In a professional liability environment in which there are an ever increasing number of claims against accountants brought by those who were not directly the accountant’s client, ascertaining who the defendant accountant owes a duty to is one of the key issues to resolve in responding to such claims. This survey will address the board spectrum of laws that govern this area of the law.

As stated by the Court of Appeals of Missouri, Western District in *Midamerican Bank & Trust Co. v. Harrison*, 851 S.W.2d 563, 564-565 (1993):

> The states are generally divided three ways with regard to the issue of accountant liability to third parties with whom the accountant is not in privity. *First Nat'l Bank of Commerce v. Monco Agency Inc.*, 911 F.2d 1053, 1058 (5th Cir. 1990). The restrictive minority view is endorsed by New York and holds accountants liable to nonclients only if (1) “the accountants actually know that their financial reports are to be used for a particular purpose”; (2) “the accountants must actually know that a nonclient is expected to rely upon the financial reports in furtherance of a particular purpose”; and (3) “there must be some conduct, on the part of the accountants, that links them to the nonclient and evinces the accountant's understanding of the third party's reliance upon the audit.” *Id.*

A second view endorsed by a small group of states including New Jersey and California expands liability. These states hold accountants liable “to the extent that damages incurred by nonclients are reasonably foreseeable.” *Id.* Under this theory, liability would extend to foreseeable nonclients such as investors and commercial lenders. *Id.*

The third view is the Restatement (Second) of Torts § 552 which takes the moderate position “allowing only a restricted group of third parties to recover for pecuniary losses attributable to inaccurate financial statements.” *Id.* The Restatement represents the majority view and is endorsed by several states including Missouri. *Id.* at 1060(citing *Mark Twain Plaza Bank v. Lowell H. Listrom & Co.*, 714 S.W.2d 859 (Mo. App. 1986)). While the Restatement view allows liability in limited cases where the
accountant is not in privity with the third party, liability is not extended to “every reasonably foreseeable consumer of financial information.”

In full, the Restatement (Second) of Torts, § 552, 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.

(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
(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.

(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.

Our review would add one more category of states that have a statutory scheme. These statutes generally provide a greater level of protection to accountant, similar to the New York common law “near privity” standard.

<table>
<thead>
<tr>
<th>State</th>
<th>Common law or statutory</th>
<th>Description of law</th>
<th>Contributors</th>
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<tbody>
<tr>
<td>Alabama</td>
<td>Common law; “near privity”</td>
<td>In Colonial Bank of Alabama v. Ridley &amp; Schweigert, 551 So.2d 390 (Ala. 1989) and Altrust Financial Service, Inc. v. Adams, 756 So.2d 228 (2011) the Alabama Supreme Court looked to the law of New York and the &quot;near privity” standard set forth in Credit Alliance Corp. v. Arthur Andersen &amp; Co., 483 N.E.2d 110 (1985). In order for a claim to be made against an accountant with whom the accountant did not have a direct relationship the plaintiff must show:</td>
<td>Robert Girardeau Huie, Fernambucq, &amp; Stewart, LLP Birmingham, AL <a href="mailto:bgirardeau@huielaw.com">bgirardeau@huielaw.com</a> 205-201-1193</td>
</tr>
</tbody>
</table>
The accountant must have been aware that the financial reports were to be used for a particular purpose or purposes;

(2) in the furtherance of which a known party was intended to rely; and

(3) there must have been some conduct on the part of the accountants linking them to that party, which evinces the accountants’ understanding of that party’s reliance.

| Alaska | Common law; Modified Restatement (Second) of Torts § 552 (1977) | In *Selden vs. Burnett* (1988) 754 P.2d 256, the Alaska Supreme Court Court held that outright adoption of Section 552 would be too broad and was ambiguous. The Alaska Court felt it important to distinguish between the accountants public vs. private capacity. It held:

“… when an accountant in the course of giving personal tax advice verbally recommends a particular investment to a client, the accountant owes a duty of care to third parties only if the accountant specifically intends the third parties to invest relying on his advice, and only if he makes his intent known. Thus, if an accountant were to give investment advice to the representative of a group of investors, explicitly intending the information to be for the benefit and guidance of each member of the group, the accountant would owe a duty of care to each member. However, the accountant would owe no duty to non-members to whom the information might subsequently be relayed. Under this rule, a non-client who obtains personal investment advice secondhand will rarely be entitled to damages from the accountant who provided the advice.” |

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| Arizona | Common law; Restatement (Second) of Torts § 552 | The Supreme Court of Arizona has expressly rejected the privity defense for torts against professionals. *See Donnelly Const. Co. v. Oberg/Hunt/Gilleland*, 677 P.2d 1292, 1296 (1984). In *Donnelly*, the Court stated the general rule that "[t]here is no requirement of privity in this state to maintain an action in tort." *Id.* at 1295. The Court then went on to reject privity specifically as a Nicole Stanton
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Phoenix, AZ
nicole.stanton@quarles.com,
602-229-5662 |
defense to negligence actions against professionals, which includes accountants. *Id.* at 1296 ("we do expressly disapprove such blanket denials of causes of action"); *see also Standard Chartered PLC v. Price Waterhouse*, 945 P.2d 317, 340 (App. 1996) ("The [Supreme Court of Arizona's] rejection of privity, however, was flat, declarative, and unequivocal, and it guides us in rejecting [defendant's] call to impose a privity barrier to auditor negligence claims.").

Instead, Arizona courts apply the Restatement (Second) of Torts (the "Restatement") § 552 (1977) to determine whether an accountant owes a person a duty, rather than applying the broader foreseeability test. *See Standard Chartered*, 190 Ariz. at 29, 945 P.2d at 340 (adopting the Restatement § 552 and "deliberately reject[ing] foreseeability as the proper measure of the range of liability"). Under the Restatement § 552, an accountant's liability for supplying "false information for the guidance of others in their business transactions" is limited to a 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. Restatement § 552(2).

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<th>State</th>
<th>Statutory/ Common Law</th>
<th>Case</th>
<th>Description</th>
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<tbody>
<tr>
<td>Arkansas</td>
<td>Statutory: Ark. Stat. Ann. §§16-114-302,17-12-701.</td>
<td><em>Swink v. Ernst &amp; Young</em>, 908 S.W.2d 660, 661-662 (1995)</td>
<td>In <em>Swink v. Ernst &amp; Young</em>, 908 S.W.2d 660, 661-662 (1995), the Supreme Court of Arkansas held pursuant to the statute, a claim could not be stated against an accountant by an individual or entity with whom the accountant was not in privity unless 1) the accountant committed fraud or intentional misrepresentation or 2) sent a copy of the writing or statement to persons specifically identified in the writing or statement. A general description of individuals who might rely on the writing or statement was insufficient to state a claim.</td>
</tr>
<tr>
<td>California</td>
<td>Common</td>
<td><em>Bily vs. Arthur Young</em>, 834 P.2d 745 (1992)</td>
<td>In <em>Bily vs. Arthur Young</em>, 834 P.2d 745 (1992), the Supreme Court of California held pursuant to the statute, a claim could not be stated against an accountant by an individual or entity with whom the accountant was not in privity unless 1) the accountant committed fraud or intentional misrepresentation or 2) sent a copy of the writing or statement to persons specifically identified in the writing or statement. A general description of individuals who might rely on the writing or statement was insufficient to state a claim.</td>
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</tbody>
</table>
California addressed the question as to whether and to what extent an accountant’s duty of care in preparation of independent audit of clients financial statements extends to persons other than the client. There, after an extensive and detailed analysis of the laws in many jurisdictions across the US, the Court held there is no duty of care re conduct of audit to people other than a client. The only exceptions carved out relate to the permissible action by a third party for negligent misrepresentation or for intentional fraud to a reasonably foreseeable third person.

