

A08-1899

**State of Minnesota  
In Court of Appeals**

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R&R Investors I - UPA Partnership, Curtis Hogenson, individually and as tenant-in-partnership of R&R Investors I - UPA Partnership consisting of Curtis Hogenson, Diane Larson, Gerald Berger (deceased) and Norman Arvidson (deceased); Diane Larson, individually and as tenant-in-partnership of R&R Investors I - UPA Partnership consisting of Curtis Hogenson, Diane Larson, Gerald Berger (deceased) and Norman Arvidson (deceased); Eileen M. Berger, individually and successor as tenant-in-partnership of R&R Investors I - UPA Partnership consisting of Curtis Hogenson, Diane Larson, Gerald Berger (deceased) and Norman Arvidson (deceased); and Shirley J. Arvidson, individually and as successor tenant-in-partnership of R&R Investors I - UPA Partnership consisting of Curtis Hogenson, Diane Larson, Gerald Berger (deceased) and Norman Arvidson (deceased);

Appellants,

v.

R&R Investors and Paul Strangis,  
Faegre & Benson LLP and Eckland & Blando LLP

Respondents.

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**BRIEF OF RESPONDENT  
ECKLAND & BLANDO LLP**

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## STATEMENT OF THE ISSUES

Respondent Eckland & Blando LLP, along with Respondent Faegre & Benson LLP, represented R&R Investors, a partnership, in litigation ultimately settled in the United States Court of Federal Claims. When a dispute arose among the R&R Investors partners as to entitlement to the settlement funds, Respondents Eckland & Blando LLP and Faegre & Benson LLP initiated an interpleader action depositing the funds into court. In response, one faction of partners, referring to themselves as R&R Investors I - UPA Partnership, asserted counterclaims asserting various tort claims against Respondents. Are Respondents entitled to the Rule 12.02(e) dismissal of the counterclaims brought against them?

The trial court held in the affirmative.

Noske v. Friedberg, 670 N.W.2d 740 (Minn. 2003).

Martens v. Minnesota Mining & Mfg. Co., 616 N.W.2d 732 (Minn. 2000).

N. States Power Co. v. Franklin, 265 Minn. 391, 122 N.W.2d 26 (1963).

## STATEMENT OF THE CASE AND FACTS

Respondent Eckland & Blando LLP (Eckland) as well as Respondent Faegre & Benson LLP (Faegre) are attorneys for R&R Investors,<sup>1</sup> a partnership entity represented by Eckland and Faegre in a lawsuit against the United States Government entitled A.F.T.E.R., et al. v. U.S. (A. 74; Respondent Eckland's Appendix [R.A.] 264, 271, 355). This "Tucker Act litigation" arose out of R&R Investors' sole asset, the Maranatha Inn Apartments. (R.A. 309). R&R Investors' claims in the Tucker Act litigation were resolved through a global settlement in May 2007. (R.A. 331).

Subsequently, two factions of R&R Investors have asserted competing claims for the settlement proceeds. (A. 75). The Appellants in this action have been identified in this proceeding as "the Hogenson Group" or "Counterclaim Plaintiffs."<sup>2</sup> (A. 8). The other faction, also a party to this action – Respondent/Interpleader Defendant Paul Strangis – will be referred to as Strangis. (Id.) Each faction claims to represent the true R&R Investors and has demanded that the Attorneys pay over the settlement funds.

Rather than choose one faction over the other, the Attorneys placed the disputed funds with the court in an interpleader action pursuant to Minn. R. Civ. P. 22. (A. 73). Despite the Attorneys' neutrality in the dispute, the Hogenson Group has asserted counterclaims against the Attorneys for fraud, malpractice and conversion. (R.A. 38-71). The trial court, the Honorable Cara Lee Neville, concluded that on the face of the

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<sup>1</sup> When referred to jointly, Eckland and Faegre will be referred to as Attorneys.

<sup>2</sup> The Hogenson Group prefers to refer to themselves as R&R Investors I - UPA Partnership, but there never was in fact such a named entity in existence. (R.A. 6, 242).

pleadings and its referenced exhibits, none of the counterclaims state a claim upon which relief can be granted, and granted Attorneys dismissal pursuant to Minn. R. Civ.

