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ATTORNEY LIABILITY TO NON-CLIENTS WHEN ISSUING OIL AND GAS TITLE OPINIONS

John Land McDavid
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ISSUING OIL AND GAS TITLE OPINIONS

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INTRODUCTION

Until recent years an attorney issuing a title opinion was not liable for malpractice except to his or her client because there was no privity between the attorney and a non-client. Stated differently, an attorney owes a duty only to his or her client.1 The elements of an action for negligence are duty, breach, proximate cause and damages.2 Liability for negligent conduct may only be imposed where there is a duty of care owed by the defendant to the plaintiff; and, where there is no legal duty there can be no actionable negligence.3 The elements of legal malpractice are an attorney-client relationship, negligence, proximate cause and damages.4 The Mississippi Supreme Court compared the elements of negligence and the elements of legal malpractice and concluded: "[A]t most, a legal malpractice action is a negligence action dressed in its Sunday best."5 Attorneys issuing title opinions are still protected by the privity defense in most states. There is a minority view, however, apparently representing a trend, which no longer recognizes the lack of an attorney-client relationship as a
defense for attorneys issuing title opinions against claims by non-clients.⁶

The cases which allow attorney liability to non-clients generally fall into three categories: (i) third-party beneficiary contract theory, (ii) negligence of duty theory in tort and (iii) a hybrid theory originating in California and usually called the "balancing of factors" theory.⁷ Factors to be considered in the "balancing of factors" theory are: (i) the extent to which the transaction was intended to affect the plaintiff, (ii) the foreseeability of harm to him, (iii) the degree of certainty that the plaintiff suffered injury, (iv) the closeness of the connection between the defendant’s conduct and the injuries suffered, (v) the moral blame attached to the defendant’s conduct and (vi) the policy of preventing future harm.⁸ This paper will examine selected authorities and cases which reflect the minority view including the law in Arkansas. Finally, the avoidance or limitation of liability to non-clients will be considered.

ATTORNEY’S DUTY OF CARE

Before considering the main topic, a few general rules applicable to attorney liability will be stated to provide background and context:

[1.] [An attorney’s] duty to his client requires [the] attorney to exercise the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated. He is not bound to exercise extraordinary diligence, but only a reasonable
degree of care and skill, having reference to the character of the business he undertakes to do. Within this standard, he will be protected so long as he acts honestly and in good faith.9

[2.] If an attorney acts in good faith and in an honest belief that his acts and advice are well founded and in the best interest of his client, he is not held liable for a mere error of judgment. A fortiori, an attorney is not liable for an error in judgment on points of new occurrence or of nice or doubtful construction, or for a mistaken opinion on a point of law that has not been settled by a court of last resort on which reasonable doubt may well be entertained by informed lawyers.10

[3.] In the absence of an express agreement, an attorney is not an insurer or guarantor of the soundness of his opinion.11

[4.] An attorney in examining and reporting on a title is not a guarantor. He only undertakes to bring to the discharge of his duty a reasonable skill and diligence, and he is not liable for making a mistake with respect to a doubtful question of law.12

[5.] An attorney’s non-compliance with a state code of professional responsibility is not malpractice per se.13

[6.] [Violation of] state codes of professional responsibility . . . [cannot] form the basis of liability of an attorney to a non-client, even if such rules were violated by the attorney’s negligent actions.14

THE LAW ACCORDING TO THE RESTATEMENT OF TORTS

Many of the cases which hold an attorney liable to a non-client cite with approval Section 552 of the Restatement (Second) of the Law of Torts which provides:

(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.\textsuperscript{15}

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of 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\textsuperscript{16}

(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.\textsuperscript{17}

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.\textsuperscript{18}

It should be noted that this Section deals solely with "pecuniary" loss and that liability of the attorney extends only to the person to whom the attorney intends to supply the information or knows that his client will supply the information in the event the non-client relies upon the information. Section 552 describes a very narrow and specific circle of persons to which the attorney's liability extends. The Restatement makes this clear in the Comments to this Section which read in part:

Although liability under the rule stated in this Section is based upon negligence of the actor in failing to exercise reasonable care or competence in supplying correct information, the scope of his liability is not determined by the rules that govern liability for the negligent supplying of chattels that imperil the security of the person, land or chattels of those to whom they are supplied (See §§ 388-402), or other negligent misrepresentation that results in physical harm. (See § 311). When the harm that is caused is only pecuniary loss, the courts have found it necessary to adopt a more restricted rule of liability, because of the extent to which misinformation may be, and may be expected to be, circulated, and the magnitude of the losses which may
follow from reliance upon it.