Colorado


Colorado defines negligent misrepresentation according to the Restatement (Second) of Torts, § 552 (1977) (Mehaffy, 892 P.2d at 236). A claim of negligent misrepresentation may be pursued if:

1. The professional gave false information to the plaintiff;
2. The information was given in the course of the profession or in a transaction in which the professional had a financial interest;
3. The information was given for the guidance of the plaintiff in a business transaction;
4. The professional was negligent in obtaining or communicating the
information;

(5) The professional gave the information with the intent or knowing that the plaintiff or a limited group of persons including the plaintiff would rely on the information;

(6) The plaintiff relied on the information; and

(7) Plaintiff's reliance caused damages.

| Connecticut | Common law; split between “near privity” and Restatement (Second) of Torts § 552 (1977) | In Connecticut, a duty is owed by contract or by privity. There are no exceptions yet recognized by the Connecticut Appellate or Supreme Court. The Connecticut trial courts, however, have applied two tests to determine whether an accountant owes a duty of care to third-parties who are not in privity. The first is the so-called “near privity” test, which is adopted from New York: An accountant may be held liable in negligence to noncontractual parties who rely to their detriment on representations made by an accountant if the following prerequisites are satisfied:

1. the accountants must have been aware that [their representations] were to be used for a particular purpose or purposes;

2. in the furtherance of which a known party or parties was intended to rely; and

3. there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance.” Twin Manufacturing Co. v. Blum, Shapiro and Co., 42 Conn. Supp. 119, 120, 602 A.2d 1079 (1991) (quoting Credit Alliance Corp. v. Arthur Anderson & Co., 65 N.Y.2d 536, 551 (1985)). Most Connecticut trial courts apply this test, when appropriate. | Josh Auxier
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At least two Connecticut trial courts, however, have applied Restatement (Second) of Torts § 552. A trial judge, *Retirement Programs for Employees v. NEPC, LLC*, 2011 WL 6934794 (Dec. 8, 2011), stated that the Restatement provides for accountant liability owed to third parties when: "One who, in the course of his business, profession or employment ... 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.” The liability in subsection (1) of § 552 is restricted by the parameters of subsection (2), which limits liability to that 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.” As further explained by comment (a): ‘one who relies on 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 the use to which the information was to be put and intended to supply it for that purpose.” (Emphasis added.)” *Retirement Programs for Employees v. NEPC, LLC*, contains a useful discussion of the two tests and a brief history as to why the Connecticut appellate courts have not yet decided this issue. Neither test has been adopted by a controlling Connecticut court. In Connecticut, one should be prepared to argue against both tests when a claim is made against an accountant by a third-party who is not in privity with the accountant.

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<tr>
<th>Delaware</th>
<th>Common law; Restatement</th>
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<tr>
<td>In Delaware, though the Supreme Court has not addressed directly addressed the issue, the defense of privity for accountants arises out of the common law and not from any statute. Delaware follows the Restatement (Second) of</td>
<td>John Elzufon Elzufon, Austin, Tarlov, &amp; Mondell</td>
</tr>
</tbody>
</table>
| (Second) of Torts § 552 | Torts § 552. *Guardian Constr. Co. v. Tetra Tech Richardson, Inc.*, 583 A.2d 1378, 1386 (1990) (adopting the § 552 of the Restatement (Second) of Torts). In *Guardian*, the Delaware Superior Court held that “privity of contract is not an indispensable prerequisite to the recovery of economic damages in negligence cases . . . which fall within the parameters of § 552 of Restatement (Second) of Torts. *Id.*

The *Guardian* Court went on to hold as a matter of law, the lack of contractual privity between the plaintiffs and defendant was not fatal to the plaintiffs’ negligence claims notwithstanding the fact that plaintiffs sought purely economic damages. *Id.*

The Superior Court elaborated on its holding in *Guardian* in another case:

This Court has earlier decided in related cases that the applicable standard for the tort of negligent misrepresentation in an accounting malpractice action lies in section 552 of the Restatement (Second) of Torts and that for an accounting firm to be held liable to plaintiffs who had no direct contractual relation to the accounting firm, “at the time [the accounting firm] was auditing [its client's] financial statements, [the accounting firm] would have had to have known (or have had reason to have known) that [its client] would share those statements with [a] class [of similarly-situated business owners who had sold their businesses to the client] or with [those] [p]laintiffs as part of a potential business transaction.


| Florida | Common law; Restatement (Second) of Torts § 552 | The law in Florida regarding privity as it relates to accountants is established through common law. Florida Statutes do not specifically address privity. However, Florida Statute 621.07 does discuss liability for agents of a professional service corporation or company; the statute states that “[n]othing contained in this act shall be interpreted to abolish, repeal, modify, restrict, or | Wilmington, DE
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limited” the law now in effect in this state applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional service.” Therefore, common law applies to professional corporations and companies.

The Florida Supreme Court in *First Florida Bank N.A. v. Max Mitchell & Co.*, 558 So.2d 9 (1990), specifically address accountants liabilities as related to third parties.

The Court reviewed four possible standards to determine professional liability. It declined to follow the narrow approach requiring privity or near privity, and it declined to follow the expansive approach recognizing liability for those plaintiffs that are reasonably foreseeable. Instead, the Court adopted the rule in the *Restatement (Second) of Torts* §552 (1977) which “limits liability to those persons or classes of persons whom an accountant ‘knows’ will rely on his opinion rather than those he ‘should have known.’” Thus, one who negligently performs professional service, knowing that another person will be injured if the service is negligently performed, is liable in tort even though there is no privity between parties.

<table>
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<tr>
<th>State</th>
<th>Common Law</th>
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<tr>
<td>Georgia</td>
<td>In the case of <em>Badishe Corp. v Caylor</em>, 356 S.E.2d 198 (1987), the Georgia Supreme Court answered the following certified question from the United States Court of Appeals for the Eleventh Circuit:</td>
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<td>‘Can third parties recover against an accountant under Georgia law for the accountant’s negligence in preparing audited financial statements where it was foreseeable that the third parties would rely upon the financial statements?’</td>
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<td><em>Badishe</em>, 356 S.E.2d at 199.</td>
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<td>In answering the question in the negative, the Court ruled “…professional liability for negligence, including the liability of accountants, extends to those persons, or the limited class of persons who the professional is actually aware will rely upon the information he prepared.” <em>Id.</em> at 200.</td>
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A general privity requirement for torts arising out of a contract is codified in O.C.G.A. § 51-1-11 which reads, in pertinent part:

(a) Except as otherwise provided in this Code section, no privity is necessary to support a tort action; but, if the tort results from the violation of a duty which is itself the consequence of a contract, the right of action is confined to the parties and those in privity to that contract, except in cases where the party would have a right of action for the injury done independently of the contract . . .

O.C.G.A § 51-1-11

In Badishe Corp. v Caylor, 356 S.E.2d at 200, the Court adopted the “middle ground” standard between unlimited foreseeability and a narrow privity rule set forth in the Restatement (Second) of Torts, § 552 (1977):

[O]ne who supplied information during the course of his business, profession, employment, or in any transaction in which he has a pecuniary interest has a duty of reasonable care and competence to parties who rely upon the information in circumstances in which the maker was manifestly aware of the use to which the information was to be put and intended that it be so used. This liability is limited to a foreseeable person or limited class of persons for whom the information was intended, either directly or indirectly. In making a determination of whether the reliance by the third party is justifiable, we will look to the purpose for which the report or representation was made. If it can be shown that the representation was made for the purpose of inducing third parties to rely and act upon the reliance, then liability to the third party can attach. If such cannot be shown there will be no liability in the absence of privity, wilfulness or physical harm or property damage. The additional duty that this rule imposes may be, of course, limited by appropriate disclaimers which would alert those not in privity with the supplier of information that they may
<table>
<thead>
<tr>
<th>Location</th>
<th>Common Law</th>
<th>Section/Case</th>
<th>Corresponding Recommendation</th>
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</table>
| Hawaii   | Common law; Restatement (Second) of Torts § 552 | In *Blair vs. Ing*, 31 P.3d 184 (2001) the court addressed the issue of whether privity of contract precludes non-clients from bringing a malpractice action against an accountant arising from estate planning. The causes of action involved negligence and third-party beneficiary claim. The Court determined that because the accountant’s post-mortem services were for preparation of fiduciary estate tax returns, the heirs to the widow were only incidental beneficiaries of the agreement between the accountant and the widow. It was noted that a “new duty will not be imposed on members of society without a logical, sound and compelling reason.” Therefore, the court adopted the rationale and analysis utilized in attorney malpractice cases in determining that “justification for holding accountants liable includes: (1) the extent to which the transaction as intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant’s conduct and the injury; (5) the policy of preventing future harm; and (6) whether imposing liability imposed an undue burden upon the profession.” This followed the balancing approach adopted in the California decision of *Lucas vs. Hamm*, 364 P.2d 685 (Cal. 1961) and *Lee vs. Correjedo*, 925 P.2d 324 (1996). In *Kohala Agriculture v. Deloitte & Touche*, 949 P.2d 141 (App.1997), which dealt with a claim of negligent misrepresentation against an accountant, the Court held that as to that cause of action, where an accounting firm negligently supplied information in business audits to non-client investors who relied upon the misinformation to grant loans to an overinflated business, Restatement (Second) of Torts §552 would apply. There was no negligent misrepresentation claim made in *Blair*. | Jennifer Saunders*  
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| Idaho    | Common law; “near privity” | The leading case is *Idaho Bank & Trust Co. v. First Bancorp*, 772 P.2d 720 (Idaho 1989). In that case, the Supreme Court of Idaho adopted the holding from *Credit Alliance v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 493 N.Y.S.2d 435, 483 N.E.2d 110 (1985), which extends public accountants’ | George Burbidge*  
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liability to parties with whom they are not in privity of contract under the following conditions: “(1) the accountants must have been aware that the financial reports were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely; and (3) there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance.” *Idaho Bank & Trust*, 772 P.2d at 722, quoting *Credit Alliance v. Arthur Anderson & Co.*, id. 493 N.Y.S.2d at 443, 483 N.E.2d at 118.

