

NO. A06-486

State of Minnesota
In Supreme Court

McIntosh County Bank, et al.,
Plaintiffs/ Respondents,

v.

Dorsey & Whitney LLP,
Defendant/ Appellant.

BRIEF OF RESPONDENTS

LEONARD, O'BRIEN,
SPENCER GALE & SAYRE,
LTD.

Thomas C. Atmore (#191954)
Edward W. Gale (#33078)
100 South Fifth Street
Suite 2500
Minneapolis, MN 55402
(612) 332-1030

Attorneys for Respondents

BRIGGS AND MORGAN, P.A.
Richard G. Mark (#67581)
Mark G. Schroeder (#171530)
Jason R. Asmus (#319405)
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400

*Attorneys for Appellant
Dorsey Whitney LLP*

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF THE ISSUES ON APPEAL.....1

STATEMENT OF THE CASE.....3

A. Background3

**B. Bankruptcy Court Proceedings and Initiation
 of the Present Action**.....4

**C. United States Bankruptcy and District Court
 Rulings**6

D. Proceedings Below8

STATEMENT OF FACTS.....9

A. Dorsey’s Knowledge of the M&S Business Model9

**B. Dorsey’s Knowledge of the Specific Relationships
 in the St. Regis Loans**12

C. M&S’s Intention in Retaining Dorsey.....16

**D. The Bank’s Participants’ Understanding
 of the Transactions**.....17

E. The Participation Agreements18

F. Dorsey’s Negligence19

G. President’s Default and the Tribe’s Refusal to Pay21

ARGUMENT	21
I. INTRODUCTION	21
II. STANDARD OF REVIEW	25
III. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT DORSEY WAS NOT ENTITLED TO SUMMARY JUDGMENT ON THE ISSUE OF WHETHER RESPONDENTS HAVE STANDING TO SUE DORSEY	26
IV. THE BANK PARTICIPANTS WERE THE THIRD PARTY BENEFICIARIES OF THE AGREEMENT BETWEEN DORSEY AND M&S	29
A. <u>Minnesota has Adopted a Multi-Factor Analysis for Determining Third Party Beneficiary Status</u>	29
1. Negligence v. Contract Based Analysis	30
2. This Court Previously Adopted the Negligence/Policy Based Analysis and any “Sole Purpose” Requirement is Inconsistent With that Approach	32
3. The Courts in Minnesota Have Struggled in Addressing and Applying a Sole Purpose Requirement	34
B. <u>The Court of Appeals Correctly Applied The <i>Lucas</i> Factors</u>	37
1. The Transaction Was Intended to Benefit Respondents	38
2. It was Clearly Foreseeable that Respondents Would Suffer the Harm	39
3. Respondents Have Suffered All the Harm	39
4. There is a Direct Connection Between Dorsey’s Malpractice and Respondents’ Losses	40
5. Holding Dorsey Responsible Will Prevent Future Harm in Similar Circumstances	40

C.	<u>Even if the Court Adopts A Contract Based Analysis, Respondents Remain Third Party Beneficiaries Entitled To Pursue Dorsey For Its Malpractice</u>	41
D.	<u>Alternatively, This Court Should Adopt The Restatement Standard</u>	43
E.	<u>Other Courts Addressing Similar Facts Have Found Standing</u>	44
V.	AN ATTORNEY-CLIENT RELATIONSHIP EXISTED BETWEEN DORSEY AND THE BANKS UNDER THE THEORY OF IMPLIED CONTRACT	45
VI.	THE CLAIM OF CONFLICT IS WITHOUT MERIT	48
	CONCLUSION	49

TABLE OF AUTHORITIES

Cases

<i>Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan</i> , 494 N.W.2d 261 (Minn. 1992)	1, 23, 26, 33, 34, 35, 37, 43, 44
<i>Anderson v. Orlins</i> , 1998 WL 113764 (Minn. Ct. App. 1988)	34, 35
<i>Anoka Orthopaedic Associates, P.A. v. Mutschler</i> , 773 F. Supp. 158, 166-67 (D. Minn. 1991)	37
<i>Blair, et al. v. Ing, et al.</i> , 95 Hawaii 247, 254, 21 P.3d 452, 459 (2001).....	31, 32
<i>Blue Water Corporation, Inc. v. O'Toole</i> , 336 N.W.2d 279, 281 (Minn. 1983)	32, 47
<i>Cerberus Partners, L.P. v. Gadsby & Hannah</i> , 728 A.2d 1057 (R.I. 1999)	2
<i>Christy v. Saliterman</i> , 288 Minn. 144, 179 N.W. 2d 288 (Minn. 1970).....	2, 46
<i>Collins v. Binkley</i> , 750 S.W.2d 737 (Tenn. 1988)	44
<i>CPJ Enterprises, Inc. v. Gernander</i> , 521 N.W.2d 622, 624 (Minn. Ct. App. 1994)	35
<i>Credit General Insurance Co. v. Midwest Indemnity Corp., et al.</i> , 872 F. Supp. 523 (N.D. Ill. 1995).....	44
<i>Cretex Companies, Inc. v. Construction Leaders, Inc.</i> , 342 N.W.2d 135, 139 (Minn. 1984)	31
<i>Drager by Gutzman v. Aluminum Indus.</i> , 495 N.W.2d 879, 882 (Minn. Ct. App. 1993) 25, 26	
<i>Estate of Leonard v. Swift</i> , 656 N.W.2d 132 (Ia. 2003).....	44
<i>Fabio v. Bellomo</i> , 504 N.W.2d 758 (Minn. 1993)	25

<i>Fairview Hosp. & Health Care Serv. v. St. Paul Fire & Marine Ins. Co.</i> , 535 N.W.2d 337 (Minn. 1995)	25
<i>First Financial Savings & Loan Assoc. v. Title Insurance Company of Minnesota, et al.</i> , 557 F.Supp. 654 (N.D. Ga. 1982)	44, 45
<i>Francis v. Piper</i> , 597 N.W.2d 922, 925 (Minn. Ct. App. 1999).....	35, 43
<i>Friske v. Hogan</i> , 698 N.W.2d 526 (S.D. 2005)	44
<i>Goldberger v. Kaplan, Strangis and Kaplan, P.A.</i> , 534 N.W.2d 734, 738 (Minn. Ct. App. 1995)	35, 37
<i>Gresser v. Hotzler</i> , 604 N.W.2d 379, 383 (Minn. Ct. App. 2000).....	25
<i>Guy v. Liederbach, et. al.</i> , 501 Pa. 47, 59-61, 459 A.2d 744, 750-752 (1983).....	31
<i>In re SRC Holding Corp.</i> , ___ B.R. ___, 2007 WL 1080002 (D. Minn. 2007).....	7, 20
<i>In re SRC Holding Corp.</i> , 352 B.R. 103 (Bkrtcy. D. Minn. 2006)	7
<i>Ingram v. Syverson</i> , 674 N.W.2d 233, 235 (Minn. Ct. App. 2004).....	25
<i>Lucas v. Hamm</i> , 56 Cal. 2d 583, 15 Cal. Rptr. 823-24, 364 P.2d 685, 687-88 (1961), cert. denied, 368 U.S. 987, 82 S.Ct. 603, 7 L.Ed. 2d 525 (1962)	30, 33, 35
<i>Marker v. Greenberg</i> , 313N.W.2d 4 (Minn. 1981).....	1, 23, 29, 30, 32, 33, 34, 35, 36, 43
<i>McIntosh County Bank, et. al v. Dorsey & Whitney, LLP</i> , 726 N.W.2d. 108 (Minn. Ct. App. 2007).....	9
<i>Murphy v. Country House, Inc.</i> , 307 Minn. 344, 351, 240 N.W.2d 507, 512 (1976).....	25
<i>Offerdahl v. Univ. of Minn. Hosps. & Clinics</i> , 426 N.W.2d 425, 427 (Minn. 1988)	25
<i>Petrillo v. Bachenberg, et al.</i> , 139 N.J. 472, 655 A.2d 1354 (1995)	44

Pine Island Farmers Coop v. Erstad & Riemer, P.A., 649 N.W.2d 444, 448 (Minn. 2002) 46

Ritter v. M.A. Mortenson Co., 352 N.W.2d 110 (Minn. App. 1984) 25

Schuler v. Meschke, 435 N.W.2d 156 (Minn. Ct. App. 1989) 1, 46

Thommes v. Milwaukee Mut. Ins. Co., 622 N.W.2d 155 (Minn. App. 2001) 25

Wartnick v. Moss & Barnett, 490 N.W.2d 10 (Minn. 1992)..... 25

Whisler v. Findeisen, 280 Minn. 454, 160 N.W.2d 153 (1968) 25

Other Authorities

Attorney Malpractice: Use of Contract Analysis to Determine the Existence of an

Attorney-Client Relationship, 63 Minn. L. Rev. 751, 754-755 (1979) 46

R. Mallen & J. Smith, 1 *Legal Malpractice* 27, 30, 32

Restatement (Second) of the Law Contracts 23, 31, 41

Restatement (Third) of the Law Governing Lawyers 24, 43, 44

Rules

Minn. R. Civ. P. 56.03 (2004)..... 25

Minnesota Rules of Professional Conduct, Rule 1.5(8)(b) 27

STATEMENT OF THE ISSUES ON APPEAL

1. Whether the District Court erred in granting summary judgment to Appellant Dorsey & Whitney, LLP, on the issue of Respondents' standing to sue Appellant under the third-party beneficiary theory of attorney liability where the District Court failed to analyze the "Lucas factors" and engaged in a weighing of evidence.

Result Below: The Court of Appeals reversed the District Court and ruled that 1) An analysis of the "Lucas factors" was required; and 2) Genuine issues of material fact precluded summary judgment on the issue of the third-party beneficiary theory.

Most Apposite Authority:

Marker v. Greenberg, 313 N.W.2d 4 (Minn. 1981)

Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan, 494 N.W.2d 261 (Minn. 1992).

2. Whether the District Court erred in granting summary judgment to Appellant Dorsey & Whitney, LLP, on the issue of Respondents' implied contractual attorney-client relationship with Appellant when there were genuine issues of material fact precluding summary judgment.

Result Below: The Court of Appeals reversed the District Court and ruled that genuine issues of material fact precluded summary judgment where, among other things, Appellant and Miller & Schroeder knew and intended that Appellant's work was on behalf of Respondents.