The liability stated in this Section is likewise more restricted than that for fraudulent misrepresentation stated in § 531. When there is no intent to deceive but only good faith coupled with negligence, the fault of the maker of the misrepresentation is sufficiently less to justify a narrower responsibility for its consequences.

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On the other hand, it does not follow that every user of commercial information may hold every maker to a duty of care. Unlike the duty of honesty, the duty of care to be observed in supplying information for the use in commercial transactions implies an undertaking to observe a relative standard, which may be defined only in terms of the use to which the information will be put, weighed against the magnitude and probability of loss that might attend that use if the information proves to be incorrect. A user of commercial information cannot reasonably expect its maker to have undertaken to satisfy this obligation unless the terms of the obligation were known to him. Rather, one who relies upon information in connection with a commercial transaction may reasonably expect to hold the maker to a duty of care only in circumstances in which the maker was manifestly aware of a duty of care and the use to which the information was to be put and intended to solve it for that purpose. 19

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The rule stated in Subsection (1) applies only when the defendant has a pecuniary interest in the transaction in which the information is given. If he has no pecuniary interest and the information is given purely gratuitously, he is under no duty to exercise reasonable care and competence in giving it. 20

Sections 388 to 402 of the Restatement (Second) of Torts referred to in the comments discuss suppliers of chattels and "physical harm" caused by the use of the chattels. 21 Section 395 specifically provides for the liability of a manufacturer of a chattel for anyone who is harmed without the necessity of privity of contract. 22 This Section states the law of MacPherson v. Buick.
Motor Co. 23 Section 311 mentioned in the Comment deals with negligent misrepresentation involving risk of physical harm. 24 The Comment to Section 311 expressly states that this section represents a somewhat broader liability than the rules stated as to liability for pecuniary loss resulting from negligent misrepresentation stated in Section 552. 25 It is clear from the Restatement that Section 552 prescribes a very small circle of non-client liability. The Section is clearly distinguishable from other sections of the Restatement which cover products liability or negligent misrepresentation and have to do with chattels or physical damage.

THE LAW IN ARKANSAS

In 1987 the Arkansas Legislature adopted a statute prescribing an attorney's liability to non-clients. 26 The statute has been described as "nothing more than a restatement of the general rule of liability". 27 While this statement is substantially correct it does not do justice to this commendable statute. ARK. CODE ANN. § 16-22-310 provides:

(a) No person licensed to practice law in Arkansas and no partnership or corporation of Arkansas licensed attorneys or any of its employees, partners, members, officers, or shareholders shall be liable to persons not in privity of contract with the person, partnership, or corporation for civil damages resulting from acts, omissions, decisions, or other conduct in connection with professional services performed by the person, partnership, or corporation, except for:

(1) Acts, omissions, decisions, or conduct that constitutes fraud or intentional misrepresentations; or

(2) Other acts, omissions, decisions, or conduct if the person, partnership, or corporation was aware that a primary intent of the client was for the professional
services to benefit or influence the particular person bringing the action. For the purposes of this subdivision, if the person, partnership, or corporation:

(A) Identifies in writing to the client those persons who are intended to rely on the services, and

(B) Sends a copy of the writing or similar statement to those persons identified in the writing or statement, then the person, partnership, or corporation or any of its employees, partners, members, officers, or shareholders may be held liable only to the persons intended to so rely, in addition to those persons in privity of contract with the person, partnership, or corporation.

(b) This section shall apply only to acts, omissions, decisions, or other conduct in connection with professionals services occurring or rendered on or after April 6, 1987.28

This section does not provide a defense to actions involving fraud, collusion, malicious or tortious acts. 29 Although it uses the terms "fraud" and "intentional misrepresentations" when discussing exceptions to the privity requirement, the exception includes intentional torts committed on third parties. 30 The section was not intended to make attorneys immune from liability for damages in case of intentional tort, but it "appears to be a legislative statement that the privity requirement still exists in Arkansas in connection with contract or negligence actions." 31 This statute substantially conforms to both the minority rule with respect to liability to non-clients and to Section 552 of the Restatement (Second) of Torts in that (i) the defense of privity is eliminated for those person or persons intended by the client and reasonably apparent to the attorney to be benefitted or influenced by the attorney's professional services and (ii) fraud, intentional misrepresentation and intentional torts are exceptions to the privity defense.
Section 16-22-310 contains a feature which is probably unique to Arkansas. It provides that if the attorney identifies in writing to the client the persons who are intended to rely on the service and sends a copy of this statement to the non-clients identified as intended recipients of the services, then the attorney’s liability will be limited to those persons so identified.\(^{32}\)

