ESTATE PLANNERS AND THE TORT OF NEGLIGENT MISREPRESENTATION: BUT I THOUGHT THAT BENEFICIARIES COULDN'T SUE ME FOR MALPRACTICE?

Comment

by Jobe Jackson

I. INTRODUCTION

So long as estate planners practice their craft, the potential for beneficiaries to face disappointment in the work of estate planners will exist. The disappointment of beneficiaries with estate planners is especially understandable when the source of conflict is not the fault of the testator, but rather the fault of poor legal drafting. Traditionally, the cause of action against an estate planner who does not practice their craft with skill is a claim of malpractice.[1] Therein lies the problem for disappointed beneficiaries. Texas does not allow non-client beneficiaries to sue an estate planner for legal malpractice due to the privity rule.[2] Therefore, beneficiaries who would otherwise sue an estate planner for malpractice are rejected by the barrier of privity and must rely on the estate's personal representative to bring a suit for malpractice.[3]

It appears that Texas's desire to maintain the sanctity of the privity barrier has left beneficiaries out in the cold when it comes to punishing the malpractice of estate planners. But, this may not be the case. Texas allows beneficiaries to

1. *See* Bradley E. S. Fogel, *Estate Planning Malpractice: Special Issues in Need of Special Care*, LAW TRENDS & NEWS ESTATE PLANNING (May 2005), http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/0506_estate_estateplanning.html.

2. *See* Barcelo v. Elliott, 923 S.W.2d 575, 579 (Tex. 1996).

3. *See* Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 784 (Tex. 2006) (holding that an estate's personal representative may maintain a legal malpractice claim on behalf of the estate against the decedent's estate planner).

bring a tort claim of negligent misrepresentation against attorneys.[4] Negligent misrepresentation may be the silver bullet to the privity barrier for Texas beneficiaries. Because of this weapon against the privity barrier, estate planners may face future claims of negligent misrepresentation and ask themselves, but I thought beneficiaries couldn't sue me for malpractice?

This comment will focus on the ability of beneficiaries in Texas to sue estate planners for negligent misrepresentation in situations when they could not otherwise bring a claim of malpractice. The first section of this comment will explore how Texas courts have protected estate planners from legal malpractice suits brought by disgruntled beneficiaries.[5] Specifically, the history and recent developments of the Texas privity barrier are examined.[6] The second section of this comment will analyze the individual elements of a claim for negligent misrepresentation in Texas.[7] This article gives special focus is given to the fact that Texas has yet to interpret the "business" or "business transactions" language of the second element of negligent misrepresentation.[8] The comment compares interpretations by Colorado and Iowa are compared and the concluding argument recommends that Texas should follow the persuasive interpretation presented by Colorado instead of Iowa.[9] The third and final section of this comment presents practitioners with a hypothetical situation in which a claim of negligent misrepresentation may arise against a Texas estate planner.[10] The hypothetical illustrates the potential for liability for negligent misrepresentation, on an element by element basis, faced by a fictitious Texas estate planner, Larry Lawyer.[11] As a whole, this comment strives to provide practicing estate planners with an in-depth look at a tort that may circumvent Texas's robust privity barrier in the estate planning context, and allow a disgruntled beneficiary to sue them when they otherwise could not—negligent misrepresentation.

II. ESTATE PLANNERS VS. DISGRUNTLED BENEFICIARIES: PROTECTIONS & EXPOSURE

This portion of the comment focuses on the legal background in the ongoing conflict between estate planners and disgruntled beneficiaries seeking recovery for legal wrongs. Understanding this foundation of information allows for a greater appreciation of the tort of negligent misrepresentation in the estate planning context. Only after estate planners recognize the strength of the privity barrier to malpractice claims in Texas, can they truly appreciate the

4. McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 788 (Tex. 1999).
5. *See infra* Part II.
6. *See infra* Part II.
7. *See infra* Part III.
8. *See infra* Part III.C.2.
9. *See infra* Part III.D.
10. *See infra* Part IV.
11. *See infra* Part IV.

substantial exposure created by negligent misrepresentation claims brought by beneficiaries.

A. Legal Protection for Estate Planners: The Privity Barrier

The privity barrier is "a bright-line . . . rule which denies a cause of action to all beneficiaries whom the attorney did not represent."[12] The landmark Texas Supreme Court case of *Barcelo v. Elliott* answered the question of "whether an attorney who negligently drafts a will or trust agreement owes a duty of care to persons intended to benefit under the will or trust, even though the attorney never represented the intended beneficiaries."[13] After weighing the rationale that without the privity barrier "clients would lose control over the attorney-client relationship, and attorneys would be subject to almost unlimited liability," with the counter argument "that recognizing a limited exception to the privity barrier as to lawyers who negligently draft a will or trust would not thwart the rule's underlying rationales," the court in *Barcelo* held that "an attorney retained by a testator or settlor to draft a will or trust owes no professional duty of care to persons named as beneficiaries under the will or trust."[14] Although an exception to the privity rule in the event of negligence seems equitable given the damage incurred by beneficiaries, the court did not allow it.[15] Rather, *Barcelo* embraced a bright-line privity rule as a means to "ensure that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation."[16]

As an estate planner in Texas, the application of the privity rule in *Barcelo* should not be taken lightly. The court gave estate planners a strong shield of protection from beneficiaries that is both rare and subject to strong criticism.[17] As former Texas Supreme Court Justice Cornyn critiqued in his dissent, "the Court embraces a rule recognized in only four states . . . [that] unjustifiably insulates an entire class of negligent lawyers from the consequences of their wrongdoing, and unjustly denies legal recourse to the [beneficiaries] for whose benefit [the client] hired a lawyer in the first place."[18] Justice Cornyn's dissent raises a point that no doubt resonates with many but was nonetheless irrelevant in the end.[19] *Barcelo* established a bright-line privity rule that would remain unchanged for a decade.[20]

A slight alteration in the bright-line privity rule occurred in 2006 when the independent executors of an estate attempted to bring a legal malpractice claim

12. Barcelo v. Elliott, 923 S.W.2d 575, 578 (Tex. 1996).
13. *Id.* at 576.
14. *Id.* at 577–79.
15. *Id.* at 577.
16. *Id.* at 578–79.
17. *See id.* at 578.
18. *Id.* at 579.
19. *See id.*
20. *See id.* at 578.

against the estate planners of the estate.[21] In the case of *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, the Texas Supreme Court resolved the issue of whether or not the independent executors of an estate could bring a malpractice claim against its estate planner.[22] "[T]he estate [had] incurred over $1,500,000 in tax liability that could have been avoided by competent estate planning."[23] Given the court's previous firm holding in *Barcelo*, the estate planner expected to be protected by the privity barrier.[24]

However, in a decision that reversed the holdings of the lower courts and opened a new, albeit small, door to the privity barrier, the *Belt* court held that "there is no legal bar preventing an estate's personal representative from maintaining a legal malpractice claim on behalf of the estate against decedent's estate planners."[25] But what if a disappointed beneficiary is also the personal representative, how is the policy rationale of the *Barcelo* decision upheld under this common circumstance?

The court addressed the issue of when a disappointed beneficiary is the personal representative by noting that "he or she would not necessarily recover the lost inheritance [that made them disappointed] should the malpractice claim succeed."[26] This is because "the recovery would flow to the disappointed beneficiary only if the estate plan had provided for such a distribution, fulfilling the decedent's wishes [, and t]hese factors prevent personal representatives who are also beneficiaries from using our holding today as an end run around *Barcelo*."[27] Therefore, by "limiting the class of potential estate-planning malpractice claimants to the personal representatives of a client's estate . . . [the decision in *Belt*] ensure[s] that estate-planning attorneys are not subject to 'almost unlimited liability'"; thus the decision in *Belt* does not thwart the goal of the *Barcelo* decision.[28]

Given the decisions of both *Barcelo* and *Belt*, estate planners in the state of Texas are only subject to legal malpractice claims from either the testator or the estate's personal representative on behalf of the deceased testator.[29] Despite the legal protection provided to estate planners, disgruntled beneficiaries may still have a legal weapon at their disposal to circumvent the privity barrier.