Most Apposite Authority:

Schuler v. Meschke, 435 N.W.2d 156 (Minn. Ct. App. 1989)

Christy v. Saliterman, 288 Minn. 144, 179 N.W. 2d 288 (Minn. 1970)

Cerberus Partners, L.P. v. Gadsby & Hannah, 728 A.2d 1057 (R.I. 1999)

STATEMENT OF THE CASE

A. Background

Respondents,¹ community banks from Minnesota and the Upper Midwest, were participants in two loans totaling approximately \$12,000,000 to President R.C.-St. Regis Management Company (“President”), the developer and manager of a casino owned by the St. Regis Mohawk Tribe (“Tribe”) in New York. The loans were originated by Miller & Schroeder (“M&S”). M&S acted as the nominal lender on behalf of the Respondents. M&S required, as a precondition to the loans closing, that it receive commitments from participant banks to purchase one-hundred percent of the loans. M&S secured those commitments from the Respondents. Almost immediately after the loans closed M&S formally sold to Respondents the entire beneficial interest in the loans based on the pre-closing commitments. M&S did not and, as Dorsey & Whitney, LLP (“Dorsey”) knew, never intended to retain a principal position in the loans.

M&S asked Dorsey to represent the lenders and draft all of the loan transaction documents and advise as to any issues relating to documenting and enforcing the loans. There was no written agreement between M&S and Dorsey relating to the representation.

As a component part of the structure of the loan transactions, a “Notice and Acknowledgement of Pledge” (“Pledge”) was signed by the Tribe pursuant to which the Tribe pledged the casino revenues to secure the repayment of the loans. Dorsey drafted the Pledge and issues arose prior to closing regarding the need for the National Indian Gaming Commission (“NIGC”), a federal agency charged with oversight responsibility

¹ Respondents will also be referred to as “Bank Participants.”

for Indian gaming transactions, to approve the Pledge and the other loan documents. Dorsey lawyers discussed among themselves the need for NIGC approval and the need to postpone closing of the loans until the NIGC had acted. Dorsey did not, however, convey its concern to M&S or the Respondents, instead advising the lenders to proceed with closing without first obtaining NIGC approval.

The loans closed in February 1999. President almost immediately defaulted and the Tribe then claimed that the lack of NIGC approval of the Pledge rendered that agreement null and void under federal law. Respondents were left with millions of dollars in bad debt. M&S and Respondents would not have closed the loans had they been advised of the risks of closing and funding the loans before the NIGC had made a determination regarding the Pledge and loan documents.

B. Bankruptcy Court Proceedings and Initiation of the Present Action

M&S filed for bankruptcy in 2002. Pursuant to federal law, a Trustee was appointed to administer the bankruptcy estate. The bankruptcy Trustee, Respondents and Marshall Investments (“Marshall”), the successor to M&S as servicer of the loans, sued Dorsey in Federal Bankruptcy Court in 2003, alleging malpractice in connection with Dorsey’s work on the loans. The Trustee and Marshall also asserted a claim for breach of fiduciary duty arising out of Dorsey’s failure to disclose the potential malpractice claim and Dorsey’s failure to disclose a conflict of interest when Bremer Bank, a loan participant that is not a party to the present action, sued M&S to recover Bremer Bank’s participation interest. Dorsey responded to the malpractice action by seeking dismissal of

the case, including, among other arguments, on the basis that the Bank Participants did not have “standing” to sue Dorsey.

The Bankruptcy Court decided that it did not have jurisdiction over 28 of the 31 Bank Participants. As to the three Bank Participants over which the court had jurisdiction it denied Dorsey’s motion for summary judgment on the standing issue. The Bankruptcy Court granted Dorsey’s motion to dismiss Marshall’s claim for malpractice and the Trustee voluntarily dismissed his malpractice claims. Finally, the court denied Dorsey’s motion to dismiss the breach of fiduciary duty claims. *See* “Order Dismissing Certain of Plaintiffs’ Claims and Granting in Part and Denying in Part Defendant’s Motion for Summary Judgment as to Remaining Plaintiffs” dated January 10, 2005, in *McIntosh County Bank, et al. v. Dorsey & Whitney LLP*, United States Bankruptcy Court, District of Minnesota, Adv. Case No. ADV 03-4291, Respondents’ Supplemental Record (“SR”) at 1-9.

Dorsey then brought a motion asking the Bankruptcy Court to abstain from hearing the remaining three Bank Participants’ malpractice claims. While that motion was pending, and to eliminate possible statute of limitations preclusion, all the Bank Participants and Marshall initiated the present case in Hennepin County District Court, asserting the same claims as had been asserted in the Bankruptcy Court action. Respondents alleged that Dorsey committed malpractice and that they were entitled to recovery under the intended beneficiary, tort and/or contract theory of legal malpractice liability. Appellant’s Appendix (“AA”) at 26-28. Respondents also alleged that Dorsey had negligently misrepresented the enforceability of the loan. *See* AA at 27-28.

The Bankruptcy Court then granted Dorsey's motion for abstention as to the remaining Bank Participants. SR at 10-19. Later, Marshall voluntarily dismissed its breach of fiduciary duty claim in Hennepin County. The net result is that the Trustee's and Marshall's breach of fiduciary duty claims proceeded in Bankruptcy Court and the 31 Bank Participants' malpractice claims proceeded in Hennepin County.

C. United States Bankruptcy and District Court Rulings

At approximately the same time that the present action was initiated, Bremer Bank, along with the Trustee, sued Dorsey in a separate malpractice action in Bankruptcy Court. *Bremer Business Finance Corporation, et al. v. Dorsey & Whitney LLP*, United States Bankruptcy Court, District of Minnesota, Adv. Case No. ADV 05-4051. Bremer Bank is one of the participants in the underlying loans and is the only participant that is not a plaintiff in the present case. The Bankruptcy Court exercised jurisdiction over Bremer's case. That case, consolidated with the Trustee's and Marshall's case, proceeded to trial.

Shortly before trial, Dorsey asked the United States District Court to review Judge Dreher's denial of summary judgment on the standing issue. The request for discretionary review was assigned to Judge John Tunheim, who refused to grant review, noting that "The existence of an attorney-client relationship is usually dependent on facts, and this case is no exception. Indeed, as the Bankruptcy Court noted, there are a number of disputed factual issues..." "Order Denying Motion for Leave to Appeal" dated February 7, 2006. SR at 20-24.

The trial in Bankruptcy Court began on February 8, 2006 and ended on February 21, 2006. On August 28, 2006, Judge Dreher issued a decision, in which she concluded, among other things, that Bremer did have standing and that Dorsey had committed malpractice. *In re SRC Holding Corp.*, 352 B.R. 103 (Bkrtcy. D. Minn. 2006).

Dorsey filed objections and appealed Judge Dreher's decision appeal to the United States District Court. On April 6, 2007, Judge Donovan Frank affirmed in part and reversed in part. Judge Frank held that Bremer did not have standing to pursue Dorsey for Bremer's loan losses. *In re SRC Holding Corp.*, ___ B.R. ___, 2007 WL 1080002 (D. Minn. 2007). Judge Frank affirmed the Bankruptcy Court's ruling that Dorsey breached its fiduciary duties to Bremer, M&S and Marshall. *Id.* at 29-32. Judge Frank also expressly found that Dorsey had committed malpractice in its handling of the loan transaction. *Id.* at 25-27.

Judge Frank addressed the third party beneficiary issue in *dicta*. *Id.* at 24. The Court noted that the "sole purpose" language found in some Minnesota cases was not what Dorsey supposed it to be. *Id.* at 25. Judge Frank determined that M&S did not intend to retain Dorsey for the benefit of Bremer, in large part because, according to the Court, M&S was a "placement agent" for President.² *Id.*

Both courts that have addressed the issue have found that Dorsey committed malpractice. Of the five courts that have looked at the standing issue, three, the

² Note that Judge Frank arguably draws the wrong conclusion from this fact. President had its own counsel. If M&S was its agent, there was no need for Dorsey to be involved on that side of the deal. Dorsey, moreover, was obviously representing the lender side of the deal. Thus, M&S' status as "placement agent" leads to the conclusions that Dorsey was retained solely for the participants.

Minnesota Court of Appeals, Judge Tunheim and Judge Dreher, have concluded either that genuine issues of material fact preclude a ruling in Dorsey's favor or, in the case of Judge Dreher, that a bank participant does have standing to sue Dorsey. Two courts have concluded that there is no standing. Only Judge Dreher had the benefit of live testimony and an opportunity to observe the demeanor of the witnesses.

D. Proceedings Below

In the present case, Dorsey immediately responded to the complaint with a motion for summary judgment. No discovery was conducted.³ After a number of judges recused themselves from hearing the case, Dorsey's motion was finally heard by the Honorable Heidi S. Schellhas. Dorsey had argued to the Bankruptcy Court that M&S had no claim for malpractice because it had sold off 100% of the beneficial interest in the loans and, therefore, could not prove it suffered any damages. Dorsey now argued to the Hennepin County District Court that the Bank Participants lacked standing because they were neither a client nor a direct beneficiary of Dorsey's agreement with M&S.

On January 17, 2006, Judge Schellhas granted Dorsey's motion, ruling that no genuine issues of material fact existed and that, as a matter of law, the Respondents had no standing to sue Dorsey for legal malpractice and, furthermore, as non-clients Respondents could not assert a claim for negligent misrepresentation. AA at 238.

Respondents appealed to the Minnesota Court of Appeals. On January 10, 2007, the Court of Appeals reversed in part and affirmed in part, ruling that genuine issues of material fact precluded summary judgment on the issues of third-party beneficiary and

³ Dorsey relied on the depositions and discovery obtained in the *Bremer* case.

implied contract standing to sue. *McIntosh County Bank, et. al v. Dorsey & Whitney, LLP*, 726 N.W.2d. 108 (Minn. Ct. App. 2007). Regarding the issue of third party beneficiary standing, the Court of Appeals concluded that the law in Minnesota required an analysis of the “*Lucas* factors” and rejected the District Court’s opinion that the courts must first address a “threshold question” regarding whether the “sole purpose” of the representation was to benefit the plaintiff. *Id.* at 115-117.