Prior to the adoption of Section 16-22-310 the United States District Court for the Western District of Arkansas held that for claims alleging negligent misrepresentation against attorneys the defense of privity applied.\(^{33}\) The court refused the plaintiff’s urging that the court adopt the "better" or "more progressive" rule as set forth in Section 552 of the Restatement (Second) of Torts.\(^{34}\) In *Robertson v White*, the trustee in bankruptcy for a farmers co-op and a class of plaintiffs comprised of co-op members, distributees of patronage dividends and holders of demand notes and others sued numerous defendants including several attorneys involved in various transactions leading up to and, as alleged by the plaintiffs, resulting in the co-op’s bankruptcy.\(^{35}\) Concerning the law in Arkansas the court stated:

In fact, it is a general rule of Arkansas contract law, (except in sales of goods), that consequential damages for faulty performance are strictly limited to those which necessarily flow from the breach, or which were tacitly agreed-to by the breaching party. [citation omitted] This rule is not direct or compelling authority for the court’s position on this issue. Rather, the rule obliquely supports the court’s determination in this way: the contractual relationship is initially consensual, and the Arkansas courts conceive that the relationship maintains its consensual character throughout, even to the point of holding that a breaching party must be found
to have "assented to such a liability" before he might be charged with consequential damages for his breach. [citation omitted] Arkansas has held to this minority position even in the face of its decline elsewhere in the country. This court would find it hard to believe that Arkansas would broaden tort liability to innumerable third parties arising out of a contractual relationship, while it retains a strict limitation vis a vis the extent and kind of contractual remedies available to the parties in privity. 36

In Almand v. Benton County, Arkansas, 37 the United States District Court for the Western District of Arkansas again had occasion to consider the liability of an attorney to a non-client. 38 Section 16-22-310 was then in effect and the defending attorney plead this statute as a defense to all claims. 39 The plaintiffs sued several law enforcement officials in Benton County, a savings bank and the attorney for the savings bank alleging civil rights violations under Section 1983 United States Code Annotated and made various state law claims which generally were in the nature of abuse of process and conversion of property growing out of the bank's aggressive collection activities in which it took into its possession cattle and equipment belonging to the plaintiffs. 40 The jury found for the plaintiffs on a number of their claims and awarded judgements against the savings bank, the attorney and others. As stated, the defendant attorney pled Section 16-22-310 as a defense to all of these claims. 41 The court stated after having reviewed the law in general and Section 16-22-310, that this statute was not meant to extend immunity from civil damages to intentional acts such as abuse of process or conversion. 42 The court said that although the statute uses the terms "fraud" or "intentional misrepresentation" when discussing exceptions to the
privity requirement, the exception includes intentional torts committed on third parties.\footnote{43} The court did not believe the statute was intended to make attorneys immune from liability for damages in the case of intentional tort; rather that the statute appears to be a legislative statement that the privity requirement still exists in Arkansas in connection with contract or negligence actions,\footnote{44} and that this may very well have been a legislative response to the erosion of the privity requirement in other aspects of the law as well as its erosion in connection with attorney liability to third parties.

In \textit{Wiseman v. Batchelor},\footnote{45} decided in 1993, the Arkansas Supreme Court held that the immunity contained in Section 16-22-310 included constructive fraud but not actual or intentional fraud.\footnote{46} The defendant’s attorney, according to the plaintiff, had on behalf of his client: (i) filed a bankruptcy petition which was dismissed (ii) which included an asset schedule which failed to list all of the client’s assets and (iii) claimed an exemption of land for his client in bad faith.\footnote{47} The plaintiff claimed actual fraud and constructive fraud based on alleged misrepresentations made by the attorney (the defendant) as attorney for the plaintiff’s debtor in prior litigation.\footnote{48} The plaintiff brought suit against the attorney who represented the debtor.\footnote{49} He claimed that the attorney’s actions, taken on behalf of his client, the debtor, prevented him from collecting a judgement against the debtor.\footnote{50} The plaintiff claimed he had been damaged by the attorney’s effort on behalf of the attorney’s client.\footnote{51} In disposing of the actual fraud
claim, the court held that the complaint contained no allegation that the plaintiff relied on the attorney's misrepresentations, a necessary element for an actual fraud claim.\textsuperscript{52} With respect to constructive fraud, the court stated that ARK. CODE ANN. 16-22-310 grants immunity to attorneys from lawsuits brought by persons not in privity with them except for actual fraud or intentional misrepresentation.\textsuperscript{53} The court also said that the exception appears to be one for intentional torts.\textsuperscript{54} Constructive fraud is not an intentional tort.\textsuperscript{55}

