvency was not a bar to the action. *Id.* at 118-19, 248 N.W.2d at 297. Under Minnesota law, the court found that to be an intervening cause, the intervening negligence could not have been caused by the plaintiff. *Id.* In the case before it, the court found that the Commissioner had relied on the accountants' entries and therefore the negligence was not intervening. *Id.* at 119, 248 N.W.2d at 297. The judgment of the lower court was therefore affirmed. *Id.* at 111, 248 N.W.2d at 291.

The preferable approach would have been to analyze the problem of the commissioner's negligence in the context of the Restatement (Second) of Torts § 552A. The question would then be: "Was it reasonable for the Commissioner to rely on the accountants' entries, in light of the warnings he had received?" *See id.* Otherwise, blind or foolish reliance, which ought not be judicially encouraged, would be enough to sustain a cause of action.

the opportunity to decide the question, will permit only a limited contributory negligence defense.

One of the cases which suggests how New Jersey courts may rule on the question is *Bexiga v. Havir Manufacturing Corp.*,[99] in which the plaintiff sustained personal injuries when his hand was caught in a punch press manufactured by the defendant.[100] It was contended that the manufacturer was liable under the theories of negligence, breach of implied warranty of fitness for a particular purpose, and strict liability in not installing particular devices which would have prevented the operator's hand from being caught in the press.[101] After finding that sufficient facts existed to raise a question for the jury on the issue of liability, the supreme court rejected as a matter of law the defense of contributory negligence.[102]

The court first noted that "in negligence cases, the defense [of contributory negligence] has been held to be unavailable where considerations of policy and justice dictate."[103] The court found that in the case before it, "interests of justice" precluded the contributory negligence defense because the asserted contributory negligence of the plaintiff in permitting his hand to be caught in the press could have been avoided if the machine had been equipped with the safety device.[104] A different ruling would have lead to the anomalous result that a defendant who had a duty to install the safety device, but breached that duty, would not be liable in spite of the fact that performance would have prevented injury.[105]

The defense of contributory negligence was also limited in *Soronen v. Olde Milford Inn, Inc.*[106] There it was contended that the defendant tavern owner was liable for negligently serving plaintiff's decedent alcoholic beverages, resulting in the death of the patron from injuries sustained in a fall.[107] It was contended that the action was barred by the contributory negligence of plaintiff's decedent in

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[99] 60 N.J. 402, 290 A.2d 281 (1972).

[100] *Id.* at 404, 290 A.2d at 283.

[101] *Id.* at 405, 290 A.2d at 282.

[102] *Id.* at 412, 290 A.2d at 286.

[103] *Id.* The court noted that contributory negligence could in theory be a defense to a strict liability action, *id.*, but not on the facts before it. *Id.*

[104] *Id.*

[105] *Id.* This, however, is not to say that the defendant will always be barred from asserting a plaintiff's contributory negligence in a strict liability action against the defendant. Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 160, 406 A.2d 140, 147 (1979). In *Suter*, the supreme court noted that "when the plaintiff has voluntarily and unreasonably proceeded to encounter the known risk [contributory negligence may exist]." *Id.*

[106] 46 N.J. 582, 218 A.2d at 630 (1966).

[107] *Id.* at 584-85, 218 A.2d at 632.

"getting so intoxicated that he could not take care of himself."[108] This contention was rejected. Noting that administrative regulations applicable to liquor license holders had been adopted for the protection of patrons and that in furtherance of the public policy of protection of the patrons civil tort liability had been imposed on tavern owners, the court found that to permit the patron's contributory negligence as a defense would result in the dilution of the accountability imposed on the tavern keeper.[109] The very aid being afforded would be nullified.[110]

The opinion of the New Jersey Supreme Court in *Cartel Capital Corp. v. Fireco*[111] contains added support for adoption by New Jersey courts of the *National Surety* rationale. In *Cartel*, the plaintiff restaurant sued the retailer-installer-servicer of fire extinguishing equipment which failed to operate during a fire at plaintiff's restaurant, resulting in property damage to the restaurant.[112] The claim was based on strict liability and negligence. The asserted negligence of the plaintiff[113] did not, the court held, amount to conduct which was sufficient to bar the strict liability claim.[114] Because the defendant was found strictly liable and the conduct of the plaintiff was not sufficient to bar that claim, the court held that any negligence of the plaintiff was irrelevant.[115] Nevertheless, the supreme court expressed doubt[116] whether the conduct of the plaintiff could, as a matter of law, have been the proximate cause of the damage "since the purpose of the . . . equipment was to extinguish a fire on the grill irrespective of its origin."[117] Although the fire itself may have started as a result of the plaintiff's negligence, the failure of the extinguisher to operate properly was not the result of, or influenced by, the plaintiff's negligence.