This Court, at Dorsey’s request, granted further review. The Court also granted the *amicus* petitions of three parties, Minnesota Lawyers Mutual Insurance Co., the Minnesota State Bar Association, and the Minnesota Defense Lawyers Association. The *amici* submitted a joint brief that concludes by asking this Court to reverse the Court of Appeals and dismiss the Respondents’ case.⁴

STATEMENT OF FACTS

Dorsey asserts that the facts are undisputed. Dorsey’s rendition of the facts, however, is incomplete. The Court of Appeals looked at all of the facts presented, not just those Dorsey chose to highlight, and correctly concluded that genuine issues of fact exist requiring remand for trial.

A. Dorsey’s Knowledge of the M&S Business Model

Prior to its work on the loans that are the subject of this case, Dorsey knew M&S’ business model well, as it had worked on approximately **three dozen** other such loans originated by M&S. Dorsey, then, knew that one of the primary objectives of its work was to benefit the Respondents.

⁴ Counsel for *amicus* MLM, Charles Lundberg, was retained by Dorsey as an expert witness in the Bankruptcy Court proceeding and testified on behalf of Dorsey at trial.

M&S provided, among other services, specialized debt financing including commercial loan and gaming finance. AA at 279, ¶2. One of the businesses of M&S was the origination, participation, and servicing of commercial loans, including Indian Gaming loans. *Id.*

All of M&S' gaming loans were structured in the same general way. *Id.* at ¶3. M&S would originate the loan, acting as placement agent, and later, servicer of loans. *Id.* Upon M&S and the borrower agreeing to terms, M&S would prepare a "Loan Participation Marketing Book", including a template Participation Agreement. *Id.* These books were then sent to a network of banks that had expressed an interest in participating in loans originated by M&S. The interested banks would evaluate the loan and decide whether to purchase an interest in the loan. *Id.* Since M&S' business plan was to originate and sell loans to banks, it typically would not close a loan with a borrower until it had commitments from bank participants to purchase 100% of the loan. *Id.* M&S normally retained only the servicing rights. *Id.*

M&S would hire experienced counsel to handle the documentation and closing of the loans, a fact that was made known to the banks. AA at 280-281, ¶8. After M&S obtained commitments from the banks, a closing with the borrower would be scheduled. AA at 279-280, ¶4. The committed participants would be kept advised as to the progress towards closing and would, in fact, if issues developed, be asked to vote on whether they were in agreement with the proposed course of action. *See, e.g.*, AA at 530-531. Immediately after closing with the borrower, M&S would send a Closing Book (that included all the loan documents and a "Participation Agreement") to each bank

participant that had committed to purchase an interest. *Id.* The bank participant would then sign the Participation Agreement and transfer the funds to M&S to formally purchase an interest in the loan. *Id.* M&S' sales of the participation interests were generally completed one week after closing with the borrower. *Id.* In other words, while M&S originally funded the loan, it only held a lender's position for about one week. *Id.* at ¶5. Thereafter, the bank participants held the lender's position and bore all risk of loss in the event the loan went into default. *Id.*

M&S' network of banks consisted mostly of small to medium size community banks in the Upper Midwest. Respondents are banks from the following communities: Luxemburg, WI, Herreid, SD, Langdon, ND, Roseau, MN, Lino Lakes, MN, Valley City, ND, Phillipsburg, KS, Sioux Falls, SD (2), Russell, MN, Sandstone, MN (2), Williston, ND, Bigfork, MN, Long Prairie, MN, Ashley, ND, McVile, ND, New Auburn, WI, Manistique, MI, Shakopee, MN, Oregon, WI, Page, ND, Lewisville, MN, Devils Lake, ND, Center, ND, Bemidji, MN, Sebeka, MN, Iron River, WI, Park Rapids, MN, Winger, MN and Leeds, ND. The vast majority of the banks contributed \$300,000 or less to the loans, with many contributing just \$100,000.⁵

Dorsey was paid \$50,000 to handle the transactions. AA at 283, ¶20. It is Dorsey's contention, accepted by the trial court, that the banks should have each found their own counsel with experience in the highly specialized area of Indian Gaming finance, paid that counsel what would surely be significant fees (presumably approaching the \$50,000 paid to Dorsey) to review all the loan documents and the applicable Indian

⁵ Bremer Bank's contribution is not included.

Gaming transaction laws and provide an opinion that the loans were properly documented and enforceable. That contention, and the trial court's acceptance of that contention, ignores the practical realities of the situation and ignores Dorsey's own knowledge of how these transactions work and what role Dorsey was playing. It also ignores M&S' purpose in retaining Dorsey and advertising to the banks that experienced counsel had been retained.

As noted above, prior to being retained on the St. Regis loans, Dorsey worked on thirty-six other gaming loans originated and sold by M&S. AA at 280, ¶7. Each of these prior gaming loans were sold to bank participants and in each Dorsey had been retained as lenders' counsel. *Id.* Dorsey's job was to represent the lenders in structuring, documenting and closing the loans, including obtaining all necessary approvals and securing the loans; work that benefited M&S and the Bank Participants. *Id.* Dorsey was well aware of M&S' business model for its gaming loans. *Id.* and AA at 326, ¶5.

B. Dorsey's Knowledge of the Specific Relationships in the St. Regis Loans

The loans and sale of loan participations in this case followed the same pattern as that described above. In 1998, M&S entered into discussions to finance the construction of the Akwesasne Mohawk Casino in Hogansburg, New York (the "Casino"). AA at 281, ¶9. The Casino was to be built for the Tribe on reservation land in New York state owned by the United States for the benefit of the Tribe. *Id.* The Casino was to be developed and managed by President. *Id.*

President approached M&S about providing funding to construct the Casino, the parties came to terms and in December 1998, M&S hired Dorsey. *Id.* As was the case in

the previous thirty-six transactions, Dorsey was hired to assist in the structuring, documenting and closing of the loans; in this case two loans (the "St. Regis loans"), totaling over \$12,000,000 to President. *Id.* at ¶11. There was no written agreement between M&S and Dorsey regarding the representation. As in the past, M&S' interests and the Bank Participants' interests were aligned, Dorsey was hired for the benefit of all and Dorsey knew its role. *Id.*

Dorsey assigned several attorneys to work on the St. Regis loans, including Paula Rindels and Mark Jarboe, both partners in Dorsey's Minneapolis office, and Chris Karns, a partner in Dorsey's Washington, D.C. office. AA at 280, ¶6 and AA at 325, ¶3. Ms. Rindels had primary responsibility for drafting the loan documents and advising the lenders, and did ninety percent of the work on the file. SR at 26-27, 30. Among other documents, she drafted the Loan Agreements, Promissory Notes, Escrow Agreement and the Pledge.

Ms. Rindels knew that Dorsey's work was for the benefit of the Respondents:

Q. Did you understand in 1998 and 1999 when you were doing work for Miller & Schroeder that they would act as originator of the St. Regis loans?

A. Yes.

Q. Did you understand that their Indian gaming loans were structured so that they would be sold off in loan participations?

- A. I understood that they would be participating the loans, yes.

SR at 29.

In addition to her testimony, the documents establish Ms. Rindels' knowledge of the participations. For example, on the same day as it was entered into, M&S sent to Ms. Rindels the "Loan Placement Agreement" signed by M&S and President relating to the smaller of the two loans. SR at 32-33 and SR 37-46. Under that agreement, M&S is referred to as the "Placement Agent" for the loan. SR at 38. Importantly, there is no designation of "Lender." Instead, under the heading "General Terms & Conditions" on page 6 of the agreement, it states:

Placement Agent shall provide Borrower with an irrevocable commitment...to close and fund the [loan] **at the time** the Placement Agent satisfactorily completes all due diligence associated with the underwriting of the [loan]...**and Placement Agent has received signed "Commitments to Participate" letters from all other [loan] Participants for purchase of 100% of the [loan].**

SR at 43. (Emphasis Added).⁶ Ms. Rindels, then, knew that unless M&S had commitments from banks to purchase 100% of the loan, there would be no loan.

Similarly, while "Lender" is defined in the loan agreements (drafted by Dorsey) as M&S, the loan agreements, consistent with the Loan Placement Agreement, expressly contemplate that the loans would be owned by the Bank Participants. AA at 401, ¶8.06; 402, ¶8.08. In fact, the loan agreements (drafted by Dorsey) provide that President

⁶ The use of the word "other" is significant. In some cases, M&S might be a participant in a loan. See AA at 328 (fourth "Whereas" clause); 331 (definition of "Participants"). Contrary to Dorsey's claim of conflict, the interests of M&S and the participants are clearly aligned.

“acknowledges that the Lender will be selling participation interests in the Loan,” expressly allows assignment of the agreement by the Lender and is made binding on the Lender’s successors and assigns. AA at 401-402.

Dorsey, moreover, did specific work that solely benefited the Bank Participants. Before the St. Regis loans closed, Mary Jo Brenden, M&S’ in-house counsel, discussed with Ms. Rindels and Mr. Karns revising the Participation Agreements to provide protection to the Bank Participants. AA at 326, ¶7. Specifically, based on information that Mr. Karns had received from the State of New York Racing and Wagering Board, sections 3.1 and 7.7 of the Participant Agreements were revised to assure that the Bank Participants could enforce the provisions of the loan documents. *Id.* Dorsey not only knew that the St. Regis loans would be sold to participants, but it specifically rendered legal advice for the express purpose of protecting the interests of the Bank Participants. SR at 29 and AA 326, ¶7.

Dorsey was also familiar with the terms of the Participation Agreements. AA at 326, ¶6. The Participation Agreements contained the following at paragraph 2.2:

Relationship of Parties. The relationship between Lender [Miller & Schroeder] and Participant is and shall be that of a seller and purchaser of a property interest (i.e., **an outright, absolute partial assignment of an undivided interest in and to the Loan, in the Collateral and in the Collections**)....The Participant hereby approves of and authorizes the [Miller & Schroeder] to be named as the **nominal payee of the Note and nominal beneficiary of each Guaranty and the nominal secured party under the Loan Documents** and, subject to the provisions of this Agreement, to **generally act as agent for all the Participants** in the holding and disposition of the Collateral. [Miller & Schroeder] agrees that [it] holds the security interests and other interests granted by the Note and the Loan

Documents not in its individual capacity **but rather as an agent for the Participants** in accordance with this Agreement.