As attorneys who regularly issue oil and gas title opinions sometimes prepare abstracts of title separate and apart from a title opinion, two Arkansas cases involving the liability of an abstractor to a third party should be considered. In \textit{Tapley v. Wright},\textsuperscript{56} a landowner caused the defendant abstract company to prepare an abstract for purposes of acquiring a real estate loan.\textsuperscript{57} The loan was closed in due course.\textsuperscript{58} Subsequently the first lender sold the loan to the plaintiff.\textsuperscript{59} The plaintiff obtained a copy of the abstract and relied on it in acquiring the loan.\textsuperscript{60} Later, the plaintiff discovered the abstract contained certain defects which resulted in damages to the plaintiff.\textsuperscript{61} In sustaining the defendant's demurrer, the court stated there was no allegation that the defendant abstract company contracted with the landowner to prepare the abstract for the use and benefit of the plaintiff.\textsuperscript{62} The court stated that while the first lender might be liable to the plaintiff for furnishing to it a defective abstract, the defendant abstract company could not be liable in absence of an allegation
that the first lender was acting as the agent of the defendant abstract company in furnishing the abstract as a part of the purchase of the loan. The court also observed that as the defendant abstract company did not contract to furnish an abstract to the plaintiff or to anyone for the plaintiff's use and benefit, the plaintiff had no cause of action against the abstract company. These statements as well as other comments in the opinion imply that the abstract company would be liable to the first lender if the abstract company knew the abstract was being prepared for the use and information of the first lender. This opinion implies that privity of contract is not an absolute defense against third party claims where the abstract company had knowledge the abstract was being expressly prepared for the use and benefit of a third party.

In Wright v. Allmon-Mack Agency, Inc., an abstract of title was prepared, apparently at the request of a commissioner for the judicial sale of land, and furnished to a perspective purchaser, who, after having the abstract examined by his attorney, proceeded to close the sale. Afterwards, the purchasers discovered defects in the abstract and sued the abstract company. In sustaining the abstract company's demurrer, the court stated the law in Arkansas was that an abstractor's liability is not in tort but is contractual. The court noted that in Tapley v. Wright the court held there must be privity of contract between the abstractor and the person attempting to hold the abstractor liable. The court then went on to say that in the complaint it was not alleged on whom the demand for an abstract was made or that the abstractor
knew the purpose for which the abstract was to be used. The court also stated that there was no allegation that the abstractor contracted with the plaintiffs to prepare an abstract for their use and benefit or that the abstractor knew the abstract was intended for the use and benefit of the plaintiffs. The decision implies that had the abstractor known the abstract was being prepared for the use and benefit of the plaintiffs, the abstractor would have been liable.

SELECTED TITLE OPINION CASES

Tennessee. In Citizens Bank of Gainesboro v. Williford, the defendant attorney was requested by his clients to prepare a deed of trust and title opinion covering farm land owned by them in connection with a loan from the bank. The land was already subject to a Production Credit Association (PCA) loan which was apparently noted in the attorney's title opinion. It was the practice of the bank to allow loan documents and title opinions to be prepared by their borrowers' attorney. The attorney searched the title, rendered a title opinion and prepared a second deed of trust which documents were delivered to the bank. The loan subsequently closed. Both the title opinion and the deed of trust generally described the land as containing 335 acres and then described by metes and bounds a tract which covered only 119.6 acres. In addition, the title opinion referred to the estate of the borrowers as fee simple when they owned only mineral rights under a portion of 119.6 acres. The PCA loan foreclosed and the collateral did not
sell for enough to pay off the first debt. As a result, the bank’s lien was extinguished. The bank sued the attorney alleging it relied upon his title opinion, that had it known the true facts it would not have made the loan and that the attorney had failed to use and exercise reasonable care and diligence in preparing the opinion. The attorney defended on several grounds, the first of which was that this was a "legal malpractice" claim and only a client can maintain such a suit against an attorney. The Tennessee appellate court in deciding the defense was without merit stated that the attorney did the title opinion and deed of trust in the course of his employment for a price and he had full knowledge that the title opinion was to be used by his clients and the bank for the purpose of the loan. The court further stated that the purpose of the title opinion was to induce the bank to make the loan and in reliance upon the title opinion the loan was made. The decision gave no indication of the legal theory for its decision. The court cited and discussed briefly Section 552 of the Restatement (Second) of Torts.