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[108] *Id.* at 589, 218 A.2d at 634.

[109] *Id.* at 591-92, 218 A.2d at 636.

[110] *Id.* at 592, 218 A.2d at 637.

[111] 81 N.J. 548, 410 A.2d 674 (1980).

[112] *Id.* at 553, 410 A.2d at 677. The manufacturer of the equipment was also a party. That claim, however, was settled at the outset of trial. *Id.* at 554, 410 A.2d at 677.

[113] *Id.* at 562, 410 A.2d at 681-82. The defendant contended that the plaintiff was negligent for storing paper plates near a hot grill and for allowing grease to accumulate on the walls and the grill. *Id.*

[114] *Id.* at 562-63, 410 A.2d at 681-82. To bar a claim in strict liability, the "defendant must show that the plaintiff with actual knowledge of the danger posed by the defective product voluntarily and unreasonably encountered that risk." *Id.*, 410 A.2d at 682. (footnote omitted).

[115] *Id.* at 564-65, 410 A.2d at 683.

[116] Since the court found the defendant strictly liable, it did not have to consider the effect of the plaintiff's negligence with respect to the negligence claim. Accordingly, the court's discussion of the plaintiff's conduct in the context of the negligence claim is dictum.

[117] 81 N.J. at 562, 410 A.2d at 682.

Both *Bexiga* and *Cartel* cited *Bahlman v. Hudson Motor Car Co.*[118] It was contended in *Bahlman* that the construction of an automobile caused plaintiff's injuries. Bahlman sued the defendant, alleging that the latter was liable for damages for breach of warranty in misrepresenting the safety features built into its vehicle.[119] The manufacturer asserted plaintiff's contributory negligence in causing the accident.[120] The court rejected this defense, finding that although the accident was caused by the plaintiff's negligence, that negligence was foreseeable, and the safety features of the car represented by the manufacturer were not for the purpose of avoiding accidents, but to lessen the injuries that might result from such accidents.[121] Since the manufacturer represented that the construction of the automobile would protect the driver from the consequences of careless driving,[122] it would be illogical to relieve the manufacturer from liability when the anticipated event occurred.[123]

Bexiga involved a personal injury claim which occurred in the work place, so that the nonapplicability of the defense of contributory negligence may be the product of what seems to be a special policy of protecting the worker.[124] *Soronen* also involved a clear public policy expressed in administrative regulations.[125] The discussions of contributory negligence as a defense to a negligence claim in *Cartel* is *dictum* and probably provides more of a question than an answer.[126]

Nevertheless, it is submitted that these expressions from the New Jersey Supreme Court, together with the court's citation of *Bahlman*, do contain an expression of policy that contributory negligence will not be permitted to bar a claim for a loss where a defendant had the duty to prevent the loss, without regard to whether the origin of the

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[118] 290 Mich. 683, 288 N.W. 309 (1939).

[119] *Id.* at 687, 288 N.W. at 310-11.

[120] *Id.* at 697, 288 N.W. at 314 (Chandler, J., dissenting).

[121] *Id.* at 690-91, 288 N.W. at 312.

[122] *Id.* at 690, 288 N.W. at 311. The court held that the manufacturer in affirmatively warranting its product "has enlarged his duty beyond that imposed by law, and assumes 'the risk of injuries proximately caused by such misrepresentation.' " *Id.* at 695, 288 N.W. at 313 (quoting Curby v. Mastenbrook, 288 Mich. 676, 683, 286 N.W. 123, 126 (1939)).

[123] 290 Mich. at 697, 288 N.W. at 312-13.