AA at 332. (Emphasis added). Dorsey, then, had full knowledge of the relationship between the Bank Participants and M&S and the role M&S played in the loan transaction: **Agent** for the participants and **nominal** lender.

C. M&S's Intention in Retaining Dorsey

M&S intended that Dorsey's work benefit the Respondents. As noted above, M&S informed the Bank Participants that experienced counsel would be hired. As Steven Erickson, the head of M&S' Indian Gaming Department, testified:

Q. Because with regard to Dorsey's role in this transaction, you expected that Dorsey's work would benefit both Miller & Schroeder and the participants, correct?

A. Yes.

SR at 48. (Note, again, that if for some reason M&S retained an interest in the loans, it would be a participant on par with all other participants. AA at 328; 331.

That everyone understood the nature of the relationships is highlighted by events prior to the closing. When the issues arose regarding whether the loan should be closed on schedule, M&S, conveying the incomplete advice that Dorsey had given regarding the Pledge, asked the Participant Banks to approve or disapprove of continuing with the transaction. *See e.g.*, AA at 530-531. The Bank Participants had committed to participate in the loans and all parties recognized their interest well in advance of closing.

Dorsey claims that one fact supporting its position is that the Respondents did not pay Dorsey's fee. Dorsey fails to mention that M&S, who Dorsey claims was its only

client, did not pay those fees either and, in fact, had no obligation to pay those fees. If the borrower, President, did not pay the legal fees, the Respondents, not M&S, would be responsible for those fees. AA at 342, ¶7.14; *see also* SR at 51, ¶5.

D. The Bank Participants' Understanding of the Transactions

The St. Regis loans closed on February 24, 1999 and interests, representing the entire principal balance, were then formally sold in the committed amounts to 32 participating banks (31 of which are plaintiffs in this action). AA at 282, ¶¶14-15.

Each Bank Participant had purchased other participations from M&S before purchasing an interest in the St. Regis loans; knew that M&S was the originator, placement agent, and servicer of the loans; knew that M&S intended to sell 100% of the St. Regis loans and would not retain the position of a lender; and knew that M&S acted as agent on behalf of the Bank Participants. SR at 50-52.

Each Bank Participant was told that M&S' retained nationally recognized experts and attorneys with well-respected gaming law practices to provide advice and counsel in their gaming transactions; knew that Dorsey had been hired to structure, document and close the St. Regis loans for the benefit of the Bank Participants; knew that Dorsey was a large and well-known Minneapolis law firm; and, importantly, knew that the legal fees generated by Dorsey for work done in relation to the St. Regis loans would be paid either by President or the Bank Participants, not M&S. SR at 51-52, ¶7. Each Bank Participant relied on Dorsey to properly document and close the loan, to obtain all necessary approvals and to secure the collateral. *Id.* In short, M&S advertised to the banks that M&S would retain experienced counsel for the loan transaction to assure the banks that

the loans were properly documented and enforceable. In this case, that counsel, as it had been thirty-six times before, was Dorsey.

E. The Participation Agreements

The Participation Agreements signed by the banks contain identical language. The trial court, ruling against Respondents, concluded that the disclaimer language in the Participation Agreements precludes an action against Dorsey for malpractice. AA at 243, ¶15.⁷ A review of that language, however, shows the opposite to be true.

As an initial matter, it should be noted that the Participation Agreement makes clear that M&S is assigning to each bank an undivided interest in the loans, collateral and collections. AA at 332, ¶2.2. The Participation Agreements also provide that each participant will make its own “credit analysis and decision to purchase its participation interest” based on the information and documents provided by M&S. AA at 332-333, ¶3.1. The agreements go on to state that the banks disclaim any reliance on “representations or warranties” made by M&S. *Id.* and AA at 336 ¶5.2. There is no language, however, that disclaims any reliance on the work or representations of counsel retained to provide advice and document the loans. In other words, the Participation Agreement effectively results in the banks having to rely solely on work of counsel (Dorsey) hired to document and close the loans.

⁷ The District Court ruled that there was no privity between Respondents and Dorsey and, therefore, Respondents could not assert a malpractice claim based on contract. Ironically, the court based its “no privity” ruling giving Dorsey liability protection on language in a contract (the Participation Agreement) to which Dorsey was not a party.

F. Dorsey's Negligence

Although the District Court did not reach the issue, it is worth noting the nature of the malpractice claim against Dorsey. The District Court stated that the malpractice claim is "based on Dorsey's legal advice given to M&S that the Pledge Agreement...did not require NIGC approval to be enforceable." AA at 242, ¶8. This recitation of the nature of the claim is only partially correct.

The Affidavit of Michael Cox, the former general counsel at the NIGC who was largely responsible for drafting the regulations at issue in the case, provides a detailed explanation of how and why Dorsey was negligent. SR at 53-58. In summary, the sole source of security for the St. Regis loans was the Pledge. The Dorsey lawyers were not sure whether the Pledge needed NIGC approval in order to be valid and enforceable. What the Dorsey attorneys did know was that if the St. Regis loans closed and NIGC approval was needed, but not obtained, the lenders' sole source of collateral for repayment of the St. Regis loans would be lost.

Several weeks before closing, with knowledge of the risk, the Dorsey attorneys sent the Pledge to the NIGC for its review. As the days passed without hearing from the NIGC, and with the date of the closing and funding of the loan transactions approaching, there was a flurry of internal e-mails exchanged between the Dorsey attorneys questioning what should be done if the NIGC did not decide the issue before the St. Regis loans closed. When the St. Regis loans closed on February 24, 1999, the NIGC had still not made a determination as to whether the Pledge was subject to its approval obligations and had not approved the amendment to the Management Agreement. The Dorsey

attorneys never discussed with either M&S or the Bank Participants any of the risks of proceeding to close the loan transaction without a response from the NIGC and, at no time, advised them to wait until these concerns were satisfactorily addressed and resolved before closing and funding the loans.

Had M&S known of the risks associated with not waiting for the NIGC to make a determination both on the Pledge and issues raised in a February 16, 1999 letter from the NIGC, M&S would have waited to close and fund the St. Regis loans until the NIGC had made its determination. SR at 48. M&S would not have proceeded to close the St. Regis loans if there was even a "perceived risk." SR at 49. Likewise, had the Bank Participants been advised that there was any issue as to either the validity or enforceability of any of the loan documents, they would not have authorized closing and would not have purchased the participant interests. AA at 464-465. The Respondents' claims, then, revolve around the fact that Dorsey did not in any way advise its clients of the risks and consequences of proceeding to closing: 1) Without a determination from the NIGC that the Pledge did or did not need approval; and 2) Prior to the NIGC approving the amended management agreement.

As noted above, the United States District Court (Frank, J.) recently affirmed the Bankruptcy Court's determination that Dorsey had committed malpractice. *See In Re SRC Holding Corp.*, ___ B.R. ____, 2007 WL 1080002, at 26-27.

G. President's Default and the Tribe's Refusal to Pay.

In February, 2000, President stopped making any payments on the St. Regis loans. AA at 282, ¶16. Once it became evident that President would not cure its default, representatives of M&S and representatives of several of the Bank Participants, along with their attorney John Thomas of the Dorsey firm, traveled to New York to meet with the Tribe in October, 2000. SR at 59-61. At that meeting, a Tribal Chief stated that the Tribe was not obligated to make any payments under the Pledge because, lacking NIGC approval, it was not enforceable. *Id.* The Tribe has never made any payments under the Pledge. AA at 282-283, ¶17.

ARGUMENT

I. INTRODUCTION

M&S intended that the Bank Participants benefit from Dorsey's work and hired Dorsey for that purpose. Dorsey knew that the Bank Participants were the beneficiaries of its services. Dorsey understood how M&S' loan participation business worked and that it was the Bank Participants who needed the loans to be properly documented and the lenders' rights to be enforceable. That was Dorsey's sole function. Dorsey was hired to make sure the loans were properly documented and the lenders' rights were enforceable. There was no conflict between M&S and the Bank Participants, because it was in their joint interests for the loans to be properly documented, closed and enforceable.

Two courts have now concluded that Dorsey committed malpractice in its handling of the loan transaction. Dorsey, however, does not believe that anyone involved

in the St. Regis loans can sue Dorsey for malpractice. When this case was in the Bankruptcy Court, Dorsey asserted:

Dorsey concedes, for purposes of this discussion, that the Bank Participants did, in fact, suffer an investment loss when the Loans went into default. Miller & Schroeder **suffered no such loss, however, because it sold both Loans in their entirety to the Bank Participants after closing and, therefore, had no interest that could have been harmed** as a result of President's default. Because Miller & Schroeder suffered no loss, Dorsey questions whether the Trustee can assert claims against Dorsey set forth in the first three counts of the complaint.

"Defendant's Memorandum of Law Regarding Subject Matter Jurisdiction" dated December 8, 2004, at p. 3, in *McIntosh County Bank, et al. v. Dorsey & Whitney LLP*, United States Bankruptcy Court, District of Minnesota, ADV Case No. 03-4291. (Emphasis added) SR at 62-70.

The "first three counts of the complaint" are the negligence/malpractice and misrepresentation claims. Under Dorsey's theory, the Bank Participants are not clients nor can they otherwise make a claim for malpractice, so Dorsey cannot be held liable to those parties. M&S, meanwhile, has not suffered a loss, so Dorsey cannot be held liable to that client. According to Dorsey, no one can sue it for its negligence in handling the St. Regis loan transactions; it accepted \$50,000 for its work, but is responsible to no one for its performance. Such a position is untenable and contrary to public policy. Dorsey must be made accountable to the parties that suffered a loss as a result of Dorsey's negligent advice and counsel.

Dorsey and the *amici* have cloaked their arguments in terms of professional duties and obligations and policy. What those duties and obligations and policy truly demand, however, is that a lawyer not be allowed to evade responsibility when that lawyer

undertook a matter, for a large fee, knowing that her work was for the benefit of another and knowing that if that work were not done properly, the beneficiary would suffer substantial loss.