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21. *See* Belt v. Oppenheimer, 192 S.W.3d 780 (Tex. 2006).
22. *Id.* at 782.
23. *Id.*
24. *See Barcelo*, 923 S.W.3d at 578. As a point of interest, it is worth noting that in the decade between *Barcelo* and *Belt*, Texas has become one of eight states that apply a strict privity rule in the estate planning malpractice context. *See Belt*, 192 S.W.3d at 783.
25. *Id.* at 782.
26. *Id.* at 788.
27. *Id.*
28. *Id.* at 789 (alteration in original) (citation omitted).
29. *See id.* at 788–89; *see* Barcelo v. Elliott, 923 S.W.2d 575, 579 (Tex. 1996).

B. Legal Exposure for Estate Planners: Negligent Misrepresentation

Although the privity barrier still stands strong and estate planners are substantially protected from legal malpractice claims brought by disappointed beneficiaries, there is a cause of action that should raise concern among estate planners. Estate planners are subject to a claim of negligent misrepresentation, which:

> is not equivalent to a legal malpractice claim . . . [because] liability is not based on the breach of duty a professional owes his or her clients or others in privity, but on an independent duty to the nonclient based on the professional's manifest awareness of the nonclient's reliance on the misrepresentation and the professional's intention that the nonclient so rely.[30]

The Texas Supreme Court adopted the tort of negligent misrepresentation in the case of *Federal Land Bank Association of Tyler v. Sloane*.[31] The court adopted the tort as found in the Restatement Second of Torts § 552 (1977).[32] *Sloane* held that the elements for a cause of negligent misrepresentation are:

> (1) the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest; (2) the defendant supplies "false information" for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation.[33]

Although the decision in *Sloane* marked the first time the Supreme Court of Texas adopted the tort, negligent misrepresentation had been applied to many different types of professionals in lower Texas courts.[34] However, despite being applied to numerous professionals, negligent misrepresentation had not been applied to attorneys.[35]

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30. McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 792 (Tex. 1999) (alteration in original) (citation omitted).

31. Fed. Land Bank Ass'n of Tyler v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991).

32. *Id.*

33. *Id.*

34. *McCamish*, 991 S.W.2d at 791 ("*See, e.g.*, *Steiner v. Southmark Corp.*, 734 F. Supp. 269, 279–80 (N.D. Tex. 1990) (auditor); *Smith v. Sneed*, 938 S.W.2d 181, 185 (Tex. App.—Austin 1997, no writ) (physician); *Hagans v. Woodruff*, 830 S.W.2d 732, 736 (Tex. App.—Houston 1992, no writ) (real-estate broker); *Lutheran Bhd. v. Kidder Peabody & Co.*, 829 S.W.2d 300, 309 (Tex. App. —Texarkana 1992, writ granted w.r.m.) (securities placement agent); *Blue Bell v. Peat, Marwick, Mitchell & Co.*, 715 S.W.2d 408, 411–12 (Tex. App.—Dallas 1986, writ ref'd n.r.e) (accountant); *Cook Consultants, Inc. v. Larson*, 700 S.W.2d 231, 234 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (surveyor); *Great Am. Mortgage Investors v. Louisville Title Ins. Co.*, 597 S.W.2d 425, 429–30 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.) (title insurer); *Shatterproof Glass Corp. v. James*, 466 S.W.2d 873, 880 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.) (accountant).").

35. *See id.*

In 1999, the Texas Supreme Court addressed the question of "[w]hether the absence of an attorney-client relationship precludes a third party from suing an attorney for negligent misrepresentation."[36] The court in *McCamish* held that "[w]e perceive no reason why section 552 [negligent misrepresentation] should not apply to attorneys . . . nothing in the language of section 552 or in the reasoning of *Sloane* warrants such an exception."[37] Therefore, estate planners are subject to a claim of negligent misrepresentation from disappointed beneficiaries.[38]

Although the *McCamish* court is quick to point out that the privity barrier in *Barcelo* is not overruled because "allowing a nonclient to bring a negligent misrepresentation cause of action against an attorney does not undermine the general rule that persons who are not in privity with an attorney cannot sue the attorney for legal malpractice[,]" this silver lining provides little solace for estate planners.[39] There is a way for beneficiaries to circumvent the protections of the privity barrier, and it is here to stay.

C. Legal Repercussions for Estate Planners: Available Damages for a Claim of Negligent Misrepresentation

The next logical topic for estate planners facing potential liability from negligent misrepresentation claims brought by disappointed beneficiaries is the subject of potential damages. The *Sloane* decision not only established the Restatement (Second) of Torts as the source of a negligent misrepresentation claim, but also established that available damages should be governed by the Restatement (Second) of Torts as well.[40] When the plaintiffs in *Sloane* sought to extend damages beyond pecuniary loss to include mental anguish, the court "decline[d] to extend damages beyond those limits provided in Restatement section 552B."[41] Under section 552B(1), the available damages for negligent misrepresentation:

> are those necessary to compensate the plaintiff for the pecuniary loss to him of which the misrepresentation is a legal cause, including (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and (b) pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation.[42]

The most relevant available damage in the context of a beneficiary suing an estate planner is "pecuniary loss suffered otherwise as a consequence of the

36. *Id.*
37. *Id.* (alteration in original) (citation omitted).
38. *See id.*
39. *Id.* (alteration in original); *see supra* Part II.A.
40. *See* Fed. Lank Bank Ass'n of Tyler v. Sloane, 825 S.W.2d 439, 443 (Tex. 1991).
41. *Id.*
42. RESTATEMENT (SECOND) TORTS § 552B(1)(a)–(b) (1977).

plaintiff's reliance upon the misrepresentation."[43] In essence, section 552B allows detrimental reliance damages to a beneficiary who has relied on a negligent misrepresentation made by an estate planner.[44] Therefore, depending on the extent of reliance on the part of the beneficiary, the damages for a claim of negligent misrepresentation could be substantial. For example, could a beneficiary rely on a negligent misrepresentation of their expectancy as collateral for a transaction and thus incur pecuniary loss?[45] There are no dispositive Texas cases on this issue; however, the subject of potential damage outcome scenarios will arise in the application section of this comment.[46]

III. ANALYSIS OF THE ELEMENTS: NEGLIGENT MISREPRESENTATION IN THE ESTATE PLANNING CONTEXT

This portion of the comment will consist of a basic analysis of the elements of negligent misrepresentation in the estate planning context.[47] The purpose of the analysis is to give estate planners a basic idea of their potential to exposure from a claim of negligent misrepresentation brought by a disgruntled beneficiary. Specifically, the analysis will differentiate between the elements that are readily established in the estate planning context and those that are not. Furthermore, in an effort to provide clarity to this particular cause of action, this portion of the comment will recommend that the State of Texas adopt a common meaning of "business" within the context of negligent misrepresentation.

A. The Elements of Negligent Misrepresentation as Adopted in Federal Land Bank Association of Tyler v. Sloane

As a matter of convenience and necessity for the following discussion, a restatement of the elements of negligent misrepresentation as adopted by the Texas Supreme Court decision in *Sloane* is sensible. As held in the *Sloane* decision, there are four elements for a cause of negligent misrepresentation in Texas.[48]

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43. *Id.* § 552B(1)(b) (1977).

44. *See id.* § 552B.

45. *See generally* Humble Oil & Refining Co. v. Luckel, 171 S.W.2d 902, 905 (Tex. App.—Galveston 1943, writ ref'd w.o.m.) ("It is well settled in this state that an expectancy of inheritance, or even the anticipated rights of a person as next of kin, may be the subject of a sale and conveyance in equity[.]") (alteration in original).