[124] *Cf.* Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 177, 406 A.2d 140, 155 (1979). *Suter* was a strict products liability case involving injury to an employee in the work place. *Id.* at 154, 406 A.2d at 141. The defendant was alleged to have failed to provide a safety device on a piece of its machinery. *Id.*, 406 A.2d at 142. The supreme court would not allow the manufacturer to avoid liability for breach of its duty to prevent injury to those who use the product. *Id.* at 168, 406 A.2d at 153.

[125] *See supra* text accompanying note 109.

[126] *See supra* note 116.

loss was the plaintiff's negligence.[127] Applying this policy to cases alleging accountant's malpractice, New Jersey courts will probably find that the negligence of a client in failing to discover fraud or in conducting its business will not bar a claim for malpractice.[128] If it is determined that the accountant had and breached a duty to discover and expose employee fraud, the accountant will not be permitted to assert as a defense, the contributory negligence of the client in permitting or failing to discover the very losses which the accountant was under a duty to prevent. To hold otherwise would be inconsistent with what appears to be New Jersey's policy of limiting the contributory negligence defense when the defendant has undertaken to prevent a loss anticipating that the loss may occur as a result of the plaintiff's negligence.

IV. Conclusion

It is submitted that the better reasoned view, and the view supported by the weight of authorities which have considered the question, is that the negligence of a client in managing his business should not generally be a defense in accountant's malpractice actions. When, however, the conduct of the client is unreasonable under the circumstances and interferes with the accountant's ability to perform his duty, that conduct should be a bar, or partial bar (depending on applicability of comparative negligence concepts) to the cause of action. In other words, the better rule is that set forth in *National Surety*.

The earlier cases like *Craig* which denied relief to a plaintiff when the accountant had negligently failed to discover employee fraud, on the ground that the element of proximate cause was missing, are clearly wrong. If the accountant discovered the wrong, the employee would have been discharged and future losses would have been prevented. When the claim made is that as a result of the accountant's erroneous report, the client took actions which resulted in loss, proximate cause may be more difficult to establish, but the difficulty is factual and not legal.

The *National Surety* rationale does require some refinement. When the accountant negligently fails to discover employee defalca-

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[127] *See supra* notes 99 & 124 and accompanying text.

[128] *See* Kurland, *supra* note 68, at 158. There, the author suggests that courts ought to use a balancing test in determining whether the defense of contributory negligence should be permitted. *Id.* at 158-59. Kurland does not, however, detail what factors should be considered in the balancing test he proposes. It is Kurland's opinion that the availability of the defense should be made on a case-by-case basis. *Id.* at 159.

tions, but does advise the client to make certain improvements in his operations, which if taken would prevent future defalcations, then strictly speaking the client has not interfered with the accountant's ability to perform his examination and discovery of the loss. Therefore, that conduct would, under *National Surety*, not bar a claim against the accountant. In this situation it would be unfair and unwise from a policy point of view to visit the entire liability on the accountant when the client could have avoided the loss if it had followed the accountant's suggestions.[129] Here, the question of the reasonableness of the client's conduct in the circumstances should be left to the trier of fact. The factors to be considered by the trier of fact in determining the reasonableness of the client's conduct should include the utility and cost of the recommended improvements. The circumstance of the accountant's failure to discover prior losses, and the client's resulting perception of the utility of the suggested changes are relevant to the reasonableness of the client's decision not to implement suggested improvements. If the client unreasonably does not follow the accountant's suggestions, that failure must still be the proximate cause of the loss in order to bar recovery by the client. Therefore, if the accountant has breached his duty over a period of time and during that span of time several losses occur, only those losses occurring after the client's unreasonable failure[130] to adopt the accountant's recommendations would be affected.

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[129] The rule suggested here, i.e., that the defense of contributory negligence in the sense of failure to follow the accountant's recommendations, could explain at least in part the results in *Craig*, *International Laboratories*, and *Social Security Administration*, in that in each of these cases the client did not follow suggestions which would have prevented or limited the losses.

The refinement suggested here is somewhat analogous to medical malpractice cases in which it is contended that a patient is contributorily negligent in not following the therapy prescribed by the physician. It has been held that this type of conduct by the plaintiff, subsequent to the physician's breach of duty, will not bar a claim but may limit the amount of damages recoverable on a failure to mitigate theory. Flynn v. Stearns, 52 N.J. Super. 115, 145 A.2d 33 (App. Div. 1958).

[130] This would allow the court to give a client a reasonable period of time to implement the suggested changes.