This appeal raises the issue of what rules should apply in determining whether a plaintiff has standing to sue for legal malpractice under the third-party beneficiary theory. The Court of Appeals, following precedent from this Court, held that the “*Lucas factors*” must guide the decision and rejected any requirement to answer a threshold question of whether the client’s “sole purpose” was to benefit the third-party. The Court of Appeals was correct. The “sole purpose” test as applied by the District Court is based on an inaccurate reading of applicable law and, moreover, is an undefined and unworkable requirement that has only led to confusion and inconsistency in results. No court has effectively explained nor applied a “sole purpose” test. The law of third party beneficiary standing, as developed by various courts, has, in fact, taken two divergent paths. One is based on the law of contract, with courts applying third party beneficiary contract law based upon the *Restatement (Second) of the Law Contracts*. The other is based on the law of negligence and on public policy, with courts employing the “*Lucas factors*” to determine whether a duty is owed and policy supports the claim.

This Court’s decisions in *Marker v. Greenberg*, 313N.W.2d 4 (Minn. 1981) and *Admiral Merchants Motor Freight, Inc. v. O’Connor & Hannan*, 494 N.W.2d 261 (Minn. 1992) represent an adoption of the “*Lucas factors*” approach to addressing the issue. Analysis of those factors require remand of this case for trial. Even if the Court adopts a contract based analysis, however, there still remain genuine issues of material fact that

preclude summary judgment. M&S clearly intended that Respondents primarily benefit from Dorsey's work. Alternatively, this Court could adopt the standards set out in the *Restatement (Third) of the Law Governing Lawyers*. That analysis also leads to remand for trial.

The issues of conflict or fiduciary responsibilities raised by Dorsey and the *amici* have little relevance to the third party beneficiary analysis and, moreover, are a red-herring. As M&S' and the Bank Participants' interests were perfectly aligned there is no conflict of interest. Dorsey's work was expressly limited to the loan transaction. Respondents are entitled to pursue claims against Dorsey under the third party beneficiary theory of standing.

The facts of the case also preclude summary judgment against Respondents on the implied contract theory of standing. Dorsey, having handled thirty-six prior similar loans and having knowledge of the roles played by M&S and the banks, knew that M&S represented to the banks that it would hire experienced counsel to handle the loan transaction. M&S' intent in hiring Dorsey was to provide counsel for the Bank Participants. Critically, the scope of Dorsey's work was, by its own admission, limited to documenting and advising as to the terms and conditions of loans. That work was solely for the benefit of the ultimate lenders: The Bank Participants.

The Court of Appeals decision should be affirmed in all respects and this case should be remanded to the District Court for pre-trial discovery and trial.

II. STANDARD OF REVIEW

On appeal from summary judgment, this Court reviews the evidence *de novo* and in the light most favorable to the non-moving party. *Ingram v. Syverson*, 674 N.W.2d 233, 235 (Minn. Ct. App. 2004); *citing Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). The reviewing court determines whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law. *Id.*; *citing Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 112 (Minn. 1992). All doubts and factual inferences must be resolved in favor of the non-moving party. *Id.*; *citing Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). The standard of review does not change simply because the District Court makes findings of fact. *Whisler v. Findeisen*, 280 Minn. 454, 455 n. 1, 160 N.W.2d 153, 154 n. 1 (1968); *see also Gresser v. Hotzler*, 604 N.W.2d 379, 383 (Minn. Ct. App. 2000).⁸

Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03 (2004); *see also Thommes v. Milwaukee Mut. Ins. Co.*, 622 N.W.2d 155, 157-58 (Minn. App. 2001). A court considering a motion for summary judgment may not weigh the evidence or make factual determinations. *Fairview Hosp. & Health Care Serv. v. St. Paul Fire & Marine Ins. Co.*, 535 N.W.2d 337, 341 (Minn. 1995); *Murphy v. Country House, Inc.*, 307 Minn. 344, 351, 240 N.W.2d 507, 512 (1976). Summary judgment is a “blunt instrument” to be used only when there is clearly no disputed issue of material fact involved. *Drager by Gutzman v. Aluminum Indus.*, 495 N.W.2d 879, 882

⁸ The trial court expressly stated that nothing in its Order should be considered a finding of fact. AA at 241, n.3.

(Minn. Ct. App. 1993). Summary judgment “should be granted only where the moving party has established a right to judgment with such clarity as to leave **no room for doubt**, and only where the non-moving party is not entitled to recover under any circumstances.”

Id. (Emphasis added).

III. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT DORSEY WAS NOT ENTITLED TO SUMMARY JUDGMENT ON THE ISSUE OF WHETHER RESPONDENTS HAVE STANDING TO SUE DORSEY

Respondents were the third party beneficiaries of Dorsey’s work and of the retention agreement between Dorsey and M&S. There was, moreover, an implied contract between Dorsey and Respondents. As this Court said in *Admiral Merchants*:

Whether an attorney-client relationship exists is usually a question of fact dependent upon the communications and circumstances.

Admiral Merchants, 494 N.W.2d at 265 (Emphasis added).

The District Court, in ruling that Respondents were no more than “incidental” beneficiaries and did not have an implied contract with Dorsey, failed to conduct the analysis required by Minnesota law and engaged in a weighing of the evidence, making factual determinations against Respondents in the face of competing material facts. The Court of Appeals, reversing, correctly applied the law and its decision should be affirmed.

Dorsey argues that it did not represent Respondents and owed no duty to Respondents because it did not know the identity of the committed Bank Participants, had no contact with any Bank Participant and was never specifically told, “You represent the Bank Participants.” The District Court appears to have accepted this argument,

highlighting that litany in its Order. AA at 242-243. In doing so, however, the District Court was engaged in weighing the evidence. It was comparing and contrasting Dorsey's proffered evidence with all the evidence set forth above showing Dorsey's knowledge of how M&S' deals worked and the position and understanding of the Bank Participants, M&S and Dorsey. The District Court chose to ignore some circumstances, but not others; chose to ignore some communications, but not others.

It is critical to note that Dorsey did not prepare a written retainer agreement or engagement letter. Dorsey attempts to use this fact against the Repondents, when the absence of such a writing actually supports affirmance of the Court of Appeals. As a matter of policy, lawyers should be encouraged to put their retention agreements in writing. *See e.g.*, Minnesota Rules of Professional Conduct, Rule 1.5(8)(b) (“**The scope of representation** and the basis or rate of fee for which the client will be responsible shall be communicated to the client, **preferably in writing**...” (Emphasis added). In the context of third-party beneficiary liability, one commentator has stated:

As a matter of risk management, attorneys can protect themselves from claims by nonclients by informing them, preferably in writing, that they cannot rely on the attorney for advice or services.

R. Mallen & J. Smith, 1 *Legal Malpractice* §7.8, p. 844 (2007 Ed.).

Dorsey claims it did not know the identity of the Bank Participants, but this claim is unpersuasive and does not support Dorsey's position. Dorsey knew the loans would be participated and, importantly, knew that the loans would not close until M&S had

commitments from participants to purchase the entirety of the loans.⁹ Well before the loans closed the identity of the participants was known to M&S and Dorsey could have obtained that information had it wanted to do so. M&S, in fact, was communicating with the participants prior to closing, asking them to approve continuing to closing and treating them as if they already controlled the loans. AA at 530-31. Dorsey could have easily communicated with the Bank Participants or, alternatively, could have prepared a letter for distribution by M&S to the participants. Dorsey did not take either course. M&S would likely not have agreed to such a statement to the participants in any event, because, as Dorsey knew, M&S had told the participants that experienced counsel would assure that the loans were properly closed and documented. Dorsey should not be allowed to use its failure to prepare a written retainer as a weapon against Respondents' claims.

Finally, as noted above, the essential facts underlying the standing issue have been addressed by five different courts. Each of those courts has had a different view of the facts and come to different conclusions as to the import of the facts and whether the Bank Participants have standing. Perhaps as much as any other argument, these various decisions establish that reasonable minds can disagree and that genuine issues of material fact are present that preclude summary judgment. Respondents are entitled to have a jury hear all this evidence

⁹ Dorsey, apparently, never inquired as to the identity of the participants. In the context of a transaction like the St. Regis loans, where the lawyer's role is to document the loans and advise as to enforceability, the specific identity of each bank is irrelevant to that work. It is only after the fact, in this litigation, that Dorsey has decided that knowing the identity of the banks has significance.

IV. THE BANK PARTICIPANTS WERE THE THIRD PARTY BENEFICIARIES OF THE AGREEMENT BETWEEN DORSEY AND M&S

Respondents were the third party beneficiaries of Dorsey's work. As an initial matter, it is critical to note that the scope of Dorsey's legal representation is undisputed. It was the preparation of the loan documents and advice relating thereto. AA at 242, ¶10. M&S and Respondents were perfectly aligned in wanting Dorsey to competently document the loans and provide accurate legal advice as to the loan transaction. It is beyond dispute that M&S' retained Dorsey for the benefit the Bank Participants. In addition to the testimony of Mr. Erickson quoted above, he also stated that he "...wanted [Dorsey] to...look out for the interests of the bank participants." AA 755; *see also* SR 48.

Even Dorsey, prior to the initiation of the present case, acknowledged that the Bank Participants were the beneficiaries of its services. Dorsey partner John Thomas rhetorically commented, upon reading an internal Dorsey memo in which the writer asserted that the Bank Participants "might" be third party beneficiaries of Dorsey's work: "Aren't they?" SR at 71. As Mr. Thomas acknowledged, the answer is "Yes."

A. Minnesota has Adopted a Multi-Factor Analysis for Determining Third Party Beneficiary Status

This Court previously adopted a multi-factor approach to analyzing whether a plaintiff is a third party beneficiary of a lawyer's service and, therefore, entitled to pursue a claim of malpractice. *Marker*, 313 N.W.2d at 5. *Marker* represents a decision by the state to choose a negligence based theory focusing on multiple factors that are concerned with both duty and public policy.

1. Negligence v. Contract Based Analysis.

Third party beneficiary law comes under the rubric of an attorney's liability to a "non-client." In addressing the issue of liability to a "non-client," one commentator noted in 2007:

Generalizations concerning the state of the law are neither accurate nor reliable. The rules concerning the requirement of privity have been in a state of transition for over four decades. **Particular facts, the subject matter, and the relationship of the parties may create a duty of care.**

R. Mallen & J. Smith, 1 *Legal Malpractice*, §7:7 (2007 Ed). (Emphasis added).
Moreover:

The modern trend in the United States is to recognize the existence of a duty beyond the confines of those in privity to the attorney-client contract.

A duty exists under two principal theories. The first approach is a multi-criteria balancing test, which originated in California. Another approach is the concept of third-party beneficiary contract.