In the professional negligence context, in the absence of contractual privity between a plaintiff and defendant, the plaintiff must allege and prove facts demonstrating that they are in the nature of third-party intended beneficiaries of the professional contractual relationship in order to recover in tort. *Pelham*, 92 Ill.2d at 20 (dismissing professional negligence complaint by third party against attorney); *Brumley v. Touche, Ross & Co.* (“*Brumley I*”), 123 Ill. App. 3d 636, 642 (2nd Dist. 1984)(dismissing professional negligence claim by third party against accountant, relying upon *Pelham*). “[T]o be sufficient, the plaintiff’s complaint must allege facts showing that the purpose and intent of the accountant-client relationship was to benefit or influence the third-party plaintiff,” and that the defendant knew of this intent. *Brumley v. Touch Ross & Co.* (“*Brumley II*”), 139 Ill. App. 3d 831, 836 (2nd Dist. 1985)(emphasis added).

The holding of the Illinois Appellate Court in *Brumley II* was subsequently codified by the Illinois legislature in the Public Accounting Act, 225 ILCS 450/30.1 (West 2006), which provides in pertinent part that an accountant may only be held liable to a third party when the accountant “was aware that a primary intent of the client was for the professional services to benefit or influence the particular person bringing the action.” See also *Builders Bank v. Barry Finkel & Assoc.*, 339 Ill. App. 3d 1, 9 (1st Dist. 2003).
<table>
<thead>
<tr>
<th>State</th>
<th>Law</th>
<th>Circuit, predicting what the Indiana Supreme Court would hold, ruled that in order for a non-client to state a claim against an accountant a plaintiff must show that:</th>
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<tbody>
<tr>
<td>Iowa</td>
<td>Common law; Restatement (Second) of Torts § 552 (1977)</td>
<td>1) Accountant must have been aware that the financial reports were to be used for a particular purpose(s); 2) In furtherance of which a known party or parties were intended to rely; and 3) There must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants’ understanding of that party or parties’ reliance</td>
</tr>
<tr>
<td>Kansas</td>
<td>Statutory; Kansas Ann. Statutes 1-402</td>
<td>In <em>Sparks v. CBIZ Accounting Tax &amp; Advisory of Kansas City, Inc.</em>, 142 P.3d 749, 751 (2006), the Court of Appeals of Kansas reserved the judgment of the trial court and ordered summary judgment be entered in favor of the defendant accountant in a matter in which a minority shareholder brought an action for accounting malpractice because, pursuant to statute, the plaintiff had neither directly engaged the accountants nor did the accountants know at the time of the engagement that their work would be made available to the plaintiff and that the accountants knew that the plaintiff intended to rely on their work.</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Common law;</td>
<td>In <em>Ingram Industries v. Nowicki</em>, 527 F. Supp. 683 (E.D. Ky. 1981), the court predicted that the Kentucky Supreme Court would adopt the standard of</td>
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<tr>
<td>Location</td>
<td>Law Source</td>
<td>Details</td>
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<tr>
<td>Kentucky</td>
<td>Restatement (Second) Torts, § 552 (1977)</td>
<td>This opinion has been cited with favor by subsequent the Court of Appeals of Kentucky (<em>EH Construction, LLC v. Delor Design Group, Inc.</em>, 2000 Ky. App. LEXIS 29 (2000), but the Supreme Court of Kentucky has not had the opportunity to deal with this issue.</td>
</tr>
<tr>
<td>Louisville</td>
<td>In <em>First National Bank of Commerce v. Monco Agency, Incorporated</em>, 911 F.2d 1053 (1990)</td>
<td>The court predicted that the Louisiana Supreme Court would adopt the standard of Restatement (Second) of Torts, § 552 (1977). The Louisiana Supreme Court has not had the opportunity to decide this issue.</td>
</tr>
<tr>
<td>Maine</td>
<td>Likely common law; prediction from the United States Court of Appeals for the Fifth Circuit</td>
<td>The United States District Court for the District of Maine, noting Maine’s general adoption of the Restatement (Second) of Torts § 552, has held that accountants may be liable, without privity, for negligent misrepresentation. <em>See, e.g., Allied Investment Corp. v. KPMG Peat Marwick</em>, 872 F.Supp. 1076 (D.Me. 1995); <em>Bowers v. Allied Investment Corp.</em>, 822 F.Supp. 835, 839-40 (D.Me. 1993) (“The Restatement allows a restricted group of third parties to recover for pecuniary losses attributable to inaccurate financial statements. The restricted group includes third parties whom the accountant intends to influence and those to whom the accountant knows their clients intend to influence.”). At least one Maine trial court, in the context of claim against an attorney, has adopted the same holding as the District Court. <em>See Homeowners’ Assistance Corp. v. Merrimack Mortg. Co.</em>, 2000 Me. Super. LEXIS 13. Accordingly, although the Maine Law Court has not directly spoken on the issue, it appears that pursuant to section 522 of the Restatement, accountants in Maine may be held liable for negligent misrepresentation to a person who is “one of a limited group of persons for whose benefit and guidance he intends to supply...”</td>
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the information or knows that the recipient intents to supply it."

| Maryland | Common law; “near privity” | Maryland follows the “New York” rule, which originated in the New York case of and *Ultramares Corp. v. Touche*, 174 N.E. 441, 442 (N.Y. 1931), as reaffirmed by *Credit Alliance Corp.*, 483 N.E.2d 110, 118 (1985). The New York Rule was specifically adopted and explained by the Court of Appeals of Maryland in *Walpert Smullian & Blumenthal, P.A. v. Katz*, 361 Md. 645, 692-694, 762 A.2d 582, 607-609 (2000). The *Walpert* Court described the test as follows: “All that is required is that the trier of fact could find that the evidence suffices to apprise the defendant (accountant) of the elements of the *Credit Alliance* test, i.e., the purpose for which its work product is to be used, who is intended at the time of the engagement to use it for that purpose, see *Jones v. Hyatt Ins. Agency, Inc.*, 356 Md. 639, 658-59, 741 A.2d 1099, 1108-09 (1999), and some connection with that party that is the equivalent of privity, such as knowledge of that party's reliance.” | Kevin Murphy  
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| Massachusetts | Common law; Restatement (Second) of Torts § 552 (1977) | In *Nycal Corp. v. KPMG Peat Marwick LLP*, 688 N.E.2d 1368, 1370 (1998), the Massachusetts Supreme Judicial Court explicitly adopted the Restatement (Second) of Torts § 552 (1977). Essentially, an accountant’s liability to third parties attaches only when the auditor has actual knowledge both of (1) the limited group of potential third parties who will rely on the accountant’s work product and (2) of the particular financial transaction, or substantially similar one, that such information is designed to influence. *Nycal*, 688 N.E.2d at 1372. The accountant's knowledge is to be measured “at the moment the audit [report] is published, not by the foreseeable path of harm envisioned by [litigants] years following an unfortunate business decision.” *Id.* at 98 (citing *First Nat. Bank of Commerce v. Monco Agency Inc.*, 911 F.2d 1053, 1059 (5th Cir. 1990)).  
To determine whether a deal is “substantially similar” so to satisfy the transaction requirement, Courts consider (1) what risks the auditor reasonably perceived he was assuming when he delivered the challenged report / financial statement, and (2) whether the two transactions share essentially the | Kevin Colmey  
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same character. See *N. Am. Specialty Ins. Co. v. Lapalme*, 258 F.3d 35, 41 (1st Cir. 2001). While the first step of this analysis is conducted “from the [accountant]’s standpoint,” the second step is “an objective comparison between the transaction of which the accountant had actual knowledge and the transaction that in fact occurred.” *Id.*

As explained by the Massachusetts Appeals Court in 2003, the Restatement Test “presents formidable barriers to recovery for third parties seeking to hold auditors liable for negligent misstatements in their audit opinions in annual reports.” *Reisman v. KPMG Peat Marwick LLP*, 787 N.E.2d 1060, 1075-76 (2003) (emphasis added).

