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Special Edition

*A monthly report for
wealth management
professionals.*

*Privity No Longer an
Absolute Defense in
New York 1*

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As part of our ongoing efforts to keep wealth management professionals informed of recent developments related to our practice area, we have summarized below some items we think would be of interest. Please let us know if you have any questions.

Privity No Longer an Absolute Defense in New York

Yesterday, the New York Court of Appeals issued a decision in *Estate of Schneider v. Finmann* (citation pending), a case involving the applicability of New York's strict privity defense in an estate planning malpractice claim that was previously discussed in our Wealth Management Update Newsletter (June 2010). In what is sure to cause every estate planning attorney and personal representative to take note, the Court of Appeals has held that a personal representative may maintain a legal malpractice claim for losses to the estate as a result of negligent estate planning representation.

By way of background, in New York, a third party, without privity, generally cannot maintain a claim against an attorney in professional negligence. This strict privity rule has been applied to estate planning malpractice lawsuits, thereby effectively protecting estate planning attorneys from suits commenced by personal representatives and beneficiaries. However, it also has left a decedent's estate with no recourse against an attorney who planned the estate negligently. Recognizing this, the Court of Appeals has carved out an exception to the privity rule.

In *Estate of Schneider*, decedent retained the services of an attorney for estate planning advice. Prior to decedent's death, decedent transferred ownership of a \$1 million life insurance policy from a family limited partnership he controlled to himself individually. When decedent died, the insurance proceeds became subject to estate tax. Decedent's estate commenced a malpractice action, alleging that the estate planning attorney negligently advised the decedent to transfer, or failed to advise the decedent not to transfer, the policy which resulted in increased estate tax costs. The trial court granted the attorney's motion to dismiss the estate's complaint for failure to state a cause of action. The Appellate Division affirmed, holding that, in the absence of privity, the estate may not maintain an action for legal malpractice. The Court of Appeals reversed the prior decision and reinstated the estate's claim.

In its decision, the Court of Appeals found that privity exists between a personal representative and the estate planning attorney. In siding with other jurisdictions that have a relaxed privity rule, the Court noted that "the estate essentially 'stands in the shoes' of the decedent" and, therefore, "has the capacity to maintain the malpractice claim on the estate's behalf." This decision, however, does not go so far as to strike down completely a privity defense. Indeed, the Court of Appeals notes in its decision that strict privity remains a bar against beneficiaries' and other third-party individuals' estate planning malpractice claims absent fraud or other special circumstances.

In short, a personal representative is no longer prevented from raising a negligent estate planning claim against the attorney who caused harm to the estate. As a result, a personal representative may now need to consider reviewing the estate planning advice given to the decedent during lifetime to determine whether any such claim exists and should be pursued.

The Personal Planning Department at Proskauer is one of the largest private wealth management teams in the country and works with high net-worth individuals and families to design customized estate and wealth transfer plans, and with individuals and institutions to assist in the administration of trusts and estates.

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This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice, or render a legal opinion.

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