**Kentucky.** In *Seigle v. Jasper,* the plaintiffs, purchasers of two lots, sued the seller for breach of warranty under the deed and the attorney who issued the title opinion in connection with the refinancing of the loan on one of the lots and the purchase of the other lot. The property was subject to a recorded pipeline easement. The deed contained an exception following the description of all "easements and restrictions of record and Zoning
Regulations of Spencer County." The court sustained the motion for a summary judgment in favor of the sellers on the basis that the deed exception covered the recorded easement. The attorney regularly did title searches, rendered title opinions and prepared loan documents for the lending bank in connection with its real estate loans. The plaintiffs agreed the attorney could perform the legal work and paid his fees as a part of closing costs. The title opinion made no mention of the pipeline easement. The attorney claimed he was not liable to the plaintiff because there was a lack of privity. The Kentucky appellate court held the attorney was acting in the course of his profession for his pecuniary interest when he failed to exercise reasonable care or competence in obtaining or communicating information and supplied false information for the guidance of the bank and the purchasers in the business transaction that subjected the plaintiff to a loss as a result of their justifiable reliance on the title opinion. The court indicated there was a question of fact as to whether a contractual relationship existed between the attorney and the purchasers. The court seemed to be taking the position that if the facts created a contractual relationship so that there was an attorney-client relationship then the attorney is liable for malpractice. On the other hand, if there was no attorney-client relationship, the attorney was, nevertheless, liable in tort to the purchaser because he knew the title opinion was being done for the benefit of the purchaser although rendered at the request of the bank. The court cited with approval Section 552 of the Restatement
Some other aspects of this case are of interest to title attorneys. One of the attorney's defenses was that the deed contained an exception for "easements or restrictions of record." The court held his duty was not eliminated as he had a duty to specifically advise the parties of any restrictions on the title and to communicate any defect to the intended beneficiaries of his opinion. The opinion also contained a routine exception for "unrecorded easements." The court held that since the easement in question was recorded the exception did not apply. Finally, the opinion also obtained a routine exception for "rights or claims of parties other than the purchaser in actual possession of any or all of the real property." The court held this provision did not protect the attorney because the easement owner's acts of occupancy were not sufficiently open, visible and unequivocal to put the purchasers on inquiry.

**Mississippi.** The Mississippi Supreme Court in *Century 21 Deep South Properties. Ltd. v. Corson*, extended the scope of attorney liability to non-clients further than any case reviewed in connection with this paper. In so doing the court apparently applied products liability to an attorney's title work done in preparing first and final certificates to obtain title insurance. Before considering this case, a review will be made to review certain legislative and legal developments leading up to the *Century 21* decision.
In 1976 the Mississippi legislature abolished the defense of privity "[i]n all causes of action for personal injury or property damage or economic loss brought on account of negligence, strict liability or breach of warranty, including actions brought under the provisions of the Uniform Commercial Code."\(^{105}\) In a succession of cases the Mississippi Supreme Court held that privity was not a defense for: a home builder as against a subsequent purchaser;\(^{106}\) a pest control operator against a homeowner who had not employed his services;\(^{107}\) a subsequent purchaser against a construction company;\(^{108}\) a firm of CPA's as against investors who claimed reliance on an independent audit;\(^{109}\) and a doctor who inadvertently treated a non-patient.\(^{110}\)

At the same time these cases were being decided, the Mississippi Supreme Court was also deciding a series of cases in which the Court held the existence of an attorney-client relationship was necessary in order to maintain a legal malpractice action.\(^{111}\)

When the \textit{Century 21} case reached the Supreme Court it apparently found itself with a situation where, on one hand, it had rendered a number of decisions holding that MISS. CODE ANN. § 11-7-20 (1975 Supp.) had eliminated the defense of privity for accountants, doctors and other trades and businesses while, on the other hand, it had rendered a series of cases holding that the attorney-client relationship (privity) was required for a malpractice action against an attorney although the latter cases did not always involve a plaintiff who was clearly a non-client. In \textit{Century 21}
the court apparently felt compelled to make it clear that MISS. CODE ANN. § 11-7-20 applied to attorneys. In its concluding discussion, the court stated: "Today we modify the requirements of legal malpractice actions based on an attorney's negligence in performing title work by abolishing the requirement of attorney-client relationship and extending liability to foreseeable third parties who detrimentally rely as we have done in cases involving other professions."\textsuperscript{112}