**Michigan**

MCL 600.2962 MCL 600.2962 is known as the “privity act.” The Michigan Legislature passed the Act in 1995 and it limits suits against Certified Public Accountants (CPAs) to three instances:

1. Claims by a client;

2. Claims of fraud or intentional misrepresentation by anyone; and

3. Claims by a non-client in situations where the client and the CPA both identify in writing the non-client who is going to rely on the CPA’s accounting services.

Under the Act, a CPA is specifically not liable in the following situations:

1. A claimant who is not a CPA’s client, but asserts standing to sue by virtue of assignment of the claim from the client to the claimant;

2. A claimant who is not a CPA’s client, but asserts standing to sue based on voluntary surrender of assets or acquisition of the claim by means of foreclosure or surrender under any type of security agreement between the claimant and the client; or
3. A claimant who is not a CPA’s client, but asserts standing to sue based on a writing that is not signed by the client.

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<thead>
<tr>
<th>Minnesota</th>
<th>Common law: Restatement (Second) of Torts § 552 (1977)</th>
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|           | In the state of Minnesota, the privity defense for accountants is based on common law. “The Restatement (Second) of Torts § 552 (1977) sets out the criteria for accountants’ liability to third parties who rely on the accountants’ negligent audits... Minnesota has adopted the Restatements approach.” NorAm Inv. Servs., Inc. v. Stirtz Bernards Boyden Surdel & Larter, P.A., 611 N.W.2d 372, 374 (Minn. Ct. App. 2000). In Bonhiver v. Graff, 248 N.W.2d 291 (1976), the Minnesota Supreme Court held that an accounting firm owed a duty of care to an insurance broker because a “chain of reliance” linked the firm, the state insurance commissioner who the firm knew would rely on its work product, and the insurance broker within the class of persons who should be protected by the commissioner's reliance. Id. at 301.

However in years that have followed, Bonhiver has been significantly limited. The leading limiting case is NorAm Inv. Servs., Inc. v. Stirtz Bernards Boyden Surdel & Larter, P.A., 611 N.W.2d 372 (Minn. Ct. App. 2000), in which the Minnesota Court of Appeals did not apply the “chain of reliance” duty of care standard. The NorAm court stated:

An accountant may incur liability by supplying ‘false information for the guidance of others in their business transactions ... if he fails to exercise reasonable care or competence in obtaining or communicating the information.’ NorAm Inv. Servs., Inc. v. Stirtz Bernards Boyden Surdel Larter, P.A., 611 N.W.2d 372, 374 (Minn. App. 2000) (quoting Restatement (Second) of Torts 552 (1977)). Accountants may be liable for negligent misrepresentations to those who, although not themselves foreseen, are members of a limited class whose reliance on the representation is specifically foreseen. Bonhiver v. Graff, 311 Minn. 111, 128, 248 N.W.2d 291, 301-02 (1976). The liability is limited to the particular losses suffered: |

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| Jazz Hampton | Larson King, LLP | St. Paul, MN | jhampton@larsonking.com | 651-312-6568 |
(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.

_NorAm_, 611 N.W.2d at 375 (quoting Restatement (Second) of Torts 552). See also, _Loop Corp. v. McIlroy_, No. A04-362, 2004 WL 2221619, at *4 (Minn. Ct. App. Oct. 5, 2004) (finding that the appellants did not fall within a limited group of people expected to gain access to the financial statement information, therefore the accountant did not owe the appellants a duty).

**Mississippi**

**Common law**

“In Mississippi, actionable fault must be predicated upon action or inaction, prompted by knowledge, actual or implied, of facts which make the result of the defendant's conduct not only the probable result but also a result which the defendant should, in view of the facts, have reason to anticipate.” _Touche Ross & Co. v. Comm. Union Insur. Co._, 514 So.2d 315, 323 (Miss. 1987) (citing _Sprayberry v. Blount_, 336 So.2d 1289, 1294 (Miss.1976).

In the seminal Mississippi case establishing the scope of an auditor's duty toward third parties, _Touche Ross & Co. v. Comm. Union Insur. Co._, 514 So.2d 315 (Miss.1987), the Mississippi Supreme Court held that “an independent auditor is liable to reasonably foreseeable users of [its] audit, who request and receive a financial statement from the audited entity for a proper business purpose, and who then detrimentally rely on the financial statement, suffering a loss, proximately caused by the auditor's negligence.” _Id._ at 322.

**Missouri**

**Common law; Restatement (Second) of**

In _Mark Twain Plaza Bank v. Lowell H. Listrom & Co._, 714 S.W.2d 859, 865 (1986) and in _MidAmerican Bank & Trust Co. v. Harrison_, 851 S.W.2d 563, 564-565 (1993) the Missouri Court of Appeals, Western District adopted Restatement (Second) of Torts § 552 (1977) to address who may bring an action for negligence.
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<tr>
<th>State</th>
<th>Common law</th>
<th>Action against an accountant.</th>
<th>312-578-7653</th>
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<tr>
<td>Montana</td>
<td>Common law; near privity”</td>
<td>With respect to privity in accounting negligence actions, Montana has distinguished professional negligence claims from those asserting negligent misrepresentation under the Restatement (Second) of Torts (1977). <em>See Western Sec. Bank v. Eide Bailly LLP</em>, 249 P.3d 35, 40 (Mont. 2010). &quot;A professional negligence claim asserts that the accountant negligently performed its professional services.&quot; <em>Id.</em> at ¶ 22. &quot;A negligent misrepresentation claim asserts, in contrast, that the plaintiff justifiably relied on false information negligently provided by an accountant.&quot; <em>Id.</em> at ¶ 23. With respect to professional negligence claims, the Montana Supreme Court adopted a near privity approach for accounting professionals in <em>Thayer v. Hicks</em>, 793 P. 2d 784, 791 (1990). An accountant may owe a duty of care to third parties with whom he is not in privity of contract if the accountant actually knows that a specific third party intends to rely upon the work product and if the reliance is in connection with a particular transaction or transactions of which the accountant is aware when the work product is prepared. <em>Id.</em></td>
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<td>Nebraska</td>
<td>Common law</td>
<td>In <em>Citizen National Bank of Wisner v. Kennedy &amp; Coe</em>, 441 N.W.2d 180 (1989), the Supreme Court of Nebraska stated: “[w]e now hold that an accountant’s duty of reasonable care is to his client and generally does not extend to third parties absent fraud or other facts establishing a duty to them.” A few years later in <em>St. Paul Fire &amp; Marine Ins. Co. v. Touche &amp; Ross &amp; Co.</em>, 507 N.W.2d 275, 281 (1993), the Court stated: “[t]hus, <em>Kennedy &amp; Coe</em> establishes that even in the absence of fraud, there exist circumstances under which an accountant who negligently performs a service for the accountant's client may become liable to a third party. What the limits of those circumstances may prove to be will necessarily be established on a case-by-case basis.”</td>
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G. Patrick HagEstad Milodragovich, Dale, & Steinbrenner, PC Missoula, MT gpatrick@bigskylawyers.com, 406-728-1455