Id. at § 7:8. ¹⁰

Thus, courts have generally decided to apply one of the two approaches. As this Court decided in *Marker*, the balancing test set out in *Lucas v. Hamm*, 56 Cal. 2d 583, 15 Cal. Rptr. 823-24, 364 P.2d 685, 687-88 (1961), cert. denied, 368 U.S. 987, 82 S.Ct. 603, 7 L.Ed. 2d 525 (1962) should be used to determine whether the lawyer owed a duty to the third party. Some courts have referred to this approach as being grounded in negligence, rather than contract, as the purpose is to determine whether the facts justify finding that

¹⁰ *Legal Malpractice* notes that the California balancing test embodies questions of public policy. *Id.* It also points out that Minnesota has adopted that test. *Id.*, fn. 6.

the defendant owed a duty to the plaintiff. *See, e.g., Blair, et al. v. Ing, et al.*, 95 Hawaii 247, 254, 21 P.3d 452, 459 (2001).

Other courts have adopted the contract approach, using the *Restatement (Second) of the Law Contracts*, § 302. Section 302 provides that, unless otherwise agreed between the promisor and promisee, a beneficiary of a promise is an intended beneficiary where recognizing the beneficiary's right to performance will effectuate the intent of the parties and either: 1) Performance will satisfy a debt owed to the beneficiary by the promisee; or 2) the "circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." Section 302 goes on to state that an "incidental beneficiary is a beneficiary who is not an intended beneficiary."¹¹ Thus, a court employing the contract analysis would look to the intent of the contracting parties and the intent of the promisee. *See, e.g., Guy v. Liederbach, et. al.*, 501 Pa. 47, 59-61, 459 A.2d 744, 750-752 (1983). Importantly, contrary to the District Court's ruling below, an "incidental beneficiary" is simply someone that was not intended to receive a benefit. In other words, the issue is not a comparison of how much benefit the party receives compared to the promisee, but rather whether there was an intent to benefit that party.¹²

Some states have concluded that either the negligence or contract theory, or both, might be available, depending upon the nature of the claims being made and the

¹¹ Minnesota has adopted the *Restatement* as to third party beneficiary contract law. *See Cretex Companies, Inc. v. Construction Leaders, Inc.*, 342 N.W.2d 135, 139 (Minn. 1984).

¹² Any contention that Respondents were the mere "incidental beneficiaries" cannot stand in the face of the established, material facts in this case. The "incidental beneficiary," if any, of the precise work Dorsey was asked to do was M&S, not Respondents.

undertaking of the lawyer. *See Blair*, 21 P.3d 452. In Minnesota, for example, legal malpractice claims sound in both negligence and contract. *See Blue Water Corporation, Inc. v. O'Toole*, 336 N.W.2d 279, 281 (Minn. 1983) (reciting elements of malpractice claim, including that plaintiff must prove “acts constituting negligence or breach of contract.” (emphasis added)).

Dorsey and the *amici* claim that extension of liability to third parties creates problems because of a lawyer’s fiduciary obligations to a client and potential conflicts of interest. The law of third-party beneficiary standing, however, addresses these concerns.

As Mallen and Smith put it:

There is an important distinction between whether there was an attorney-client relationship or merely a duty of care. An attorney can assume an undertaking requiring a duty of care to a nonclient, which does not involve the creation of an attorney-client relationship. The significance primarily concerns the existence of fiduciary duties. Generally, lacking a special relationship, the fiduciary obligations do not attach if there is no attorney-client relationship.

1 *Legal Malpractice* § 7:2. The authors go on to point out that where the intent is to benefit the third party, there is no conflict. *Id.* Dorsey’s and the *amici*’ concerns, then, are addressed within the analysis and do not suggest the abandonment of that analysis.

2. This Court Previously Adopted the Negligence/Policy Based Analysis and any “Sole Purpose” Requirement is Inconsistent With That Approach.

As noted above, this Court, in *Marker*, adopted the multi-factor test set forth in *Lucas*. *See Marker*, 313 N.W.2d at 5 (reciting the *Lucas* factors and then “[applying these factors” to the facts of the case). Although the *Marker* Court summarized cases from other states and suggested that those cases held that the “client’s sole purpose in

retaining the attorney is to benefit directly some third party,” the Court did not set out a “threshold question” as to “sole purpose” nor employ one in its analysis. In fact, in *Lucas*, the California Supreme Court case on which *Marker* relied, the court repeatedly noted that the “main purpose” of the transaction in that case was to benefit the plaintiff and made no mention of a “sole purpose” requirement. *Lucas*, 56 Cal.2d at 589-590.

In *Admiral Merchants* this Court, quoting *Marker*, recited the law as requiring that the client’s “sole purpose” in hiring the lawyer must be to benefit the plaintiff. *Admiral Merchants*, 494 N.W.2d at 266. This notion of a “sole purpose” requirement, however, is not what it may appear to be at first blush. It has never been defined, has apparently never been adopted by any other state, is contrary to both a multi-factor and contract analysis, and, moreover, is unworkable. In fact, such a “sole purpose” requirement would remove the third-party beneficiary basis for attorney liability all together, as it could never be satisfied. The client always has some purpose in establishing, and gets some benefit from, the representation.¹³ An analysis of both *Marker* and *Admiral Merchants* shows that such a requirement, as the Court of Appeals in this case noted, cannot be enforced.

The defendant lawyers in *Admiral Merchants* had been hired by Admiral Merchants to represent both Admiral Merchants and related companies, which were referred to as the “Control Group.” *Id.* at 264. The lawyers’ services benefited both Admiral Merchants and the Control Group entities. *Id.* at 264-265. The liability of the Control Group was a “major concern” to the client, but not the “sole” concern. *Id.* at

¹³ This may well explain why Dorsey is able to argue that no Minnesota case has ever found an attorney liable to a third party beneficiary.

265-266. The *Admiral Merchants* Court, in fact, indicated that it was necessary to examine “the **extent to which** the transaction was intended to affect” the third party. *Id.* at 266 (emphasis added). Such a holding, as the Court of Appeals recognized here, is contrary to a “sole purpose” requirement.

Similarly, as the Court of Appeals noted in this case, the defendant lawyer in *Marker* drafted a deed transferring property into the name of the client and the client’s son. *Marker*, 313 N.W.2d at 4. The Court did not hold in *Marker* that the plaintiff was prevented from suing the lawyer because benefiting the son was not the father’s “sole purpose” in hiring the lawyer. Instead, this Court concluded that the lawyer was not responsible because he had done exactly what was required of him. *Id.* at 6.

In *Marker*, this Court adopted a multi-factor analysis. That analysis, which has as its first step a determination as to the “extent” of the client’s “intent to benefit” the plaintiff, is contrary to a “sole purpose” requirement. To require such a “threshold test” before moving to the *Lucas* factors is inconsistent with those factors and should be rejected.

3. The Courts in Minnesota Have Struggled in Addressing and Applying a Sole Purpose Requirement.

Since *Marker*, and particularly after *Admiral Merchants*, courts in this state have struggled with enunciating the necessary standard and factors for establishing third party beneficiary standing. For example, in *Anderson v. Orlins*, 1998 WL 113764 (Minn. Ct. App. 1988), the Court of Appeals endorsed application of the multi-factor analysis. It is also worth noting that Judge Lansing concurred specially in that case to point out that the decision should not be read as prohibiting third-party beneficiaries claims in “multi

purpose representation” and other situations. *Id.* at p. 2-3. Judge Lansing goes on to endorse the application of the *Lucas* factors in “determining whether the lawyer had a legal duty to a non-client who has brought a malpractice action.” *Id.* at p. 3.¹⁴

A few years later, in *Goldberger v. Kaplan, Strangis and Kaplan, P.A.*, 534 N.W.2d 734, 738 (Minn. Ct. App. 1995), the Court of Appeals tried to reconcile the apparent conflict between the “sole purpose” language and the “balancing-of-factors test.” Referring to *Marker* and *Admiral Merchants*, the court wrote:

Both cases...state that the non-client must be a direct, intended beneficiary of the attorney’s services. The cases then state the *Lucas* factors (*Lucas v. Hamm*, 56 Cal. 2d 583, 15 Cal. Rptr. 823-24, 364 P.2d 685, 687-88 (1961), cert. denied, 368 U.S. 987, 82 S.Ct. 603, 7 L.Ed. 2d 525 (1962)) **must be considered** in determining the attorney’s duty to the non-client. It seems, then, that the supreme court intended the *Lucas* factors as an aide in determining whether the non-client is a third party beneficiary and that is how we have analyzed this case.

Goldberger, 534 N.W.2d at 738. (Emphasis added)(Citation omitted).

Just four years after the *Goldberger* decision, the Court of Appeals again addressed the issue in *Francis v. Piper*, 597 N.W.2d 922, 925 (Minn. Ct. App. 1999). This time the court decided that *Marker* and *Admiral Merchants* required a “threshold question” as to the client’s “sole purpose” in retaining the lawyer to be addressed before turning to the *Lucas* factors.

Still another panel of the Court of Appeals appears to have considered the issue in terms of contract law. In *CPJ Enterprises, Inc. v. Gernander*, 521 N.W.2d 622, 624 (Minn. Ct. App. 1994), the Court of Appeals recited that third parties have standing to

¹⁴ The case was apparently reviewed under a negligence theory only. *Id.* at p. 4.

pursue malpractice claims to “implement the client’s intent and...enforce the lawyer’s obligations to the client...”¹⁵

The Court of Appeals opinion below, returning to a *Lucas* factors analysis, provides exactly the harmony and certainty that the Dorsey and the *amici* claim has been destroyed. The courts of this state have produced inconsistent decisions in their effort to use a standard (“sole purpose”) that is contrary to the multi-factor test and can have no applicability to any real world situation. The *amici* argue that the Court of Appeals’ removal of the “threshold question” and adoption of the *Lucas* factors results in a lawyer’s potential liability to *unintended* third-party beneficiaries. *Joint Brief of Amici Curiae* at 3. This contention ignores the first *Lucas* factor: “The extent to which the transaction was intended to affect the plaintiff.” If there was *no* intent to benefit, *i.e.*, the third-party was an *unintended beneficiary*, then there would be no liability. The first step in the *Lucas* analysis is to determine the intent of the client by looking at the extent to which the underlying transaction was intended to benefit the third party. Use of the *Lucas* factors actually addresses the very concerns that *amici* are raising. In contrast, a “sole purpose” test effectively destroys any ability for a non-client plaintiff to establish standing. *Amici*, then, are, in reality, advocating a return to strict privity.