46. *See infra* Parts IV–V.

47. For a discussion of the elements of negligent misrepresentation that is not aimed specifically to the estate planning context, *see* Robert K. Wise & Heather E. Poole, *Negligent Misrepresentation in Texas: The Misunderstood Tort*, 40 TEX. TECH L. REV. 845 (2008).

48. *See* Fed. Land Bank Ass'n of Tyler v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991) (holding that the four elements are "(1) the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest; (2) the defendant supplies 'false information' for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in

In the following subsections, the elements of negligent misrepresentation will be divided into two groups for analysis. A discussion of those elements which are likely met in the estate planning context is followed by a discussion of those elements that only questionably apply to that context.

B. The Elements of Negligent Misrepresentation That Readily Apply to the Estate Planning Context: Elements One and Three as Adopted in the Sloane *Decision*[49]

The first element of negligent misrepresentation that clearly applies in the estate planning context is that "the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest."[50] The estate planning context in which an attorney may convey a negligent misrepresentation to a beneficiary would be in the course of their representation of the testator.[51] The attorney-client relationship with the testator, in which the attorney is both acting in the course of a business (the practice of law) and has a pecuniary interest (the legal fee), acts as an appropriate satisfaction of the first element of negligent misrepresentation.[52] Therefore, if in the course of the attorney's dealings with the client-testator, the estate planner makes any representations to a beneficiary, then the attorney has met the first element of negligent misrepresentation.[53] For example, if an estate planner makes a representation to a beneficiary during a will execution, the door for a claim of negligent misrepresentation has opened because the first element will be met. This is because the proper context exists due to the will execution ceremony qualifying as both the course of an estate planner's business as well as a pecuniary interest.[54]

The next element of negligent misrepresentation that readily applies in the estate planning context is the question of whether or not the estate planner "exercise[d] reasonable care or competence in obtaining or communicating the information."[55] Regarding information not previously known to a beneficiary (like their expectancy in a will or trust), the official comments to section 552 state that the recipient of information is entitled to expect that the supplier will exercise that care and competence in its ascertainment which the supplier's business or profession requires.[56] Since the profession of estate planners is law,

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obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation.").

49. *Id.*

50. *Id.*

51. *See* Barcelo v. Elliott, 923 S.W.2d 575, 578 (Tex. 1996).

52. *See Sloane*, 825 S.W.2d at 442.

53. *See supra* note 51.

54. Gerry W. Beyer, *The Will Execution Ceremony*, GERRY W. BEYER (1999), www.professorbeyer.com/Articles/Will_Ceremony.html.

55. *See Sloane*, 825 S.W.2d at 442.

56. *See* RESTATEMENT (SECOND) OF TORTS § 552, cmt. e (1977).

they are "held to the standard of care that would be exercised by a reasonably prudent attorney."[57] Therefore, in the event a beneficiary brings a claim of negligent misrepresentation against an estate planner, the beneficiary will need expert testimony of an attorney to prove that the accused estate planner did not exercise the reasonable care or competence required by section 552.[58]

Although there is no case law specifically addressing the subject in the estate planning context, the risk of an expert finding that the estate planner did not exercise reasonable care makes this question of fact not worth relying on as a crutch against liability. As the later hypothetical illustrates, the situations inducing a beneficiary to bring a claim of negligent misrepresentation against an estate planner will most likely not impress a legal peer.[59] Therefore, despite the lack of concrete case law examples, it is best that an estate planner assume that this standard will most likely be met in the event of litigation.

C. The Elements of Negligent Misrepresentation That Lack Clarity in the Estate Planning Context: Elements Two and Four as Adopted in the Sloane *Decision*[60]

As a matter of convenience for the format of the discussion presented in this comment, the element of justifiable reliance will be discussed before the business element.[61]

1. Justifiable Reliance by the Beneficiary

The justifiable reliance element has two facets as it applies to the estate planning context.[62] There is the reliance by the beneficiary as well as the inducement to reliance by the estate planner.[63] Although the existence of justifiable reliance by the beneficiary is a straightforward question of fact, the means by which an estate planner invites that reliance is subject to confusion.[64]

The *Sloane* decision requires that the "plaintiff suffers pecuniary loss by justifiably relying on the representation" in order to state a claim of negligent misrepresentation.[65] In order to determine whether this element is met, a court must "consider the nature of the relationship between the attorney, client, and

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57. Hall v. Rutherford, 911 S.W.2d 422, 424 (Tex. App.—San Antonio 1995, writ denied) (citing Veschi v. Stevens, 861 S.W.2d 291, 292 (Tex. App.—San Antonio 1993, no writ)).

58. *Id.* (holding that "expert testimony of an attorney is necessary to establish this standard of skill and care ordinarily exercised by an attorney." (citing Anderson v. Snider, 808 S.W.2d 54, 55 (Tex. 1991))).

59. *See infra* Parts IV.A, D.

60. *Sloane*, 825 S.W.2d at 442 ("the defendant supplies 'false information' for the guidance of others in their business . . . [and] the plaintiff suffers pecuniary loss by justifiably relying on the representation.").

61. It is more logical to discuss the business element in detail directly preceding the section advocating that Texas adopt the Colorado interpretation of this element. *See infra* Parts III.C.2.i–ii.

62. *See* RESTATEMENT (SECOND) OF TORTS § 552(2) (1977).

63. *See id.*

64. *See* discussion *infra* Part III.C.1.

65. *Sloane*, 825 S.W.2d at 442.

nonclient."[66] Stated alternatively, a court must decide whether "given a [negligent misrepresentation] plaintiff's individual characteristics, abilities, and appreciation of facts and circumstances at or before the time of the alleged [misrepresentation,] it is extremely unlikely that there is actual reliance on the plaintiff's part."[67] Therefore, Texas courts have two considerations when determining whether or not the beneficiary justifiably relied on the alleged misrepresentation made by the estate planner.[68] First, a court must assess whether or not the relationship between the estate planner, client, and beneficiary is one in which the situation could arise where a beneficiary could have justifiably relied on the statements of the attorney.[69] Second, the court must consider whether the beneficiary in this situation is one who would be susceptible to rely on any misrepresentation taking place.[70] These are questions of fact, and the results in any given situation will depend on the facts presented for consideration.[71]

Where the element of justifiable reliance lacks clarity in the estate planning context is in establishing what behavior is required of the estate planner to induce reliance. The potential for confusion arises from the lifecycle of the Texas Supreme Court's interpretation of the Restatement Second of Torts § 552(2).[72] The first interpretation of § 552(2) in the context of holding an attorney liable for negligent misrepresentation was in *McCamish*, where the court held that inducement to reliance "is available only when information is transferred by an attorney to a known party for a known purpose."[73] In the estate planning context, this would look like a situation where an estate planner supplies information about the contents of a will to a beneficiary for the known purpose of informing the beneficiary of his or her inheritance rights.[74] This situation would in turn induce the beneficiary to justifiably rely on an expectancy from the will.[75] If the information leads that beneficiary to rely on the expectancy for a conveyance or as collateral, and the beneficiary never actually receives the inherited property and suffers a pecuniary loss, then the

66. McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 794 (Tex. 1999).

67. Grant Thornton LLP v. Prospect High Income Fund, 314 S.W.3d 913, 923 (Tex. 2010) (quoting Haralson v. E.F. Hutton Grp., Inc., 919 F.2d 1014, 1026 (5th Cir. 1990) (applying Texas law)).

68. *See id.*

69. *See id.* at 923 (quoting Lewis v. Bank of Am. NA, 343 F.3d 540, 546 (5th Cir. 2003) (applying Texas law) ("a person may not justifiably rely on a representation if 'there are "red flags" indicating such reliance is unwarranted.'")).

70. *See id.*

71. *See id.*

72. RESTATEMENT (SECOND) TORTS § 552(2) (1977) ("Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered[:] (a) by the person or one of a limited group of 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 that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.").