Donald Patrick Eckler* Pretzel & Stouffer, Chartered Chicago, IL deckler@pretzel-stouffer.com 312-578-7653
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<th>State</th>
<th>Section / Common Law</th>
<th>Text</th>
<th>Contact Information</th>
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<tr>
<td>Nevada</td>
<td>Common law</td>
<td>The Nevada Supreme Court in <em>Eikelberger v. Rogers</em>, 549 P.2d 748 (1976), held that an accountant’s duty of care only extends to parties in privity with the accountant. Absent a professional relationship between the accountant and a third party, there is no legal basis for damages.</td>
<td>Jeff Hsu*&lt;br&gt;Murphy, Pearson, Bradley, &amp; Feeney&lt;br&gt;San Francisco, CA&lt;br&gt;<a href="mailto:jhsu@mpbf.com">jhsu@mpbf.com</a>&lt;br&gt;213-327-3500</td>
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<td>New Hampshire</td>
<td>Common law; Restatement (Second) of Torts § 552 (1977)</td>
<td>Rejecting the privity defense, the New Hampshire Supreme Court has adopted Restatement (Second) of Torts § 552 as “a reasoned approach to the issue of professional liability for negligent misrepresentation.” <em>See Spherex v. Alexander Grant &amp; Co.</em>, 451 A.2d 1308, 1312 (1982). In doing so, the <em>Spherex</em> Court noted the New Hampshire judiciary’s “disfavor for the privity doctrine in personal injury cases.” <em>Id.</em> at 1311 citing <em>Lenz v. Company</em>, 186 A.329, 330 (1936).&lt;br&gt;The <em>Spherex</em> Court also noted, however, that “while an accountant is to employ a sufficient degree of care in the performance of professional activities in order to protect himself from liability, the law must not arbitrarily extend that liability beyond his reasonable expectations as to whom the information will reach. ‘The risk reasonably to be perceived defines the duty to be obeyed.’ <em>Id.</em> at 1312 (internal quotations omitted); <em>see also Demetracopoulos v. Wilson</em>, 640 A.2d 279 (1994) (quoting <em>Morvay v. Hanover Ins. Cos.</em>, 506 A.2d 333, 335 (1986)) (“the plaintiffs to whom an accountant may be held liable for professional negligence must be ‘within the class of persons who could have reasonably relied on the accountant’s work product.’”).</td>
<td>Hillary J. Bouchard*&lt;br&gt;Thompson &amp; Bowie, LLP&lt;br&gt;Portland, ME&lt;br&gt;<a href="mailto:hbouchard@thompsonbowie.com">hbouchard@thompsonbowie.com</a>&lt;br&gt;207-774-2500</td>
</tr>
<tr>
<td>New Jersey</td>
<td>N.J. Stat. § 2A:53A-25 – Definitions; Accountants’ Liability</td>
<td>N.J. Stat. § 2A:53A-25 – Definitions; Accountants’ Liability&lt;br&gt;b. Notwithstanding the provisions of any other law, no accountant shall be liable for damages for negligence arising out of and in the course of rendering any professional accounting service unless:&lt;br&gt;(1) The claimant against the accountant was the accountant’s client; or</td>
<td>Christopher J. Carey&lt;br&gt;Graham Curtin, P.A&lt;br&gt;Morristown, NJ&lt;br&gt;<a href="mailto:ccarey@grahamcurtin.com">ccarey@grahamcurtin.com</a>&lt;br&gt;973.401.7135</td>
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<td>Theodore T. Reilly</td>
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*Italicized text indicates legal citations or references.*
The accountant:

(a) knew at the time of the engagement by the client, or agreed with the client after the time of the engagement, that the professional accounting service rendered to the client would be made available to the claimant, who was specifically identified to the accountant in connection with a specified transaction made by the claimant;

(b) knew that the claimant intended to rely upon the professional accounting service in connection with that specified transaction; and

(c) directly expressed to the claimant, by words or conduct, the accountant’s understanding of the claimant’s intended reliance on the professional accounting service; or

(3) In the case of a bank claimant, the accountant acknowledged the bank’s intended reliance on the professional accounting service and the client’s knowledge of that reliance in a written communication.


| New Mexico | Common Law; | New Mexico recognizes the tort of negligent misrepresentation or “negligence by words.” Stotlar v. Hester, 582 P.2d 403, 405 | Paul Yarbrough Hall & Evans, LLC |
The New Mexico law pertaining to the tort of “negligent misrepresentation” is set forth in UJI 13-1632 NMRA, which states: “A party is liable for damages caused by his negligent and material misrepresentation. A material misrepresentation is an untrue statement which a party intends the other party to rely on and upon which the other party did in fact rely. A negligent misrepresentation is one where the speaker has no reasonable ground for believing that the statement made was true.” UJI-Civil 13-1632

For guidance, New Mexico follows the Restatement (Second) of Torts §552 (1977). Stotlar, at 406. The Stotlar matter involved a real estate appraisal developed by an appraiser, rather than an accountant, but the principles appear to be applicable to a claim for accounting malpractice as well. Absent fraud, the tort requires a duty on the part of the person furnishing the information. Further, the person receiving the information has a right to rely on it. Id.

The requirement of privity for the tort of negligent misrepresentation, has been removed. Id. “(T)he great weight of authority no longer recognizes privity of contract as having a place in tort law…” Id.

Further, the tort of negligent misrepresentation” is determined by the general principles of the law of negligence. Id. at 405-406 citing Maxey v. Quitana, 499 P.2d 356 (Ct.App.1972) and Restatement (Second) of Torts §552 (1977).

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<th>New York</th>
<th>Common law; “near privity”</th>
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<td>In <em>Credit Alliance Corp. v. Arthur Andersen &amp; Co.</em>, 483 N.E.2d 110 (1985), the Court of Appeals of New York held that in order to hold an accountant liable, the plaintiff must show that:</td>
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<td>(1) The accountant must have been aware that the financial reports were to be used for a particular purpose or purposes;</td>
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(2) in the furtherance of which a known party was intended to rely; and
(3) there must have been some conduct on the part of the accountants linking them to that party, which evinces the accountants’ understanding of that party’s reliance.

In North Carolina, lack of privity will only provide a defense for accountants in limited circumstances where the plaintiff’s reliance on the accountant’s advice or services was not “reasonably foreseeable.” The Supreme Court of North Carolina expressly adopted the analysis of the Restatement (Second) of Torts § 552 (1977) in *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 367 S.E.2d 609 (1988). *See also Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 513 S.E.2d 320 (1999).

The Court explained that § 552 struck an appropriate balance between the strict “privity or near-privity” requirement applied in some states and the broader “reasonably foreseeable” test, through which other states analogize an accountant’s negligent misrepresentation to a products liability claim. *Raritan*, 367 S.E.2d at 615-16.

*Raritan* holds that an accountant owes a duty of care to a third party “whom the accountant or his client intends the information to benefit.” 367 S.E.2d at 614. If it is the client who intends for this information to benefit a third party, “then the accountant must know of his client’s intent at the time the accountant audits or prepares the information.” *Id.* Furthermore, the third party must actually rely on the information provided by the accountant, not a summary or excerpt of the accountant’s conclusions or analysis. 367 S.E.2d at 612.

The United States District Court for the District of North Dakota has predicted, in *dicta*, that the North Dakota Supreme Court would not adopt negligence as a standard in third-party cases except in those cases where work was undertaken for a specific purpose wherein the accountant knew that the

| **North Carolina** | **Common law; Restatement (Second) of Torts § 552 (1977)** | In North Carolina, lack of privity will only provide a defense for accountants in limited circumstances where the plaintiff’s reliance on the accountant’s advice or services was not “reasonably foreseeable.” The Supreme Court of North Carolina expressly adopted the analysis of the Restatement (Second) of Torts § 552 (1977) in *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 367 S.E.2d 609 (1988). *See also Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 513 S.E.2d 320 (1999).