In \textit{Century 21} the court held the defendant attorney liable to non-clients even though the non-clients (plaintiffs): (i) were not aware of the existence of the defendant attorney or of any work he had done until two years after they had purchased the property; (ii) had no contact whatsoever with the defendant attorney prior to the purchase of the property; (iii) did not hire the defendant attorney; (iv) did not pay the defendant attorney any fee in connection with the purchase of the property; (v) did not rely on any work done or title certificate or title opinions prepared or issued by defendant attorney prior to purchase of the property; and (vi) at no time in connection with the purchase of the property considered the defendant attorney to be their attorney. Further, the closing attorney who did the title work for plaintiffs made no requests of or had no receipt of any of the work of the defendant attorney and did not rely on any work by defendant attorney. It is probable the closing attorney did not even know the defendant attorney had done any work in connection with the subject property.
A Mr. and Mrs. Meiers purchased the property and the defendant attorney issued an attorney's first certificate and final certificate to a title insurance company in connection with a mortgagee's policy given to the holder of the purchase money mortgage on this subject property. At the time the acquisition and loan were closed and the title certificates and title policy issued, the property was subject to four liens totaling $7,226.06. One was a federal tax lien in excess of $6,000.00 and the remainder were three small liens in favor of the Mississippi Employment Security Commission. The Meiers moved into their house and enjoyed the property without incident or any knowledge of the liens for approximately one and one half years. They then sold the house to the plaintiffs. The real estate firm involved in the sale referred the plaintiff to an attorney (not the defendant attorney) who issued a "downdated" title opinion. The title opinion in two instances made the certification date the exact date and time of the filing of the purchase money mortgage given by the Meiers. It was apparently the practice in the community to give "downdated" title opinions when the purchasers were assuming a loan. As a result the downdated opinion did not reflect the liens. The plaintiffs moved into the property and lived there without incident or any knowledge of the liens for nearly two years when they decided to purchase a computer. A bank required they give a second mortgage on their property to secure the loan for the computer. It was at this time a third attorney made a full and complete examination of the title and, as the Court stated,
"quickly" discovered the liens.\textsuperscript{122}

The court held that a copy of the title opinion is not necessary and the client of an attorney performing a subsequent update relies upon the fact that the prior title opinion revealed any encumbrances or deficiencies of title.\textsuperscript{123} The court also stated that "[r]eliance on a licensed professional to perform his work competently is intimately reasonable."\textsuperscript{124} The court also said that "[a]n attorney performing title work will be liable to reasonably foreseeable persons who, for a proper business purpose, detrimentally rely on the attorney's title work, suffering loss proximately caused by his negligence.\textsuperscript{125}

**AVOIDANCE OF LIABILITY TO NON-CLIENTS**

As attorneys can be liable in the performance of legal services to non-clients in most jurisdictions under certain facts and circumstance, consideration should be given to ways in which an attorney can avoid liability in those instances in which the attorney does not desire to be professionally liable to a non-client.

Arkansas attorneys have the benefit of the Arkansas Real Estate Title Examination Standards. Compliance with these standards in the issuance of title opinions should provide a defense to claims by either clients or non-clients.

Arkansas attorneys should take advantage of the provisions of ARK. CODE ANN. § 16-22-310 by identifying in writing to the client
non-clients to whom the attorney will be liable and by sending a copy to the non-clients. While the statute does not specifically provide for the situation where an attorney does not intend to be liable to anyone other than the client, the statute does not prohibit an attorney from so notifying his client and thereby excluding all others.

In *Touche Ross*, the Mississippi Supreme Court stated that the accounting firm remained "free to limit the dissemination of [its] opinion through a separate agreement with the audited entity." In *Century 21*, (which involved an attorney) the Mississippi Supreme Court pointed out that in *Touche Ross* the court had advised auditors "they could protect themselves from liability to an unlimited number of users by entering into an agreement with the audited entity limiting dissemination of the audits." The court made no further comments or explanation relative to this suggested procedure for limiting liability.

The most common devise to limit liability in the issuance of title opinions and other opinions of counsel are "reliance" provisions usually placed at the conclusion of a written opinion. Examples of such provisions are:

[1.] A copy of this Opinion Letter may be delivered by you to [lending bank] [syndicate participants] [subsequent purchasers] [rating agency] [other] in connection with [state purpose], and such [person] [persons] may rely on this Opinion Letter as if it were addressed and had been delivered to [it] [them] on the date hereof. Subject to the foregoing, this Opinion Letter may be relied upon by you only in connection with the Transaction and may not be used or relied upon by you or any other person for any purpose whatsoever, except to
the extent authorized in the Accord, without in each instance our prior written consent.\textsuperscript{128}

[2.] This Opinion is being rendered solely for your benefit in connection with ______________________. This opinion is not intended for the use by any person not affiliated with or under contract with you. Anyone not affiliated or under contract with you who attempts to rely on this opinion without prior written consent from this firm, shall do so at their sole risk and, by doing so, shall waive any claim against this firm such reliance.\textsuperscript{129}