73. *McCamish*, 991 S.W.2d at 794.

74. *See infra* Part IV.A.

75. *See infra* Part IV.A.

estate planner has exposed himself or herself to a claim of negligent misrepresentation.[76]

Seven years after the *McCamish* decision, the Texas Supreme Court in *Belt* reinterpreted the inducement aspect of the justifiable reliance element.[77] The court in *Belt* stated that suits for negligent misrepresentation against attorneys can only arise, the term "arise" meaning that an attorney has properly induced the third party into reliance when "an attorney has determined that communication with the third party is compatible with the attorney-client relationship and the attorney receives *consent from the client* to communicate with the non-client."[78] Although the court in *Belt* made this statement in the context of justifying the *McCamish* decision in light of *Barcelo* (the respondents in *Belt* relied on the privity barrier in *Barcelo*), this statement could lead to confusion about how an attorney can induce justifiable reliance by a recipient of information due to the additional requirement of the client's consent.[79] Courts could possibly combine the language of *McCamish* and *Belt* to create a standard where the attorney, in order to induce justifiable reliance, must transfer information to a known party for a known purpose with the consent of the client. This interpretation would greatly limit the exposure of estate planners to claims of negligent misrepresentation, because it is highly unlikely that estate planners would have the express consent of the client to supply the types of information to beneficiaries that created the liability in the first place. However, the Texas Supreme Court apparently did not mean for the *Belt* decision to result in such a conclusion.[80]

In the 2010 case of *Grant Thornton LLP v. Prospect High Income Fund*, the Texas Supreme Court apparently rejected any confusion that *Belt* could have created.[81] The court reiterated that *McCamish* stood for the proposition that "a section 552 cause of action is available only when information is transferred by an attorney to a *known* party for a *known* purpose."[82] Given that *Grant Thornton* reaffirmed *McCamish* as the Texas authority for section 552

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76. *See infra* Part IV.

77. *See* Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 788 (Tex. 2006).

78. *Id.* (emphasis added).

79. *See id.* It is worth noting that the "client's consent" language stems from a parallel issue in negligent misrepresentation claims against attorneys. Specifically, the issue exists as to whether the third party communications giving rise to negligent misrepresentation claims violate Texas Disciplinary Rules of Professional Conduct, Rule 2.02. *See* TEX. DISCIPLINARY PROF'L CONDUCT 2.02. One of the responses by the *McCamish* court to the argument that allowing claims of negligent misrepresentation would contradict the policy justification of *Barcelo* was that the attorney would not lose control of the attorney-client relationship since their actions are already governed by the rules of professional conduct. *See* McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 793 (Tex. 1999).

80. *See* Grant Thornton LLP v. Prospect High Income Fund, 314 S.W. 3d 913, 920 (Tex. 2010).

81. *See id.*

82. *Id.* (quoting *McCamish*, 991 S.W.2d at 794).

negligent misrepresentation claims, any confusion caused by *Belt* appears averted.[83]

2. Guidance of Others in Their Business

The most problematic element of negligent misrepresentation in the estate planning context is that "the defendant supplies 'false information' for the guidance of others in their business."[84] This is because Texas courts have not defined the meaning of "business" in the context of negligent misrepresentation.[85] Negligent misrepresentation is generally viewed as a commercial tort, and how Texas decides to define business will determine whether or not the tort fits within the non-commercial estate planning context.[86] Given that there is no set Texas definition of business within the context of negligent misrepresentation, it is prudent for an attorney to look at how other states have addressed the issue. The Supreme Courts of two other states, Colorado and Iowa, have recently defined the term business within the context of negligent misrepresentation.[87]

i. The Colorado "Common Usage" Approach

The Colorado Supreme Court recently had the opportunity to review a case *en banc* in which non-clients sued an attorney for negligent misrepresentation, because the attorney allegedly provided the non-clients with incorrect information about a statute of limitations for a separate negligence lawsuit.[88] Colorado, like Texas, uses the 1977 Restatement Second of Torts, section 552, as the basis for negligent misrepresentation claims.[89] Relying on comment "a" to section 552 and Black's Law Dictionary to shape its interpretation of business transactions, the *Allen v. Steele* court held that "an initial consultation to discuss a potential civil lawsuit is not sufficient to meet the element 'guidance of others in their business transactions.'"[90]

The court in *Allen* began its analysis by looking to the comment sections of section 552 in order to find hints as to the Restatement's intended meaning of the term "business transactions."[91] The court noted the following:

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83. *Id.* (holding that "[w]e reaffirm today that *McCamish* represents Texas law under section 552 of the Restatement.").

84. Fed. Land Bank Ass'n of Tyler v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991).

85. *See id.*

86. *Id.* at 443 (holding that "[t]here has been no trend to reject the pecuniary loss rule in what is essentially a commercial tort.").

87. *See* Allen v. Steele, 252 P.3d 476, 484 (Colo. 2011); *see also* Sain v. Cedar Rapids Cmty. Sch. Dist., 626 N.W.2d 115, 126–27 (Iowa 2001).

88. *See Allen*, 252 P.3d at 479.

89. *Id.* at 482.

90. *Id.* at 484.

91. *See id.* at 483.

> [t]he comments discuss liability in terms of "commercial transactions" and state that "[b]y limiting the liability for negligence of a supplier of information to be used in commercial transactions . . . the law promotes the important social policy of encouraging the flow of commercial information upon which the operation of the economy rests."[92]

After the court looked at the comment section of the Restatement provision and established that section 552 had a commercial setting in mind with the intent to protect economic interests, the court turned to Black's Law Dictionary as the source to define "business" and "business transactions" outright.[93] The court held as follows:

> Common usage supports the Restatement's explanation that a business transaction is a commercial transaction. Black's Law Dictionary defines "business" as a "commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain." . . . A "business transaction" is defined as an "action that affects the actor's financial or economic interests, including the making of a contract."[94]

By turning to the Restatement of Torts and Black's Law Dictionary, the Colorado Supreme Court provided a clear mandate that a "'business transaction' in the context of negligent misrepresentation means exactly what common understanding of the term implies . . . the misrepresentation must be given for the plaintiff's business or commercial purposes."[95]

If Texas were to follow the *Allen* interpretation of section 552, referring to Black's Law Dictionary as a source of common usage, there is a possibility that an estate planner could be liable for negligent misrepresentation given the right situation. Specifically, if an estate planner in Texas were to negligently misrepresent to a beneficiary that the beneficiary had an expectancy in a client's will, a conveyance of the expectancy could classify as a business transaction.

An expectancy is defined as "[t]he possibility that an heir apparent, an heir presumptive, or a presumptive next of kin will acquire property by devolution on intestacy, or the possibility that a presumptive beneficiary will acquire property by will."[96] Texas law allows this future interest to be conveyed as the "equivalent to an assignment of the property if and when it shall fall into possession."[97]

If a Texas court were to rely strictly on the wording of the *Sloane* decision, such a conveyance would not trigger liability under negligent misrepresen-

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92. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 552 cmt. a. (1977)).
93. *See id.* at 483–84.
94. *Id.* (quoting BLACK'S LAW DICTIONARY 226–27 (9th ed. 2009)).
95. *Id.* at 484.
96. BLACK'S LAW DICTIONARY 658 (9th ed. 2009).
97. Humble Oil & Ref. Co. v. Luckel, 171 S.W.2d 902, 905 (Tex. Civ. App.—Galveston 1943, writ ref'd w.o.m.) (citing Hale v. Hollon, 39 S.W. 287, 288 (Tex. 1897)).

tation. This is because in *Sloane*, the court explains that negligent misrepresentation is "for the guidance of others in their *business*."[98] Black's defines business as "[a] commercial enterprise carried on for profit [or] a particular occupation or employment habitually engaged in for livelihood or gain."[99] Knowledge of an expectancy would not fall within this definition and therefore does not fall within the scope of information required for negligent misrepresentation in Texas. The conveyance of an expectancy is neither a commercial enterprise carried on for profit, nor is it employment *habitually* engaged in for livelihood or gain.[100] Although a beneficiary conveying an expectancy should realize a gain of some sort, a Texas court will not likely find this activity in line with Black's definition of business because the conveyance is done only once and not habitually.