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<p>| <strong>North Dakota</strong> | <strong>Common law; prediction from the</strong> | The United States District Court for the District of North Dakota has predicted, in <em>dicta</em>, that the North Dakota Supreme Court would not adopt negligence as a standard in third-party cases except in those cases where work was undertaken for a specific purpose wherein the accountant knew that the | Elizabeth Sorenson Brotten Lind, Jensen, Sullivan, &amp; Peterson, PA Minneapolis, MN |</p>
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<tr>
<th>District of North Dakota</th>
<th>third party was relying on the work, and the work was for the primary benefit of the third-party. <em>Bunge Corp. v. Eide</em>, 372 F. Supp. 1058, 1061 (D. N.D. 1974). This is the approach of The Restatement (Second) of Torts § 552 (1977). <em>Id.</em> at 1063. The North Dakota Supreme Court has not had an opportunity to consider the issue since the <em>Bunge Corp.</em> decision.</th>
<th><a href="mailto:elizabeth.brotten@lindjensen.com">elizabeth.brotten@lindjensen.com</a> 612-746-0104</th>
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<tr>
<td>Ohio</td>
<td>Common law; Restatement (Second) of Torts § 552 (1977)</td>
<td>The defense of direct privity has been rejected by the Supreme Court of Ohio. See <em>Haddon View Invest. Co. v. Coopers &amp; Lybrand</em> (1982), 436 N.E.2d 212 (1982). Specifically, in <em>Haddon View</em>, the Court held “an accountant may be held liable by a third party for professional negligence when that third party is a member of a limited class whose reliance on the accountant’s representation is specifically foreseen.” <em>Haddon View</em> 426 N.E.2d at 214. Applying the reasoning of <em>Haddon View</em>, the Ohio courts look to the Restatement (Second) of Torts § 552 (1977). Through this holding, the Ohio Supreme Court declined to maintain the previous threshold requirement that a plaintiff must be in privity of contract with a defendant-accountant in order to pursue a tort claim of malpractice caused by reliance on the accounting services provided by the defendant. <em>Id.</em> at 214-215.</td>
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<tr>
<td>Oklahoma</td>
<td>Common law; Restatement (Second) of Torts § 552 (1977)</td>
<td>Oklahoma has not limited accounting malpractice claims strictly to individuals in privity with the accountant, but instead applies a traditional analysis of negligence to determine whether the accountant owed a duty to a particular claimant. <em>Stroud v. Arthur Andersen &amp; Co.</em>, 37 P.3d 783, 793-794 (Okla. 2001). Whether an accountant owes a duty to a particular non-client for purposes of a professional negligence claim is determined by Restatement (2d) of Torts §552, which the Oklahoma Supreme Court expressly adopted for application to accountancy malpractice claims in 2001. <em>Stroud</em>, 37 F.3d at 793-794; <em>Bank of Okla. v. PriceWaterhouseCoopers, LLP</em>, 251 P. 3d 187, 190-191 (Okla. App. 2006) (cert. denied). An accountant owes a duty to, and may be held liable for professional negligence to, only those people: (1) for whose guidance the accountant intended to supply information; and (2) for whom the auditor knows his client intended to supply the information. <em>Stroud</em>, 37 F.3d at 793-794.</td>
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<tr>
<td>State</td>
<td>Common law; privity for professional malpractice claims and Restatement (Second) of Torts § 552 (1977) for negligent misrepresentation claims</td>
<td>Although Pennsylvania regulates the accounting profession by statutes, see 63 P.S. §9.1, et seq.; see also 11 Pa. Code §11.1, et seq. (regulations by the Pennsylvania State Board of Accountancy, authorized under 63 P.S. §9.3), there is no statutorily mandated privity requirement for actions against accountants. However, since at least 1919, Pennsylvania courts have required privity as a prerequisite for a professional malpractice claim. Landell v. Lybrand, 107 A. 783 (Pa. 1919). Thus, claims for damages arising from an accountant’s conduct which falls below the standard of care applicable to the profession will be barred where the plaintiff is not in direct contractual privity, or an intended beneficiary of a contract, with the defendant accountant. Cf. Guy v. Liederbach, 459 A.2d 744 (Pa. 1983). Although privity is required for a professional malpractice action, Pennsylvania has adopted the Restatement (Second) of Torts §552, which the Pennsylvania Supreme Court interprets as providing that privity is not</td>
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<td>Oregon</td>
<td>Common law; Restatement (Second) of Torts § 552 (1977)</td>
<td>In <em>U.S. Nat’l Bank of Oregon v. Fought</em>, 630 P.2d 337 (1981), the Oregon Supreme Court adopted the Restatement (Second) of Torts § 552 (1977) where one who provides information during the course of his/her business, profession, employment, or in any transaction in which he/she has a pecuniary interest has a duty of reasonable care and competence to parties who rely upon the information in circumstances in which the maker was manifestly aware of the use to which the information was to be put and intended that it be so used. In <em>U.S. Nat’l Bank of Oregon v. Fought</em>, an action by a bank against certified public accountants who had performed accounting services for corporation that was indebted to bank. There, the accountants were guilty of fraud and were liable to bank for shortages in bank-controlled, cash collateral account where accountants, with knowledge that they were misleading bank, prepared financial statements and checks which falsely represented that only funds available to pay corporation's debts to bank were those in bank-controlled cash collateral account and that all funds receivable by corporation were being deposited in that account.</td>
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| Rhode Island | Common law; likely Restatement (Second) of Torts § 552 (1977) | In *Bowen Court Assocs. v. Ernst & Young LLP*, 818 A.2d 721 (R.I. 2003), the Supreme Court of Rhode Island rejected the strict privity rule requiring a direct contractual relationship between an accountant and the aggrieved party in order to sue an accountant for professional negligence or negligent misrepresentation. See *Bowen*, 818 A.2d 721, 728 n.2. However, the court “reserve[d] [this issue] for another day” and declined to adopt a specific test for determining which third parties can file such claims and what relationship needs to exist to maintain such actions *Id.* Since deciding *Bowen*, the Supreme Court of Rhode Island has not revisited the issue.

However, two recent Rhode Island trial court decisions include an analysis of the three common tests (i.e., the near-privity test, the Restatement § 552 test, and the reasonable foreseeability rule), and relying on decisions from other jurisdictions, these two trial court decisions apply the Restatement (Second) Torts § 552. See *Anjoorian v. Arnold Kilberg & Co.*, No. PC 97-1013, 2006 WL 3436051, at *5-7 (R.I. Super. Nov. 27, 2006) (Silverstein, J.) (“[A]n accountant’s liability will be limited to losses suffered’ (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information….”) (quoting Restatement (Second) Torts, § 552); *Caparco, Sr. v. Lefkowitz, Garfinkel, Champi & Derienzo, Inc.*, No. P.C.13-1484, 2015 WL 5074489 (R.I. Super. August 21, 2015) (Silverstein, J.). In his rulings in the *Anjoorian* and *Caparco* Judge Silverstein was guided by the analysis set forth in the decision of the Massachusetts Supreme Judicial Court in the case of *Nycal Corp. v. KPMG Peat Marwick LLP*, 688 N.E.2d 1368, 1372 (Mass. 1998).

The United States District Court for the District of Rhode Island has also found that “an accountant should be liable in negligence for careless financial

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<th>South Carolina</th>
<th>Common law; likely no privity defense</th>
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<td>There is no statutory privity defense in South Carolina, and the South Carolina appellate courts have never directly addressed the issue with respect to accountants as they have with respect to (at least some) attorneys. See, e.g., Fabian v. Lindsay, 765 S.E.2d 132 (2014) (rejecting the privity rule in the context of negligence actions against estate planning attorneys). The two leading cases on accountant liability are ML-Lee Acquisition Fund, L.P. v. Deloitte &amp; Touche, 489 S.E.2d 470 (1997), and Johnson v. Robert E. Lee Academy, Inc., 737 S.E.2d 512 (Ct. App. 2012). In M-L Lee, the Supreme Court of South Carolina adopted Section 552 of the Restatement (Second) of Torts as the standard of liability in the context of negligent misrepresentation claims. The court wrote: “Under § 552, an accountant has a duty to exercise reasonable care or competence in obtaining or communicating information. This section imposes no duty to disclose information.” 489 S.E.2d at 471 n.3 (emphasis in original). In Johnson, the South Carolina Court of Appeals held an accounting firm that had not rendered a service to the plaintiff did not owe a duty to her as a matter of law. 737 S.E.2d at 515. Thus, the court hinted at the existence of a general privity requirement, though it did not explicitly say so. The court acknowledged that “South Carolina has recognized an accountant may have a duty to a third party under a negligent misrepresentation cause of action,” 737 S.E.2d at 515 n.6, though its holding suggests the principle announced in M-L Lee is an exception to a general rule. Based on the South Carolina Supreme Court’s unanimous rejection of an automatic privity defense for estate planning attorneys in Fabian, it seems unlikely that the court would adopt such a defense for accountants if given the opportunity. Most likely, as in Fabian, the court would adopt some sort of privity defense.</td>
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803-799-1111
of balancing framework that would enable at least some class(es) of third parties to bring claims in at least some circumstances.