The modern trend is to allow third-party beneficiary claims and the *Marker* decision recognized Minnesota’s desire to provide standing to plaintiffs who were intended to benefit from the transaction at issue. The “sole purpose” test would amount

¹⁵ As noted above, Judge Frank, in ruling on Dorsey’s appeal from the Bankruptcy Court decision, took yet another view and, in large measure, ignored the language.

to a return to strict privity. This Court should provide clarity and certainty by adopting the Court of Appeals decision.¹⁶

B. The Court of Appeals Correctly Applied The *Lucas* Factors

The Court of Appeals correctly applied the *Lucas* factors in deciding that this case should be remanded for trial. As explained in *Goldberger*, whether the third party beneficiary doctrine applies involves “a matter of policy and...the balancing of various factors,” set out in *Lucas* including: 1) the extent to which it was intended that the transaction benefit the plaintiff; 2) the foreseeability of harm to the plaintiff; 3) the certainty of harm to the plaintiff; 4) the connection between the lawyer’s conduct and the harm; and 5) the policy of preventing future harm. *Goldberger*, 534 N.W.2d at 738; *see also Anoka Orthopedic Associates, P.A. v. Mutschler*, 773 F. Supp. 158, 166-67 (D. Minn. 1991) (denying summary judgment on the basis that fact issues existed under contract, tort and third-party beneficiary analysis of doctors’ claims against attorney representing professional association and benefit plan). Application of the analysis to a particular case is a question of fact. *See Admiral Merchants*, 494 N.W.2d at 266. Application of the factors here shows that summary judgment should not have been granted and the Court of Appeals was correct in reversing the District Court.

¹⁶ Again, virtually all of the concerns raised by Dorsey and the *amici* could have been dealt with by a written engagement letter or agreement. Dorsey chose not to create such a writing. Dorsey should not be allowed to use the absence of such an agreement to defeat Respondents’ claims. As a matter of policy, lawyers should be encouraged to, as they advise their clients, “get it in writing.”

1. The Transaction Was Intended to Benefit Respondents

The first factor in the *Lucas* analysis is a consideration of the extent to which the transaction was intended to benefit the plaintiff. The transaction at issue (the St. Regis loans) was intended to benefit the Bank Participants, as the lenders. M&S received some benefit as well, but it was primarily the benefit that it wanted Dorsey to provide for the Bank Participants: M&S wanted the Bank Participants to rest assured that experienced counsel had handled the loan documentation and closing. The Bank Participants were the real lenders with an interest in the loans. Dorsey was retained to make sure the loans were properly documented and closed and that the lenders' interests were protected. Although M&S had an interest in closing the loan, as it received an origination fee, that interest is largely disconnected from Dorsey's work.¹⁷ M&S received its origination fee upon closing regardless of whether Dorsey had properly documented the loans and received all necessary approvals prior to closing.

Dorsey makes much of the fact that Mr. Erickson from M&S testified that he did not think the Bank Participants were the client. Appellant's Brief at 8. This testimony is wholly irrelevant to the third party beneficiary analysis, which contemplates liability to a non-client. Mr. Erickson unequivocally testified that the intent was for Dorsey's work to benefit the Bank Participants.

Dorsey also claims that it is significant that there was no written agreement between Dorsey and any Appellant. Again, Dorsey fails to mention that there was no written agreement between Dorsey and M&S, either. The absence of a written

¹⁷ Again, if for some reason M&S retained an interest in the loans it too would be a participant, so its interest was the same as the other participants.

agreement, as discussed above, does not help Dorsey's case. *See above* at Section III., p. 27-28. As noted previously, moreover, under no circumstances was M&S going to pay Dorsey's fees. Under the terms of the loan, the borrower paid the fee and, if the borrower failed to pay, the Bank Participants were ultimately responsible for the fees. AA at 342, ¶ 7.14. The first *Lucas* factor is satisfied.

2. It Was Clearly Foreseeable that Respondents Would Suffer the Harm

The second *Lucas* factor looks at whether the harm to the plaintiff was foreseeable. In the present case, it was clearly foreseeable that the Bank Participants would be harmed if the St. Regis loans were not properly documented and closed. The Bank Participants had committed to purchase the entirety of the loans before closing, the loans would not have closed without those commitments, and Dorsey knew that the Bank Participants would be buying all of the debt. Dorsey incorporated terms in the documents for sole protection of the Bank Participants. If there was a problem with the enforceability of the loans, it was the Bank Participants who would suffer the attendant losses. The second *Lucas* factor is satisfied.

3. Respondents Have Suffered All the Harm

The third *Lucas* factor looks at the degree of certainty that the plaintiff actually suffered harm. There is no question in this case that the Respondents have been harmed. All sides agree that the Bank Participants, as the lenders, have not been paid under the loans. Dorsey does not and cannot deny that the Bank Participants suffered the loss. The principal amount of the loans was approximately \$12,000,000, of which the Bank Participants have recovered only a small fraction in a previous settlement with the Tribe.

In short, the Bank Participants have certainly suffered substantial harm. The third *Lucas* factor is met in this case.

4. There is a Direct Connection Between Dorsey's Malpractice and Respondents' Losses

The fourth *Lucas* factor considers the closeness of connection between the defendant's conduct and the harm to the plaintiff. In this case there is a direct connection between the inability of the Bank Participants to collect on loans and the Pledge and Dorsey's failure to obtain the necessary approval or declination of the need to approve from the NIGC and to advise of the risks prior to closing. The fourth *Lucas* factor has also been met.

5. Holding Dorsey Responsible Will Prevent Future Harm in Similar Circumstances

The final *Lucas* factor requires a determination of whether allowing the plaintiff to pursue the case will support the policy of preventing future harm. Consideration of this policy leads to the conclusion that Dorsey should be held liable. Among other things, if Dorsey truly believed that it had, despite its client's intention of benefit, no duty to the Respondents, then it could have put that belief in writing. Liability in this case will, thus, encourage lawyers to "get it in writing" and communicate to clients and involved non-clients the lawyer's belief that she is not working benefit of the non-client.

Most importantly, and as noted above, to accept Dorsey's position is to conclude that it has no responsibility to any party. Dorsey claims that the Bank Participants cannot sue it and that M&S has not suffered a loss. Loan participations are common and a holding that an attorney who represents the lenders' interests in the underlying loan

transaction does not have any responsibility to participants under the facts present here would effectively absolve the lawyer from any harm caused by the lawyer's negligence.

The Court of Appeals correctly concluded that genuine issues of material fact preclude summary judgment. This Court should affirm that decision.

C. **Even if The Court Adopts a Contract Based Analysis, Respondents Remain Third Party Beneficiaries Entitled to Pursue Dorsey for its Malpractice**

As noted above, some states have adopted a contract based analysis for determining whether a plaintiff is a third party beneficiary. Courts using the contract analysis have turned to the *Restatement (Second) of the Law of Contracts*, § 302 (1979) for guidance. Under that analysis a plaintiff is a third party beneficiary if the intent of the promisee was to benefit the third party. *Id.* The facts of the present case overwhelmingly support the conclusion that under a contract analysis the Respondents are entitled to pursue their claims against Dorsey.

Dorsey asserts that it is undisputed that M&S hired Dorsey to represent only M&S, citing Mr. Erickson's testimony, in which he was asked by Dorsey's counsel to essentially provide an expert opinion. Mr. Erickson is not a practicing lawyer and was not qualified as an expert. Mr. Erickson's testimony on ultimate questions, such as whether there was an attorney-client relationship and to whom the duty of loyalty is owed is irrelevant. One key fact that Mr. Erickson did provide, and refused to be swayed from, was that M&S retained Dorsey in these transactions to represent the interests of Respondents. *See* SR at 48. *See also* AA at 280, ¶ 7 (Affidavit of Steven Erickson dated

November 10, 2004: “In each of these loans, Dorsey was retained for the benefit of all the lenders...”).

Dorsey’s counsel attempted, but failed, to have Mr. Erickson undercut that testimony. AA at 755, p. 106-108. On the issue of whether there was an intent to benefit Respondents, then, Mr. Erickson’s testimony provides an unequivocal answer: Yes.¹⁸

Dorsey cannot seriously dispute that it had knowledge of the Respondents’ interests in the transaction and had been retained to protect those interests. *See above* Statement of the Facts, Section B. The loan documents, in fact, tie directly into the Participation Agreements. For example, the Participation Agreements state that President is paying the servicing fee owed to M&S under the Participation Agreement. AA at 335, ¶ 4.9. Dorsey’s advice regarding the transaction, moreover, was conveyed to the Respondents, who were asked to consent to closing based on that advice. AA at 530-531.

Importantly, the scope of Dorsey’s work indicates a clear intent to benefit the Respondents. Dorsey was asked to properly document the loans and provide advice regarding that documentation and other issues relating to enforceability of the loans. Dorsey was not asked to negotiate the terms of the Participation Agreements or in any other way become involved in the sale of those participations. Its role was limited and, as M&S had told the Bank Participants, Dorsey was there to make sure the loans were properly closed and enforceable.

¹⁸ The Respondents’ affidavits also state that M&S informed them that Dorsey would be retained to properly document and close the loans. *See e.g.*, SR at 51, ¶ 4. Dorsey has not deposed a single representative of the Respondents.

D. Alternatively, This Court Should Adopt The Restatement Standard

The *Restatement (Third) of the Law Governing Lawyers* which was promulgated after *Admiral Merchants* and *Marker* were decided, should be adopted now by this Court. As noted in *Francis*, Minnesota generally follows the *Restatement*. Section 51(3) of the *Restatement* provides:

A lawyer owes a duty to use care within the meaning of Section 52 in each of the following circumstances: ... (3) to a non-client when and to the extent that: (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the non-client; (b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and (c) the absence of such a duty would make enforcement of those obligations to the client unlikely.

Restatement (Third) of Law Governing Lawyers, § 51(3). See also, Comment (f) thereto.