If a Texas court interpreted beyond the exact language used in *Sloane* and used the language of section 552, then an estate planner may face liability for negligent misrepresentation under the *Allen* interpretation.[101] Section 552 uses the language of: "[S]upplies false information for the guidance of others in their *business transactions*."[102] Black's defines a business transaction as "[a]n action that affects the actor's financial or economic interests, including the making of a contract."[103] The conveyance of an expectancy would both affect the actor's financial or economic interests, since they would get some value in return, and count as the making of a contract. Therefore, if Texas were to adopt the *Allen* common usage approach and use Black's Law Dictionary to interpret the business element of negligent misrepresentation, an estate planner could, in theory, face liability for negligently misrepresenting the existence of an expectancy to a beneficiary of a client's will.[104]

For example, under the *Allen* common usage approach, if a Texas estate planner tells a beneficiary of a client's will that they have an expectancy when they in fact do not, this action could classify as "suppl[ying] false information for the guidance of others in their business transactions" under section 552(1).[105] This analysis assumes that: (1) the Texas court would view telling the beneficiary about an expectancy as "guidance," (2) the Texas court looks to the exact wording of section 552 and not *Sloane*, and (3) the beneficiary conveys the expectancy. Although this example relies on certain assumptions falling into place, it still represents a possibility of an estate planner satisfying the second element of negligent misrepresentation on their way to liability to a disgruntled beneficiary.

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98. Fed. Land Bank Ass'n of Tyler v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991) (emphasis added).
99. BLACK'S LAW DICTIONARY *supra* note 96, at 226.
100. *See supra* text accompanying note 96.
101. *See supra* text accompanying notes 94–97.
102. RESTATEMENT (SECOND) OF TORTS § 552(1) (1977) (emphasis added).
103. BLACK'S LAW DICTIONARY, *supra* note 96, at 227.
104. *See infra* Part IV.
105. RESTATEMENT (SECOND) OF TORTS § 552(1) (1977).

ii. The Iowa "Third Party Dealings" Approach

In 2001, the Supreme Court of Iowa, which also uses the Restatement Second of Tort Section 552 (1997) as the basis for the tort of negligent misrepresentation, had the opportunity to define the meaning of "business transactions" within the context of the tort.[106] In the surprising decision of *Sain v. Cedar Rapids Community School District*, the court held that a high school counselor could face liability for negligently misrepresenting information to a student athlete.[107] The student had asked the counselor whether or not a course change would affect his NCAA eligibility to accept a five year athletic scholarship and the counselor told him that it would not.[108] The student relied on the information and consequently became ineligible for the scholarship, which resulted in his inability to attend the college offering him the scholarship.[109] Despite the fact that they "have refused to recognize a cause of action in Iowa for educational malpractice," the Supreme Court of Iowa recognized the counselor could face liability for the tort of negligent misrepresentation by broadly interpreting the meaning of business transactions within Restatement (Second) of Torts Section 552.[110]

The court in *Sain* began its analysis by noting that the "commercial requirement for the tort [of negligent misrepresentation] does not actually concern the subject matter of the transaction between the plaintiff and the defendant, but requires the defendant to be in the business or profession of supplying information for the guidance of others."[111] Therefore, the counselor who is in the business of providing information meets the commercial requirement of negligent misrepresentation.[112] But what about the information provided, does it have to be commercial in nature? The information provided does not need to be commercial under the *Sain* court's interpretation.[113] When faced with the section 552 element that the information be supplied "for the guidance of others in their business transactions," the *Sain* court reasoned that:

> this additional requirement also does not exist to restrict the subject of the information to business matters. Instead, the supplied "for the guidance of others in their business transactions" requirement recognizes that the tort predominantly applies to situations where the information supplied harmed

106. Sain v. Cedar Rapids Cmty. Sch. Dist., 626 N.W.2d 115, 125-26 (Iowa 2001); *see also* Freeman v. Ernst & Young, 516 N.W.2d 835, 837–38 (Iowa 1994).

107. *Sain*, 626 N.W.2d at 129; *see generally* Sherman P. Willis, Note, *Iowa School Counselors Had Better Get It Right!*, 89 IOWA L. REV. 1093 (2004) (discussing negligent misrepresentation in the context of educational malpractice in Iowa).

108. *Sain*, 626 N.W.2d at 119–20.

109. *Id.* at 120.

110. *Id.* at 121, 129.

111. *Id.* at 125.

112. *See id.*

113. *See id.*

> the plaintiff in its relations with third parties, as opposed to harm to a plaintiff in its relations with the provider of information.[114]

Therefore, the *Sain* decision interprets the term "business" within section 552 as dealings with third parties.[115] Such an interpretation greatly expands the scope of negligent misrepresentation liability by removing the assumed context of a commercial transaction.

D. Which Definition of Business Transactions Should the State of Texas Adopt as Its Own in the Context of Negligent Misrepresentation?

The author suggests that Texas courts should incorporate the Colorado Supreme Court decision of *Allen* and adopt a common usage definition of "business" or "business transactions" within the context of the tort of negligent misrepresentation.[116] The rationale for using the common usage interpretation is twofold: (1) the analysis of section 552 by the court in *Allen* is both logical and persuasive, and (2) adopting the *Sain* court's general third party dealings approach would not comport with the expressed Texas understanding of negligent misrepresentation as a commercial tort.[117]

1. Why Colorado's Interpretation of "Business Transactions" Is Analytically Preferable

The *Allen* court's analysis of the "business transaction[s]" requirement, unlike that of the *Sain* court, begins in the comments to section 552 of the Restatement (Second) of Torts.[118] As noted in *Allen*, "[t]he comments discuss liability in terms of 'commercial transactions'" and, given the choice of terms restricting the tort to situations where information is supplied "for the guidance of others in their business transactions," the court rightly infers that the Restatement clearly meant for this tort to apply in a commercial context.[119] Drawing on its inference, the *Allen* court turned to the mainstream legal dictionary, Black's Law Dictionary, as an accepted reference point of common usage to validate that a business transaction is indeed a commercial transaction as noted in comment (a) to section 552.[120] This approach in *Allen* is a rational use of sources and logic by the Colorado Supreme Court to support its holding that "a 'business transaction' in the context of negligent misrepresentation

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114. RESTATEMENT (SECOND) OF TORTS § 552(1) (1977); *Sain*, 626 N.W.2d at 126.

115. *See Sain*, 626 N.W.2d at 126.

116. *See* Allen v. Steele, 252 P.3d 476, 484 (Colo. 2011).

117. *See id.*

118. *See Allen*, 252 P.3d at 483; *see Sain*, 626 N.W.2d at 125–26.

119. *Allen*, 252 P.3d at 483; RESTATEMENT (SECOND) TORTS § 552(1) (1977); *see also* RESTATEMENT (SECOND) TORTS § 552, cmt. a (1977) ("By limiting the liability for negligence of a supplier of information to be used in *commercial transactions*") (emphasis added)).

120. *See Allen*, 252 P.3d at 483–84.

means exactly what common understanding of the term implies," as found in Black's Law Dictionary by the court.[121] Such a finding seems especially well-formed in comparison to the analysis in *Sain*.