[3.] Pending satisfaction of the requirements set forth hereinabove the title to the captioned lands is not approved. This preliminary title opinion is rendered solely and exclusively for the use and benefit of addressee and is not a representation to the title to the captioned premises to any other party; it should not be relied upon by any other person or entity for any purpose whatsoever. Further, any utilization of this title opinion by any other person or entity is expressly prohibited without the prior express written consent of the undersigned.\textsuperscript{130}

[4.] This Original Drilling Title Opinion is a confidential communication between McDavid, Noblin & West and its client, _______________________ and is not intended to establish, and shall not be deemed to establish, an attorney-client relationship between said firm and any other party. Nor is this Title Opinion for the benefit of or advice to or to be used by any other party. Use of this Title Opinion by any other party constitutes a waiver and release of any claim or cause of action against this firm. We expressly reject the establishment of an attorney-client relationship with any other party.\textsuperscript{131}

\textbf{CONCLUSION}

Except in the majority of states where privity of contract continues to be a defense to a suit by a non-client and in Mississippi where a products liability theory has been applied, the law in Arkansas and the law in the remainder of the jurisdictions is that an attorney when performing legal services will be liable only to those non-clients whom he or she reasonably knew or
expected would rely on his legal services in connection with a particular transaction known to the attorney and for which he received a legal fee and which client relied on the attorney's work and suffered pecuniary damages as a result thereof. Attorneys who prepare title opinions and written opinions of counsel should be aware they can be liable to non-clients as well as clients for errors and omissions in the opinions. Before issuing an opinion, an attorney should clearly have in mind who is the client and who, if anyone, are non-clients which might reasonably rely on the opinion. When the attorney has identified the client and the non-client to whom professional liability is intended, the attorney should then do everything possible to limit liability to the intended parties and to exclude everyone else. Arkansas attorneys can take advantage of the provision of ARK. CODE ANN. § 16-22-310. Attorneys in all jurisdictions can use a "reliance" provision at the conclusion of an opinion and/or separate letters, agreements and waivers. Attorneys should not hesitate to limit their professional liability to only those persons to whom the attorney has willingly and intentionally provided legal services.
ENDNOTES


3. 57A A.M. JUR. 2d Negligence § 89 (1980).

4. Century 21, 612 So. 2d at 372.

5. Id. at 373.


10. See id. § 201.

11. Id.

12. See id. § 207.


16. See id. § 552 (2) (a).

17. See id. § 552 (2) (b).

18. See id. § 552 (3).

19. See id. § 552 cmt. a (emphasis added).

20. See id. § 552 cmt. c (emphasis added).

21. See id. §§ 388-402.

22. See id. § 395.


25. See id. § 311 cmt. a.

26. ARK. CODE ANN. § 16-22-310 (Michie 1987). This section is also codified as §§ 16-114-301, 16-114-303 and 17-12-702.


30. Id. at 617.

31. Id.
32. ARK. CODE ANN. § 16-22-310 (Michie 1987).
34. Id. at 970-71.
35. Id. at 958.
36. Id. at 971 (citations omitted).
38. Id.
39. Id. at 616.
40. Id. at 611.
41. Id. at 612.
42. Id. at 617.
43. Id.
44. Id.
45. 864 S.W.2d 248 (Ark. 1993).
46. Id. at 250.
47. Id. at 249-50.
48. Id. at 249.
49. Id.
50. Id.
51. Id.
52. Id. at 250.
53. Id.
54. Id.
55. Id.
57. Id. at 1073.
58. Id.
59. Id.
60. Id.
61. Id.
62. Id. at 1074.
63. Id.
64. Id.
66. Id. at 484.
67. Id.
68. Id. at 485 (citing Tapley v. Wright, 61 Ark. 275, 325 S.W. 1072).
69. Id.
70. Id.
71. Id.
73. Id. at 1 (WL).
74. Id.
75. Id.
76. Id.
77. Id.
78. Id. at 5 (WL).
79. Id. at 2 (WL).
80. Id. at 4 (WL).
81. Id. at 2 (WL).
82. Id. at 4 (WL).
83. Id.
84. Id. at 3 (WL).
85. 867 S.W.2d 476 (Ky. Ct. App. 1993).
86. Id. at 478.
87. Id. at 479.
88. Id.
89. Id. at 480.
90. Id. at 481.
91. Id.
92. Id.
93. Id. at 482.
94. Id. at 482-83.
95. Id. at 483.
96. Id. at 482.
97. Id. at 483.
98. Id.
99. Id.
100. Id.
101. Id.
102. Id.
103. 612 So. 2d 359 (Miss. 1992).
104. Id.
105. MISS. CODE ANN. § 11-7-20 (1972).
112. Century 21, 612 So. 2d at 374.
113. Id. at 363.
114. Id.
115. Id.
116. Id.
117. Id.
118. Id.
119. Id.
120. Id.
121. Id.
122. Id.
123. Id. at 373.
124. Id. at 374.
125. Id.
126. Touche Ross, 514 So. 2d at 323.
127. Century 21, 612 So. 2d at 374.
129. Brunini, Grantham, Grower and Hewes, Jackson, Mississippi.
130. James E. O’Hearn III, P.A.
131. McDavid, Noblin & West, Jackson, Mississippi. One attorney in Mississippi with a substantial real estate practice uses a series of letters to limit his liability to nonclients. K.F. Boackle, Jackson, Mississippi. For examples of these letters see generally Appendix.
APPENDIX