There can be no real dispute that M&S hired Dorsey to benefit Respondents and that Dorsey knew that one of the most important, the "primary," objective of its services was to benefit the Respondents. There was no impairment of Dorsey's obligations to M&S, meanwhile, as the scope of Dorsey's work was limited to properly documenting and closing the transaction. M&S' and the Bank Participants' interests were perfectly aligned and the scope of Dorsey's work was to advance those interests. M&S did not ask Dorsey to negotiate the participations or in any other way become adverse to the Respondents. To the contrary, M&S asked for Dorsey's advice in changing the Participation Agreements for the sole purpose of making sure the Respondents could enforce the loans. Finally, if Dorsey has no responsibility to Respondents then enforcement of its obligations is unlikely, because M&S (now bankrupt) did not retain a

lender's position in the loans. It is the Respondents who have "skin in the game" and who, properly, are seeking to enforce Dorsey's obligations.

E. Other Courts Addressing Similar Facts Have Found Standing

It does not appear that there has ever been a case in Minnesota with facts like the present one. The Minnesota case law on standing cannot fully address the issues presented. This was a multi-party, commercial transaction and cases dealing with opposing parties in prior litigation or individuals seeking representation for personal injury or similar claims offer limited insight into how this case should be decided. It is the unique nature of each case, in fact, that resulted in this Court stating in *Admiral Merchants* that the existence of an attorney-client relationship is usually a "question of fact dependent upon the communications and circumstances." 494 N.W.2d at 265.

Other Courts in other jurisdictions, both prior to and after enactment of the *Restatement*, have found that an attorney is responsible to non-client third parties in similar circumstances. *See, e.g., Collins v. Binkley*, 750 S.W.2d 737 (Tenn. 1988); *Friske v. Hogan*, 698 N.W.2d 526 (S.D. 2005)(applying *Restatement (Third)*); *Estate of Leonard v. Swift*, 656 N.W.2d 132 (Ia. 2003)(applying *Restatement (Third)*); *Petrillo v. Bachenberg, et al.*, 139 N.J. 472, 655 A.2d 1354 (1995) (applying test focusing on intent or foreseeability); and *Credit General Insurance Co. v. Midwest Indemnity Corp., et al.*, 872 F. Supp. 523 (N.D. Ill. 1995) (applying *Lucas* factors).

For example, in *First Financial Savings & Loan Assoc. v. Title Insurance Company of Minnesota, et al.*, 557 F.Supp. 654 (N.D. Ga. 1982), the court held that attorneys representing the lender in closing loan packages owed a duty to the assignees of

the loans. *Id.* at 659-660. The court held that the defendant lawyers were not entitled to summary judgment where “defendants knew an assignment of their loan packages...was to follow each of their respective loan closings, **even if they did not know the specific identity of the intended assignee.**” *Id.* at 660. (Emphasis added). Since the attorneys knew beforehand that the loans would be assigned, it was “clearly foreseeable that direct assignees such as plaintiff would rely on the accuracy of the closing attorneys’ certifications.” *Id.* As a result, the non-client third party had a right to pursue negligence claims against the attorneys.

These cases follow the modern trend and hold lawyers accountable as necessary to enforce their professional obligations. The Court of Appeals decision should be affirmed.

V. AN ATTORNEY-CLIENT RELATIONSHIP EXISTED BETWEEN DORSEY AND THE BANKS UNDER THE THEORY OF IMPLIED CONTRACT

Dorsey’s representation of the Bank Participants was implicit, if not explicit, in its role in the transaction. An attorney-client relationship existed between Dorsey and the Bank Participants. At a minimum there is a question of fact as to whether such a relationship existed. That Dorsey was representing the Bank Participants was made clear by the context and documentation of the St. Regis loans and the reason for which Dorsey was hired by M&S. Dorsey’s role as the representative of the Bank Participants was implicitly understood. M&S acted, at all times, as if it were the agent for the participants, even before the loans were closed.

Under the “contract” theory of the attorney-client relationship, such a relationship can be found “if the parties explicitly or implicitly agree that the attorney will provide

legal services” for the plaintiff. *Schuler v. Meschke*, 435 N.W.2d 156, 161 (Minn. Ct. App. 1989). The contract can be express or implied from the conduct of the parties. *Pine Island Farmers Coop v. Erstad & Riemer, P.A.*, 649 N.W.2d 444, 448 (Minn. 2002). There is no requirement of formality or even compensation. See Comment, *Attorney Malpractice: Use of Contract Analysis to Determine the Existence of an Attorney-Client Relationship*, 63 Minn. L. Rev. 751, 754-755 (1979). The contract is created when the attorney undertakes work on a person’s behalf. *Id.*; citing *Christy v. Saliterman*, 288 Minn. 144, 179 N.W. 2d 288 (Minn. 1970) (jury verdict finding that contract for employment as attorney was created where attorney began work on matter).

In the present case, all of the facts recited above support the conclusion that an implied contract existed. Several key facts must be kept in mind: a) Dorsey admits that it was retained solely to handle the documenting and closing of the St. Regis loans. This point is critical, as Dorsey’s work was for the purpose of assisting the lenders, who are the beneficiaries of a properly documented and closed loan; b) Dorsey admits that it knew the loans would be participated out; c) M&S, as Dorsey knew, would not be retaining a lender’s interest in the loans; d) Dorsey admits that the loans would not have closed absent the Respondents’ commitments and approvals for going forward with closing; and e) Dorsey admits that it was the Respondents that would (and did) suffer the loss in the event of default of the approximately \$12,000,000 principal, plus interest and the attorneys’ fees and other costs associated with a defaulting loan. M&S received an origination fee and had the right to a servicing fee, but Respondents, not M&S, bore the brunt of Dorsey’s malpractice. These facts establish that there was an implied contract

between Dorsey and the Bank Participants or, at the very least, a genuine issue of material fact as to whether such a contract existed.

The *amici* assert that there is an inconsistency between the Court of Appeals' decision allowing the implied contract to proceed and its decision against allowing the negligent misrepresentation claim to proceed, because, according to the *amici*, reliance is a necessary element of the implied contract claim. *Joint Brief of Amici Curiae* at 12. This argument is, for several reasons, without merit.

First, *amici* are conflating the claim of misrepresentation with the issue of standing. The creation of an implied contract has nothing to do with later reliance or non-reliance on the statements of the attorney. The implied contract is created at the time the attorney is retained, which can be long before any malpractice or misrepresentations occur.

Second, reliance on statements of an attorney is not a necessary element of a legal malpractice claim. See *Blue Water Corporation, Inc.*, 336 N.W.2d at 281 (listing four elements of claim). If it were, many flagrant acts of malpractice could not be pursued by the client. For example, if an attorney misses a statute of limitations deadline resulting in the client's loss of a cause of action, it matters not whether the attorney made any representation to the client regarding service of the complaint. The client has a claim for malpractice, under breach of contract and/or negligence, solely based on the attorney's failure to timely start the action. If the attorney had made an active misrepresentation about filing the complaint there may also be a claim for misrepresentation, but the one claim is not dependent upon the other.

In the present case, Dorsey, as Judge Frank found, committed malpractice in failing to advise of the risks attendant with proceeding to the loan closing without action from the NIGC. That malpractice is a failure to act; a failure to do what the attorney had a duty to do and, in fact, is the opposite of an active misrepresentation. Like missing a statute of limitations, this case is about the failure to take action. The reliance or non-reliance of the Bank Participants on any statements from Dorsey is irrelevant to the question of whether there was an implied contract.

The Court of Appeals correctly concluded that genuine issues of material fact required reversal of the District Court's grant of summary judgment on the issue of implied contract.

VI. THE CLAIM OF CONFLICT IS WITHOUT MERIT

Dorsey claims that “. . . Dorsey would have had an impermissible conflict of interest in representing both Miller & Schroeder, as seller, and Respondents, as buyers, in the same loan transaction.” Appellant's Brief at 37. This argument deserves special attention, because it is completely contrary to the facts. In making the argument, moreover, Dorsey unintentionally highlights a central fact supporting affirmance of the Court of Appeals: There was no adversity between M&S and Respondents regarding the loan transactions--the parties were perfectly aligned and moving towards a common goal.

Dorsey asserts that it could not represent the interests of the Respondents in the loan transactions because there would be an impermissible conflict of interest between the Respondents and M&S arising out of the sale of the participation interests. Note

Dorsey's attempt at combining two separate matters into one whole. Dorsey did not represent M&S "as seller" of participations.

Dorsey admits that the scope of its representation was limited to documenting and closing the loans and that it had no role in the sale of participations. *See e.g.*, Appellant's Brief at 8-9. In fact, Dorsey quotes M&S' Associate General Counsel's testimony that the scope of Dorsey's work "did not including . . . any assistance or advice relating to Miller & Schroeder's sales of . . . participations in the Loans...." *Id.* at 8-9. For Dorsey to then, twenty-eight pages later in its Brief, claim that it had a conflict is disingenuous. All sides agree as to Dorsey's role in the transaction. Dorsey was only working on the loans. It is this very point that gives rise to Dorsey's liability to Respondents. The Respondents' interests and M&S' interests were perfectly aligned and it was Dorsey's job to protect those interests.

Dorsey, by its own admission, played no role in securing commitments from the Respondents to participate in the loans nor in the signing of the form Participation Agreements after the closing. Dorsey's sole responsibility was to handle the loan transactions. There was no conflict; no "adverse situation."

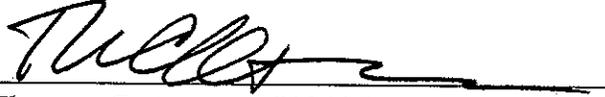
CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Court affirm the decision of the Court of Appeals and remand this case for trial.

Respectfully submitted,

Dated: May 21, 2007

LEONARD, O'BRIEN
SPENCER, GALE & SAYRE, LTD.

A handwritten signature in black ink, appearing to read 'Tully', written over a horizontal line.

Thomas C. Atmore, #191954
Edward W. Gale, #33078
Attorneys for Respondent
100 South Fifth Street
Suite 2500
Minneapolis, MN 55402
(612) 332-1030

360065

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondent McIntosh County Bank, et al., certifies that this brief complies with the requirements of Minn. R . Civ. App. P. 132.01 in that it is printed in a 13-point, proportionately spaced typeface utilizing Microsoft Word 2003 and contains 13,475 words, excluding the Table of Contents, Table of Authorities, and Appendix.

Dated: May 21, 2007



Thomas C. Atmore, #191954