The court in *Sain* came to the conclusion that "the business or commercial requirement for the tort does not actually concern the subject matter of the transaction between the plaintiff and the defendant" based on its interpretation of the requirement that "the defendant. . .be in the business or profession of supplying information for the guidance of others."[122] Based on a previous decision, the court noted that a negligent misrepresentation defendant does not have "to be in the business or profession of supplying [commercial] information," but rather information to others in general (like the guidance counselor in *Sain*).[123] From this finding, the court makes the improperly supported leap that because the defendant does not have "to be in the business of supplying [commercial] information,"[124] the subject matter of the information provided does not have to relate to a "business transaction," but rather relate to a plaintiff's dealings with a third party.[125] This inference relies on improper support in multiple ways. Not only does the *Sain* court rely on language from the Supreme Court of Hawaii that does not support abandoning the content of the "for the guidance of others in their business transactions" clause of section 552, but also the court ignores the "commercial transaction" language of comment a to section 552 relied on in *Allen*.[126] Because of this leap, the *Sain* court seems less interested in properly justifying its interpretation of "for the guidance of others in their business transactions" and more interested in adopting a third party dealings approach that would include the actions of the *Sain* guidance counselor.[127] For this reason, the logic of the *Allen* court behind the common usage approach to "business transactions" should persuade to Texas courts in light of *Sain*.[128]

2. Why Texas Should Not Adopt the Iowa Third Party Dealings Approach

In the event a Texas court is not persuaded by the Colorado interpretation of "business transaction" posited in *Allen*, it should by no means adopt the Iowa approach presented in *Sain*.[129] As noted above, the *Sain* decision rejected the constraint of section 552 negligent misrepresentation to the commercial context and applied the tort to a high school guidance counselor by adopting a third

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121. *Id.* at 484.
122. *Sain*, 626 N.W.2d at 125.
123. *See id.* at 125–26 (citing Alderson v. Rockwell Int'l Corp., 561 N.W.2d 34, 36 (Iowa 1997)); *see supra* Part III.C.2.ii.
124. *See Sain*, at 125.
125. *See id.* at 126 (citing State by Bronster v. U.S. Steel Corp., 919 P.2d 294, 311 (Haw. 1996)).
126. *See id.* at 125–26.
127. *See id.*; *see supra* Part III.C.2.ii.
128. *See supra* Parts III.C.2.
129. *See supra* Part III.C.2.ii.

party dealings approach.[130] Iowa chose to expand the scope of negligent misrepresentation beyond the bounds of the Texas Supreme Court view, essentially as a commercial tort.[131] Expanding the scope of negligent misrepresentation from information guiding others in their business transactions to any third party dealing removes any semblance of a commercial constraint to the tort and would not represent how Texas has traditionally viewed the tort.[132] For this very reason, the Iowa interpretation of business transactions within section 552 should not persuade Texas courts to adopt an interpretation similar to that of Colorado.

IV. APPLICATION OF NEGLIGENT MISREPRESENTATION TO THE PRACTICE OF ESTATE PLANNING

The following section revolves around the provided hypothetical scenario that a Texas estate planner may come across in the future. An analysis of the estate planner's potential liability for negligent misrepresentation as adopted in the Texas *Sloane* decision will present each element, with special emphasis given to the differences that either an Iowa or Colorado interpretation of "business transactions" provides.[133] It is the author's hope that this example will provide estate planners with an accurate glimpse at their potential liability for a negligent misrepresentation to a disgruntled beneficiary, whom may be able to circumvent the privity barrier provided by the *Barcelo* decision.[134]

A. Hypothetical Scenario

Larry Lawyer has been hired as the estate planner for Tim Testator who, recently diagnosed with a terminal disease, has decided to create a will to dispose of his vast estate. Mr. Testator has slightly over three million dollars in assets that he would like to leave in varying amounts to his three sons: Bill, Sam, and Samwise. Mr. Testator has instructed Larry Lawyer to draw up a will that leaves one million dollars to Bill, two million dollars to Samwise, and one dollar to Sam whom Mr. Testator has come to dislike ever since he quit the basketball team at Mr. Testator's alma mater. Larry Lawyer properly drafts the will and schedules a will execution ceremony for Mr. Testator.

Mr. Testator arrives at Larry Lawyer's office on the day of the will execution ceremony with two of his sons, Bill and Samwise. Bill and Samwise express interest in watching the will execution ceremony and, despite knowing

130. *See supra* Part III.C.2.ii.

131. *See* Fed. Land Bank Ass'n of Tyler v. Sloane, 825 S.W.2d 439, 443 (Tex. 1991).

132. *See id.* at 442 (explaining the elements of a cause of action for negligent representation in Texas, the first being that "the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest").

133. *See infra* Part IV.C.

134. *See supra* Part II.A.

better, Larry allows them to watch the proceedings in his firm's conference room. During the ceremony, Mr. Testator leaves to use the restroom, and Samwise uses this time as an opportunity to question Larry Lawyer about the unknown contents of his father's will. Samwise, known for his curiosity, says to Larry Lawyer, "I sure am glad Dad is doing this, it's great to know that he is taking care of us . . . by the way, how 'well' is Dad taking care of me?" Larry Lawyer responds, "Very well indeed Samwise, under this will he is leaving you two million dollars to do with as you like." Mr. Testator returns to the conference room and Larry Lawyer continues the will execution ceremony. When the witnesses needed to attest to the will, Larry Lawyer realizes that his secretaries he uses as witnesses had left for the day while Mr. Testator was gone. Trying not to disappoint his client, Larry Lawyer tells Mr. Testator that he will just have his witnesses sign the will tomorrow.

Samwise, who is too excited by the prospect of newfound wealth to wait any longer, heads home and immediately begins scheming ways to cash in on the expectancy he believes he has, thanks to Larry Lawyer. After consulting with commercial inheritance advance services about his prospects of an early pay day, Samwise decides that the best course of action is to find an individual to convey the expectancy to in return for cash.[135] Samwise is eventually able to convey his expectancy to Ivan Investor for a discounted 1.5 million dollars. Samwise, quite the spendthrift, spends all of the money from the deal with Ivan in the months leading up to the death of his father.

After the death of Mr. Testator, Samwise learns that he in fact did not have a two million dollar expectancy as Larry Lawyer told him. Because the will had not been properly attested by two witnesses, who had signed the instrument the next day, the will failed and one of Mr. Testator's previous wills was still effective. Mr. Testator's previous will left his entire estate to his then beloved son Sam, whom had yet to quit the basketball team. Sam was also named the executor of Mr. Testator's estate.

Ivan Investor learns of this occurrence and sues Samwise to recover his 1.5 million dollars because he did not get the benefit of his bargain. Samwise, feeling cheated and disgruntled because of the circumstances, contacts the well-respected plaintiff's attorney Tex Litigator for help. Tex informs Samwise that he cannot sue Larry Lawyer directly for legal malpractice because of the privity barrier established in the Texas Supreme Court case of *Barcelo*.[136] Tex also advises Samwise that the odds of his brother Sam bringing a malpractice suit against Larry Lawyer as the estate's personal representative, as allowed by the *Belt* decision, is highly unlikely because Sam benefits greatly from the current

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135. Samwise could contact a commercial inheritance advance company like the Inheritance Funding Company, at www.inheritancefunding.com. However, a company like the Inheritance Funding Company or others in its trade would not likely advance cash to Samwise. These companies usually require the will to be in probate before they act, therefore they would not make an advance on the expectancy. However, an unsophisticated third party may risk such a deal for an unproven expectancy.

136. *See* Barcelo v. Elliott, 923 S.W.2d 575, 578-79 (Tex. 1996).

state of events.[137] Just when Samwise thought all hope was lost, Tex informs Samwise of a potential savior for disgruntled beneficiaries in the same situation as himself. Tex offers to sue Larry Lawyer for negligent misrepresentation, which Samwise gladly accepts.