| South Dakota | Common law | South Dakota has not developed its precedent on privity directly with respect to accountant malpractice cases brought by alleged third-party beneficiaries. However, the South Dakota Supreme Court has stated that the elements of a professional malpractice claim against an accountant is the same as that for claims against “other professional people, including lawyers, doctors and architects.” *Lien v. McGladrey & Pullen*, 509 N.W.2d 421, 423 (S.D. 1993). One element that must be proved is the existence of an accountant-client relationship. *Id.* This may be shown by an express or implied contract. *Id.* The appropriation of legal malpractice standard to the accountancy context suggests that the “strict privity” rule and its exceptions apply in South Dakota to accountant-malpractice cases. Because the South Dakota Supreme Court has applied the same standards to accountant-malpractice cases as those governing attorney-malpractice cases, it would be reasonable to assume that any further expansion of exceptions to the “strict privity” rule would also apply to accountant-malpractice cases.

Thus, we look at attorney cases for more information. South Dakota has largely adhered to a common-law “strict privity” rule in attorney malpractice cases, and require a legal malpractice plaintiff to first show the existence of an attorney-client relationship between the lawyer and the plaintiff. *Chem-Age Indus., Inc. v. Glover*, 652 N.W.2d 756, 769 (S.D. 2002). However, in *Friske v. Hogan*, the state supreme court adopted a narrow exception to the privity requirement with respect to some third-party beneficiaries. 698 N.W.2d 526, 530 (S.D. 2005). The Court held that “a lawyer owes a duty of care to the direct, intended, and specifically identifiable beneficiaries of [a] testator as expressed in the testator’s testamentary instruments.” *Id.* (quoting *Scheiner v. Scoville*, 410 N.W.2d 679, 681 (Iowa 1987)). More generally, the court stated that “[t]o establish a duty owed by an attorney to a nonclient, the nonclient ‘must allege and prove that the intent of the client to benefit the nonclient was a direct purpose of the transaction of relationship’” and in | Eric Steinhoff Lind, Jensen, Sullivan, & Peterson, PA Minneapolis, MN [eric.steinhoff@lindjensen.com](mailto:eric.steinhoff@lindjensen.com) 612-746-0115 |
doing so must show that “the intent to benefit actually existed, not whether there could have been an intent to benefit the third party.”  *Id.*  (quoting *Chem-Age Indus., Inc.*, 652 N.W.2d at 771).

Under South Dakota law, an attorney-client relationship “may arise expressly or impliedly from the parties’ conduct.”  *Chem-Age Indus., Inc.*, 652 N.W.2d at 768.  The relationship is created when (1) a person seeks advice or assistance from an attorney; (2) the advice or assistance sought pertains to matters within the attorney’s professional competence; and (3) the attorney expressly or impliedly agrees to give or indeed gives the advice or assistance.  *Id.*  The person’s reasonable reliance on the attorney to provide services, when the attorney is aware of the reliance and does nothing to negate it, is sufficient to give rise to an attorney-client relationship.  *Id.*

**Tennessee**

Common law; Restatement (Second) of Torts § 552 (1977)

The leading case from the Tennessee Supreme Court on the issue of privity for accounting malpractice is *Bethlehem Steel Corp. v. Ernst & Whinney*, 822 S.W.2d 592 (Tenn. 1991).  The issue in *Bethlehem Steel* was whether an accounting firm could be liable to a non-client for negligence in the preparation of an audit report that was found to be inaccurate.  Bethlehem Steel claimed that it relied to its detriment on this audit report, which turned out to be inaccurate, in deciding to extend credit to Jackson, who was one of its customers.  On appeal after a jury verdict in favor of Bethlehem Steel, the Tennessee Supreme Court was asked to decide whether privity is required in imposing liability upon accountants to non-clients.  *Bethlehem Steel*, 822 S.W.2d at 593.  The Supreme Court chose to follow the majority of jurisdictions which follow §552 of the Restatement (second) of Torts.

The Tennessee Supreme Court interpreted section 2 of §552 to allow liability to extend to those persons or class of persons whom the accountant, at the time the information is provided, should reasonably expect to receive and rely upon the information, even if the accountant does not know the name of the person or persons with whom his/her client may share the information.  However, the Court must consider the current business practices and the

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particular factual situation in determining whether the accountant should reasonably expect the information to be received and relied upon by third parties. *Bethlehem Steel*, 822 S.W.2d at 596.

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<tr>
<th>State</th>
<th>Relevant Law</th>
<th>Key Provisions</th>
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| Texas   | Common law; privity for professional malpractice claims and Restatement (Second) of Torts § 552 (1977) for negligent misrepresentation claims | Texas approaches accountant malpractice claims from the contractual relationship, requiring privity between the accountant and the client and permitting only the client to sue the accountant for malpractice. *E.g.*, *Prospect High Income Fund v. Grant Thornton, LLP*, 203 S.W.3d 602, 609 (Tex. App. —Dallas 2006), reviewed on other grounds, 314 S.W.3d 913 (Tex. 2010); see also *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 794 (Tex. 1999). However, non-clients may maintain negligent misrepresentation claims against an accountant when the professional transfers or provides information to a known party for a known purpose. *Grant Thornton, LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 920 (Tex. 2010). This approach follows Restatement (2d) of Torts § 552 in relying heavily on foreseeability, and limits third-party misrepresentation claims to situations where the accountant: (1) is actually aware of the non-client; and (2) intends for the non-client to rely on the information with regard to a particular transaction. *Grant Thornton*, 314 S.W.3d at 920; *McCamish, Martin, Brown & Loeffler*, 991 S.W.2d at 794.  
| Utah    | Statutory; Utah Code Ann. § 58-26a-602 | Utah has a statutory privity defense for accountants found at Utah Code Ann. § 58-26a-602. This statute was analyzed and discussed by the Utah Supreme Court in *Reynolds v. Tanner*, 2013 UT 32, 307 P.3d 570. Utah Code Ann. § 58-26a-602 exempts accountants from liability to anyone with whom the accountant is not in privity of contract, except for (1) cases of fraud or intentional misrepresentation; or (2) cases where the accountant (a) knew the client intended the plaintiff to rely and (b) the accountant identified in writing to the client an intent that the plaintiff rely on the professional services the accountant performed on behalf of the client. Utah Code Ann. § 58-26a-602 provides in full: |
A licensee, a CPA firm registered under this chapter, and any employee, partner, member, officer, or shareholder of a licensee or CPA firm are not liable to persons with whom they are not in privity of contract for civil damages resulting from acts, omissions, decisions, or other conduct in connection with professional services performed by that person, except for:

1. acts, omissions, decisions, or conduct that constitute fraud or intentional misrepresentations; or

2. other acts, omissions, decisions, or conduct, if the person performing the professional services:
   
   a. knew that a primary intent of the client was for the professional services to benefit or influence the particular person seeking to establish liability; and

   b. identified in writing to the client that the professional services performed on behalf of the client were intended to be relied upon by the particular person seeking to establish liability.

| Virginia | Common law; privity | In Virginia, an action against an accountant relating to the accountant’s services requires privity of contract between the plaintiff and the defendant accountant. Although it may be possible for a plaintiff in some circumstances to bring an action as a third-party beneficiary to the contract, Virginia law requires that the contract express the parties’ “clear and definite intent” to confer a benefit on such a third party.

The leading case on this topic from the Supreme Court of Virginia is *Ward v. Ernst & Young*, 435 S.E.2d 628 (1993). In *Ward*, the Court re-affirmed that Virginia’s economic loss rule applies to malpractice actions against professionals. Expressly rejecting the approach described in the Restatement (Second) of Torts § 552 (1977), the Court refused “to carve out and apply against accountants an exception to the rule we have consistently applied in actions seeking damages for an economic loss resulting from negligent performance of a contractual commitment brought by a non-party to the contract.” *Ward*, 435 S.E.2d at 631.