REPRESENTATION LETTER
(Normal One Client Paying the Entire Fee)

December 22, 1995

Buyer’s Name

Seller’s Name

Buyer’s Address

Seller’s Address

Dear Mr. & (Buyer) and Mr. & Mrs. (Seller):

This will confirm that the closing for the sale of the
Sellers, personal residence to the Buyers will be completed on
(date). At that time, all of the closing documents will be
executed.

You have asked that I prepare the documentation to complete
this transaction. However, I wish to make it clearly understood
that I am representing the Sellers only. While I believe that all
of the paperwork is in order and this transaction will close to
everyone’s satisfaction, I make no representations to the Buyers as
to the transaction insofar as it may relate to their interests.
The Buyers can and should rely on my certificate of title and the
legal validity of any document which I prepare.

Any legal advice that I render will be to the benefit of my
clients, the Sellers. My fees in this matter will be directed to
and are to be paid by the Sellers. Certainly, the Buyers are free
to obtain legal representation and I will be happy to cooperate
with their legal representatives.

If any of you have any questions concerning my role with
respect to this transaction, please feel free to call me. However,
in the event that you are satisfied with the situation as it
currently exists, I would appreciate you acknowledging receipt of
this letter by signing where indicated and returning a signed copy
to me. The additional copy is for your file.

I look forward to seeing you at the closing.

Very truly yours,

Attorney

BUYER

SELLER

BUYER

SELLER

K.F. Boackle, Jackson, Mississippi

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TO:  (Attorney’s Name)  

IN RE:  (legal description of property)  

Grantee(s):  Buyer’s Name  

We acknowledge that you have advised us that you have made no search or examination of the title, nor have you made any representation, express or implied, as to the status of said title to the guarantees. 

We further acknowledge that you have made no investigation as to the status of the loan or loans secured by said real estate, or their assumability and we accept personal responsibility for the aforesaid determinations. 

We further acknowledge that as grantors (sellers) we are making certain warranties to the Grantee(s), namely the covenants of: 

(1) Seizure  
(2) Power to Sell  
(3) Freedom from Encumbrances  
(4) Quiet Enjoyment  
(5) Warranty of Title  

We further acknowledge that you have merely prepared the general warranty deed for us, based solely on information furnished by us and have made no independent investigation in connection therewith. 

We further acknowledge that you will not record the deed or perform any other legal services, or file any tax reports with the local, state, or federal taxing authorities; and we accept personal responsibility for said recording and filing of said reports and all attendant requirements. 

______________________________________________  
Grantor/Seller  

______________________________________________  
Grantor/Seller  

K.F. Boackle, Jackson, Mississippi
GRANTEE'S WAIVER OF TITLE SEARCH

TO: (Attorney’s Name) Date:

IN RE: (legal description of property)

Purchased from: (Seller’s Name)

We acknowledge that you have advised us that you have made no search or examination of the title, nor have you made any representation, express or implied, as to the status of said title.

We further acknowledge that you have made no investigation as to the status of the loan or loans secured by said real estate, or their assumability, whether they contain dragnet or further advance clauses, or whether they are in good standing, and we accept personal responsibility for the aforesaid determinations.

We further acknowledge your advice that "we should secure evidence of seller’s title, either by a certificate of title certified to the date of our purchase or by Owner’s Title Insurance insuring our title." However, we decline either form of title evidence and are willing to accept the seller’s deed conveying said real estate.

We further acknowledge that you have merely prepared the deed based solely on information furnished by the sellers, and have made no independent investigation in connection therewith.

We further acknowledge that you will not record the deed or perform any other legal services, or file any tax reports with the local, state, or federal taxing authorities; and we accept personal responsibility for said recording and filing of said reports and all attendant requirements.

______________________________
Grantee/Buyer

______________________________
Grantee/Buyer

K.F. Boackle, Jackson, Mississippi