B. Element One: "[T]he [R]epresentation [I]s [M]ade by the [D]efendant in the [C]ourse of [H]is [B]usiness, or in a [T]ransaction in [W]hich [H]e [H]as a [P]ecuniary [I]nterest"[138]

In the hypothetical above, Larry Lawyer clearly falls within the bounds of the first element to negligent misrepresentation in Texas. As an estate planner, Larry Lawyer's representation to Samwise, which Samwise would inherit two million dollars under Mr. Testator's will, occurred both in the course of Larry Lawyer's business and in a transaction in which he had a pecuniary interest. As an estate planning attorney, the will execution ceremony in which Larry Lawyer made the representation to Samwise was in the course of his business of practicing law.[139] Furthermore, since Mr. Testator has hired Larry Lawyer for his legal services, the will execution was a transaction in which Larry Lawyer's fee was a pecuniary interest.[140] Therefore, Larry Lawyer's situation has met the first element of negligent misrepresentation in Texas that "the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest."[141]

C. Element Two: "[T]he [D]efendant [S]upplies '[F]alse [I]nformation' for the [G]uidance of [O]thers in [T]heir [B]usiness"[142]

Due to the fact that Texas has yet to adopt an interpretation of the "business" requirement of the second element of negligent misrepresentation, the analysis of Larry Lawyer's situation will feature both the Colorado and Iowa interpretations of the term.[143]

1. Possible Result if Texas Adopts the Colorado Common Usage Approach

The Colorado Supreme Court adopted a common usage interpretation of the "business transactions" language found in Restatement (Second) of Torts Section 552 in the 2011 decision *Allen*.[144] If Texas adopts Colorado's

137. *See* Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 783 (Tex. 2006).
138. Fed. Land Bank Ass'n of Tyler v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991).
139. *See supra* Part III.B.
140. *See supra* Part III.B.
141. *See supra* Part III.B.
142. *Sloane*, 825 S.W.2d at 442.
143. *See generally supra* Parts III.C.2.i–ii (illustrating the differences between the Colorado and Iowa approaches).
144. *See* Allen v. Steele, 252 P.3d 476, 484 (Colo. 2011).

approach, Texas courts would look to Black's Law Dictionary for examples of the common usage meaning of the terms "business" and "business transactions" as in the *Allen* decision.[145] Therefore, in the context of the tort of negligent misrepresentation, Texas would interpret business and business transactions to mean a "commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain" and an "action that affects the actor's financial or economic interests, including the making of a contract," respectively.[146]

Using the Colorado approach, if the Texas court hearing Samwise's case, , against Larry Lawyer relies on the exact language of the *Sloane* decision, Larry Lawyer should be able to avoid liability under the second element of negligent misrepresentation.[147] *Sloane* states the second element as supplying false information "for the guidance of others in their *business*."[148] Larry Lawyer's representation to Samwise that he would receive an expectancy of "two million dollars to do with as you like" would not fall under the definition of "business" in Black's Law Dictionary.[149] As stated previously, the conveyance of an expectancy is neither a commercial enterprise carried on for profit nor is it employment habitually engaged in for livelihood or gain.[150] Samwise's conveyance to Ivan Investor was a one-time act that falls outside the scope of business as defined in Black's Law Dictionary.[151] Therefore, in the event Larry Lawyer litigates under the exact language of the *Sloane* decision, he should be able to avoid liability for not meeting the second element of negligent misrepresentation.[152] However, there is the possibility that a Texas court may not rely on the exact language in *Sloane*, which could significantly change Larry Lawyer's ability to avoid liability.[153]

If the Texas court deciding Larry Lawyer's liability follows the language used to define a claim for negligent misrepresentation as set out in the *McCamish* decision, he could satisfy the second element of the tort.[154] The 1999 *McCamish* decision, after recognizing that *Sloane* endorsed section 552 as the standard for a claim of negligent misrepresentation, quoted the exact language of Restatement (Second) of Torts to define the tort.[155] Under *McCamish*, it appears that the second element of negligent misrepresentation requires a defendant to "suppl[y] false information for the guidance of others in

145. *See id.* at 483–84.
146. BLACK'S LAW DICTIONARY 226–27 (9th ed. 2009).
147. Fed. Land Bank Ass'n of Tyler v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991) (emphasis added).
148. *See id.*
149. *Supra* Part IV.A.
150. *See supra* Part III.C.2.i.
151. *See* BLACK'S LAW DICTIONARY 226 (9th ed. 2009).
152. *See Sloane*, 825 S.W.2d at 442.
153. *See id.*
154. *See* McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 791 (Tex. 1999).
155. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 552(1) (1977) (emphasis added)).

their *business transactions*."[156] As defined in Black's Law Dictionary, a business transaction is "[a]n action that affects the actor's financial or economic interests, including the making of a contract."[157] Larry Lawyer represented to Samwise that he would inherit "under this will . . . two million dollars to do with as you like."[158] Larry Lawyer's representation of false information, which was false because the will was improperly executed and the expectancy never existed, guided Samwise to believe that he had an expectancy in the inheritance.[159] Samwise conveyed this expectancy to Ivan Investor as allowed by Texas law.[160] This conveyance qualifies as a business transaction in the common usage supplied by Black's Law Dictionary.[161] Samwise used the expectancy in "[a]n action that affects the actor's financial or economic interests" with Ivan Investor because he was able to turn the expectancy into $1.5 million, which clearly would effect his financial or economic interests.[162] Furthermore, if Samwise made a contractual agreement with Mitt Investor to convey the expectancy, he will have made a business transaction, which "includ[es] the making of a contract."[163] Therefore, Larry Lawyer will have met the second element of liability for negligent misrepresentation under these circumstances.[164]

As illustrated above, the results for Larry Lawyer differ greatly depending on whether a Texas court, applying the Colorado common usage approach in *Allen*, uses the exact language defining the second element of negligent misrepresentation as found in *Sloane* or of the Restatement (Second) of Torts Section 552(1).[165] Although this comment recommends that Texas courts adopt the Colorado approach, it is best for the courts to determine whether or not the exact language used in *Sloane* or section 552 should apply.[166]

2. Possible Result if Texas Adopts the Iowa Third Party Dealings Approach

In 2001, the Iowa Supreme Court in *Sain v. Cedar Rapids Community School District* interpreted the second element of section 552 negligent misrepresentation to mean that "'for the guidance of others in their business transactions' . . . predominantly applies to situations where the information

156. *Id.*

157. BLACK'S LAW DICTIONARY 277 (9th ed. 2009).

158. *Supra* Part IV.A.

159. For the purposes of this analysis, this comment assumes that a Texas court will view the act of informing a beneficiary of an expectancy as "guidance." *See McCamish*, 991 S.W.2d at 791.

160. *See* Humble Oil & Ref. Co. v. Luckel, 171 S.W.2d 902, 905 (Tex. Civ. App.—Galveston 1943, writ ref'd w.o.m.).

161. *See* BLACK'S LAW DICTIONARY 277 (9th ed. 2009).

162. *See id.*

163. *Id.*

164. *See* Fed. Land Bank Ass'n of Tyler v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991).

165. *See* Allen v. Steele, 252 P.3d 476, 483-84 (Colo. 2011); *see Sloane*, 825 S.W.2d at 442; *see* RESTATEMENT (SECOND) OF TORTS § 552(1) (1977).