*Ward* left open the possibility that some accounting service contracts might support a breach of contract action by a third-party beneficiary. But “a third party’s right to claim relief as the beneficiary of a contract between others requires evidence that the contracting parties intended to confer a benefit upon that particular claimant.” *Id.*, 435 S.E.2d at 331.

Virginia courts will carefully distinguish so-called “incidental” beneficiaries to a contract from intended beneficiaries. For example, if a client instructs his attorney to prepare a will with the express goal of minimizing taxes, then it is doubtful that the beneficiaries of the will would be considered intended beneficiaries of the contract between the lawyer and his client. By contrast, a client’s express instruction to his attorney to ensure that each of his grandchildren receives a specified amount of money upon his death may show that the grandchildren were intended beneficiaries of the contract. *See Copenhaver v. Rogers*, 384 S.E.2d 593, 596-97 (1989). | James Walker  
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| Washington | Common law | *Dewar vs. Smith*, 342 P.3d 328 (2015) dealt with the question of whether a CPA could be liable to a third party (non-client) for negligence or misrepresentation. The Court of Appeals looked to cases applying liability on professionals to non-clients in Washington, as well as out-of-state jurisdiction’s application of a “duty” to non-clients. In so doing, it was determined in this case that the balancing of factors such as had been done in an earlier decision involving an attorney’s liability to a non-client should be applied. *Trask vs. Butler*, 872 P.2d 1080 (1994). Those factors included:

1. the extent to which the transaction was intended to benefit the plaintiff;
2. the foreseeability of harm to the plaintiff;
3. the degree of certainty that the plaintiff suffered injury;
4. the closeness of the connection between the defendant’s conduct and the injury;
5. the policy of preventing future harm; and
6. the extent to which the profession would be unduly burdened by a finding of liability. |
| --- | --- | --- |
| Washington, D.C. | Common law; privity | In the District of Columbia, an accountant can likely rely on a common law privity defense. The D.C. Court of Appeals has not directly discussed the relationship between third-party claims against accountants and the Restatement (Second) of Torts § 552 (1977). An analogous privity defense is discussed in the context of legal malpractice, and the same logic likely applies to malpractice claims against accountants.

The Court of Appeals has often cited Justice Cardozo’s well known opinions in *Ultramares Corp. v. Touche*, 174 N.E. 441 (1931), and *Glanzer v. Shepard*, 135 N.E. 275 (1922), for the proposition that a professional’s duty to exercise | Jennifer Saunders*  
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reasonable care extends to third parties only where the impact on the third party is the purpose of the transaction. A frequently cited example of this analysis is provided in *Needham v. Hamilton*, 459 A.2d 1060, 1062 (D.C. 1983) (involving legal malpractice), and this analysis was recently reiterated in *Scott v. Burgin*, 97 A.3d 564 (D.C. 2014) (involving legal malpractice).

An example of third parties who might be permitted to bring an action against an accountant for misrepresentation is provided in dictum in *Hogue v. Hopper*, 728 A.2d 611 (D.C. 1999). In Footnote 4, the Court of Appeals stated: “An accountant may be held liable to stockholders of a closely held corporation if the accountant knew (or, arguably, if he should have known) that the stockholders would rely on the accountant’s representation.” The facts in *Hogue* that prompted the Court of Appeals to make this statement involved advice provided directly to a partner of a law firm by the law firm’s accountant.

| West Virginia | Common law; Restatement (Second) of Torts § 552 (1977) | In West Virginia, absence of privity of contract is not an absolute defense to a malpractice action against an accountant. *First National Bank of Bluefield v. Crawford*, 182 W. Va. 107, 386 S.E.2d 310 (1989). The Supreme Court of Appeals of West Virginia addressed this precise question in *Bank of Bluefield*. After surveying approaches in other jurisdictions, the Court adopted the approach described in the Restatement (Second) of Torts § 552 (1977).

*Bank of Bluefield* involved a malpractice action brought by a bank against an accountant that prepared financial statements for a borrower of the bank. The parties stipulated that the accountant knew the bank needed the financial statements before closing on the loan, and the bank alleged that it reasonably relied on the financial statements to make the loan.

The Court considered both the narrow exception to privity described by Chief Judge Cardozo in *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441
(1931), and New Jersey’s liberal approach, as described in *H. Rosenblum, Inc. v. Adler*, 93 N.J. 324, 461 A.2d 138 (1983). The Restatement rule was described by the Court as “more appropriate because it imposes a standard of care only to known users who will actually be relying on the information provided by the accountant.”

Recognizing that the Supreme Court of Appeals of West Virginia did not set forth what must actually be proven under § 552, the United States Court of Appeals for the Fourth Circuit later summarized six elements commonly required by other courts under this same rule:

1. Inaccurate information;
2. Negligently supplied;
3. In the course of an accountant’s professional endeavors;
4. To a third person or limited group of third persons for whose benefit and guidance the accountant actually intends or knows will receive the information;
5. For a transaction (or for a substantially similar transaction) that the accountant actually intends to influence or knows that the recipient so intends;
6. With the result that the third party justifiably relies on such misinformation to his detriment.

*Ellis v. Grant Thornton LLP*, 530 F.3d 280, 289 (4th Cir. 2008).

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<tr>
<th>Wisconsin</th>
<th>Common law</th>
<th>Wisconsin’s accountants’ privity defense is based on common law and adopts the foreseeability approach. The leading case in Wisconsin states that its</th>
<th>Connie Armstrong Lind, Jensen, Sullivan, &amp;</th>
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approach is grounded on “the fundamental principle . . . that a tortfeasor is fully liable for all foreseeable consequences of his act.” *Citizens State Bank v. Timm, Schmidt & Co., S.S.*, 335 N.W.2d 366 (Wis. 1983). In the absence of a delineation as to who may receive or rely on the accountant’s information or professional services, an accountant has a duty to all those who he or she might reasonably foresee as recipients of that work-product and its utilization for business purposes – provided, however, that the recipients in fact rely on the work-product for those purposes. *Id.*

Under Wisconsin’s foreseeability approach, “auditors owe a duty of care to all parties who are reasonably foreseeable recipients of financial statements for business purposes, provided that recipients rely on the statements pursuant to those business purposes.” *Scottish Heritage Trust v. KPMG Peat Marwick*, 81 F. 3d 606, 611 (5th Cir. 1996). The defense of claims under this standard shifts the focus to an attack on the plaintiff’s reasonable reliance.

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<tr>
<th>Wyoming</th>
<th>Statutory; Wyo. Stat. §33-3-201, as to financial statement work by certified public accountants and their firms; Common law; Restatement (Second) of Torts § 552</th>
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<td>Wyoming’s privity rules are (a) based on common law in the case of an accountant not licensed as a certified public accountant, and (b) based on statute for a CPA or the firm employing the CPA. Wyoming’s accountant liability statute, Wyo. Stat. §33-3-201, sets requirements for plaintiffs seeking relief against certified public accountants or their firms for injuries “as a result of financial statements or other information examined, compiled, reviewed, certified, audited or in the course of an engagement to provide other public accountancy services.” While no Wyoming case squarely hold to this issue, a dissent in a 1991 case involving engineers suggests that misrepresentation claims not within the scope of this statute would be allowed if the elements of the Restatement (Second) Torts, §552 are shown. (<em>Century Ready-Mix Co. v. Campbell County School Dist.</em>, 816 P.2d 795, 804-05 (dissent) (Wyo. 1991)). For claims against CPAs or their firms covered by the statute, privity is required unless the plaintiff shows the accountant...</td>
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(1977) as to non-licensed accountants and for services outside the scope of the statute.

|   | (A) Was aware at the time the engagement was undertaken … that the financial statements or other information were to be made available for use in connection with a specified transaction by the plaintiff and the transaction was specifically identified to the defendant; and  
(B) Was aware that the plaintiff intended to rely upon such financial statements or other information in connection with the specified transaction. |
|---|---|
|   | For a CPA to be entitled to the statutory limitation on liability, any financial statements provided must include disclaimer language outlined in the statute.  
As to non-licensed accountants, Wyoming follows the Restatement (Second) Torts, §552 for negligent misrepresentation claims. |

* indicates that contributor is not licensed in the state for which the contribution was made.