166. *See supra* note 165 and accompanying text.

supplied harmed the plaintiff in its relations with third parties."[167] Stated differently, *Sain* held that the term "business transactions," for the purposes of the second element of negligent misrepresentation, describes dealings with third parties.[168] Under this interpretation, Larry Lawyer would satisfy the second element of liability for negligent misrepresentation.[169]

Larry Lawyer made a representation to Samwise that "under this will he is leaving you two million dollars to do with as you like," which guided Samwise in his dealings with third parties.[170] Specifically, Larry Lawyer supplied information that guided Samwise to believe he had an expectancy that he subsequently conveyed to a third party, Ivan Investor.[171] Given the previously-used assumption that a Texas court will view telling a beneficiary about an expectancy as guidance, Larry Lawyer has supplied false information about the existence of an expectancy, as guidance, to Samwise that was part of a third party dealing with Ivan Investor.[172] Therefore, Larry Lawyer has satisfied the second element of negligent misrepresentation in a Texas court applying the Iowa third party dealings approach.[173]

When compared to the Colorado common usage approach, a Texas court using the Iowa third party dealings approach will find that Larry Lawyer has satisfied the second element of negligent misrepresentation in a much easier fashion.[174] This result is attributed to the fact that Iowa has abandoned the commercial context of negligent misrepresentation and greatly expanded the scope of the tort's reach.[175]

D. Element Three: "[T]he [D]efendant [D]id [N]ot [E]xercise [R]easonable [C]are or [C]ompetence in [O]btaining or [C]ommunicating the [I]nformation"[176]

The third element for a negligent misrepresentation claim in Texas under the *Sloane* decision is that the "defendant did not exercise reasonable care or competence in obtaining or communicating the information."[177] As noted earlier in this comment, in the event a beneficiary brings a claim of negligent misrepresentation against an estate planner in Texas, the beneficiary will need expert testimony of an attorney to prove that the accused estate planner did not

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167. Sain v. Cedar Rapids Community School Dist., 626 N.W.2d 115, 126 (Iowa 2001) (quoting RESTATEMENT (SECOND) OF TORTS § 552(1) (1977)).

168. *Id.*

169. *See id.*; *see supra* Part IV.A.

170. *Supra* Part IV.A.

171. *See supra* Part IV.A.

172. *See Sain*, 626 N.W.2d at 126; *see supra* Part IV.A.

173. *See* Sain, 626 N.W.2d at 126.

174. *Compare supra* text accompanying notes 170–73, and *supra* text accompanying notes 152–64.

175. *See supra* Part III.C.2.ii.

176. Fed. Land Bank Ass'n of Tyler v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991).

177. *Id.*

exercise the reasonable care or competence required by section 552(1).[178] Therefore, expert testimony is a requirement to determine whether Larry Lawyer exercised reasonable care or competence in telling Samwise that "under this will he is leaving you two million dollars to do with as you like" during Mr. Testator's will execution ceremony.[179]

It is unlikely that a peer of Larry Lawyer will find that he exercised reasonable care or competence in communicating the expectancy to Samwise. Although Larry Lawyer told Samwise the correct information regarding his expected inheritance from Mr. Testator's will, it was the manner in which Larry Lawyer communicated the information that is problematic.[180] Not only did Larry Lawyer discuss the contents of Mr. Testator's will to a beneficiary during the execution ceremony, he did so without the consent of the testator.[181] This type of communication will most likely not appear to a legal peer of Larry Lawyer that he exercised reasonable care or competence in communicating with Samwise.[182] For this reason, it is safe to assume for the purposes of this hypothetical, on a point for which specific case law addressing the subject does not exist, that Larry Lawyer will satisfy the third element of negligent misrepresentation.[183]

E. Element Four: "[T]he [P]laintiff [S]uffers [P]ecuniary [L]oss by [J]ustifiably [R]elying on the [R]epresentation"[184]

In order for Larry Lawyer to satisfy the fourth element of negligent misrepresentation in Texas, two requirements must exist.[185] Samwise must have suffered pecuniary loss, and done so by justifiably relying on the representations made to him by Larry Lawyer.[186] The first requirement of satisfying the fourth element of negligent misrepresentation should easily suffice by Samwise. Samwise has or will suffer pecuniary loss as a result of his dealings with Ivan Investor.[187] Samwise conveyed his expectancy to Ivan Investor for cash and is now liable to Ivan for the amount because Samwise, without his expectancy, was not able to perform his part of the deal.[188] Therefore Samwise, who has already spent all of the money from his

178. *See supra* Part III.B; *see also* Hall v. Rutherford, 911 S.W.2d 422, 424 (Tex. App.—San Antonio 1995, *writ denied*) ("[E]xpert testimony of an attorney is necessary to establish this standard of skill and care ordinarily exercised by an attorney.") (quoting Anderson v. Snider, 808 S.W.2d 54, 55 (Tex. 1991)).

179. *See supra* Part IV.A.

180. *See supra* Part IV.A.

181. *See supra* Part IV.A.

182. *See supra* Part III.B.

183. *See* Fed. Land Bank Ass'n of Tyler v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991); *see supra* Part IV.A.

184. *Sloane*, 825 S.W.2d at 442.

185. *See supra* Part III.C.

186. *See supra* Part III.C.1.

187. *See supra* Part IV.A.

188. *See supra* Part IV.A.

transaction with Ivan Investor, has suffered pecuniary loss from relying on Larry Lawyer's representation that Samwise had an expectancy to inherit from Mr. Testator.[189]

The second requirement of satisfying the fourth element of negligent misrepresentation is that the plaintiff justifiably relied on the representation.[190] In measuring the justifiability of the plaintiff's reliance, "[the court] must inquire whether, 'given a [negligent misrepresentation] plaintiff's individual characteristics, abilities, and appreciation of facts and circumstances at or before the time of the alleged [misrepresentation,] it is extremely unlikely that there is actual reliance on the plaintiff's part.'"[191] Given the scenario involving Larry Lawyer and Samwise, this requirement will most likely satisfy.[192] Larry Lawyer made the misrepresentation to a layperson beneficiary, Samwise, during the will execution ceremony that Lawyer performed.[193] It is likely that a trier of fact will find that Samwise did actually rely on Larry Lawyer's misrepresentation since Samwise conveyed the subject of the misrepresentation, the expectancy, to Ivan Investor immediately after he spoke with Larry Lawyer.[194]

Further hurting Larry Lawyer's position in the eyes of the trier of fact is that he satisfies the inducement aspect of justifiable reliance by Samwise as well.[195] For Larry Lawyer to have properly induced justifiable reliance, he must have transferred information to "a *known* party for a *known* purpose."[196] Larry Lawyer transferred information, the existence of an expectancy, to a known party, Samwise the beneficiary, for a known purpose, informing Samwise of what he would inherit under Mr. Testator's will.[197] Therefore, Larry Lawyer will satisfy the fourth element of negligent misrepresentation because he properly induced Samwise to suffer a pecuniary loss by relying on Larry Lawyer's representation.[198]

V. CONCLUSION

The hypothetical based upon Texas law and the analysis thereof illustrate that there is a real possibility that a Texas estate planner could face liability for negligent misrepresentations made to a beneficiary in a situation where the

189. *See supra* Part IV.A.

190. *Supra* Part III.C.1.

191. Grant Thornton LLP v. Prospect High Income Fund, 314 S.W.3d 913, 923 (Tex. 2010) (quoting Haralson v. E.F. Hutton Group, Inc., 919 F.2d 1014, 1026 (5th Cir. 1990)).

192. *See supra* Part IV.A.

193. *See supra* Part IV.A.

194. *See supra* Part IV.A.

195. *See supra* Part IV.A.

196. *Grant Thornton*, 314 S.W.3d at 920 (emphasis added) (quoting McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 794 (Tex. 1999).

197. *See supra* Part IV.A.

198. *See supra* Part IV.A; *see* Fed. Land Bank Ass'n of Tyler v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991).

beneficiary could not otherwise sue the estate planner for malpractice. Larry Lawyer's actions would satisfy the elements of a negligent misrepresentation claim brought against him by the disgruntled beneficiary Samwise, except for one instance where a Texas court relies on the exact language of *Sloane*.[199] By bringing a successful claim of negligent misrepresentation against Larry Lawyer, Samwise will be able to recover the "pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation," which should be substantial and just as threatening as the damages from a malpractice claim in this hypothetical.[200] Therefore, it is important for practicing estate planners to learn from the mistakes of Larry Lawyer and avoid possible situations where one is forced to ask, but I thought the disgruntled beneficiary couldn't sue me for malpractice?

199. *See supra* Part IV.A.

200. *See Sloane*, 825 S.W.2d at 442 (quoting RESTATEMENT (SECOND) OF TORTS § 552B(1)(b) (1977)).