P. 12.02(e). (A. 38-55). Eckland requests that that dismissal be affirmed.

**A. Facts Presented on Appeal Are in Accord With Rule 12.02 Standard.**

As previously stated, the trial court granted Attorneys dismissal pursuant to Minn. R. Civ. P. 12.02(e). Eckland's statement of the facts is taken from the Hogenson Group's First Amended Answer, Counterclaims and Cross-Claims (FAC). (R.A. 1). It is also, and in accord with Rule 12, based on contracts and other documents incorporated by reference in the counterclaims. (R.A. 76, 241). In re Hennepin County 1986 Recycling Bond Litig., 540 N.W.2d 494, 497 (Minn. 1995). The sufficiency of a complaint to establish a cause of action "may be determined by the terms of the exhibits" which supplement its allegations. Markwood v. Olson Mfg. Co., 207 Minn. 70, 289 N.W. 830, 831-32 (1940); *see* Marchant Inv. & Mgmt. Co. v. St. Anthony W. Neighborhood Org., Inc., 694 N.W.2d 92, 95 (Minn. Ct. App. 2005).<sup>3</sup>

The court is to presume that all the alleged facts are true for purposes of deciding the motion. Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 553 (Minn. 2003). Accordingly, Eckland presents the Statement of the Facts in accord with the Rule 12 record and the Rule 12 standard of review.

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<sup>3</sup> The Hogenson Group has failed to provide this Court in its appendix the First Amended Answer, Counterclaim and Cross-Claim, which is the operative document setting out the Hogenson Group claims.

**B. Property That Is the Subject of Mortgage and R&R Investors' Tucker Act Litigation Is the Maranatha Inn Apartments.**

The Maranatha Inn Apartments (Maranatha) is an apartment building located in Morrison County, Minnesota, which was purchased by R&R Investors in November 1978. (FAC at ¶¶ 78 and 79 at R.A. 30; R.A. 101).<sup>4</sup> The property is the subject of a mortgage, the terms of which were breached by the United States Government. (FAC ¶ 101 at R.A. 34-35). This breach of the mortgage terms gave rise to R&R Investors' claims for damages against the United States under the Tucker Act, 28 U.S.C. § 1491. (R.A. 271, 373, 434).

At issue in the Tucker Act litigation were loan agreements between various entities and the Farmer's Home Administration, United States Department of Agriculture (FmHA), the terms of which had been changed by several acts of Congress to the detriment of the borrowers. (*Id.*). One of the 118 plaintiffs in the A.F.T.E.R., et al. v. U.S. Tucker Act litigation is R&R Investors, which "entered into one contract for rental housing" for a subsidized housing project known as "Maranatha Inn Apartments." (*Id.*; R.A. 309, 412, 472).

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<sup>4</sup> Eckland does not concede any of the allegations of the FAC. And, as set out in Eckland and Faegre's record in support of sanctions, many statements of the Hogenson Group are simply inaccurate. Nonetheless, for purposes of this appeal, Eckland's presentation stays within the Rule 12 boundaries.

**C. Attorneys Represent R&R Investors in Tucker Act Litigation.**

R&R Investors is a Minnesota partnership formed by Robert and Ruth Janski in 1975. (R.A. 105). In 1984, the Janskis sold their interest in R&R Investors to Robert Abel, Gerald Berger, Norman Arvidson, Diane Larson and Curtis Hogenson. (FAC at ¶¶ 81, 82 at R.A. 30-31 and R.A. 106). In 1989, Abel sold his share of the partnership to the other partners, leaving Berger, Arvidson, Larson and Hogenson as partners of R&R Investors and by extension as sole owners of the property. (R.A. 116).

In February 2000, Berger, Arvidson, Larson and Hogenson transferred 99% of the ownership interest in R&R Investors in the property to David and Mary Klug. (FAC ¶ 85, 98 at R.A. 32, 34; R.A. 106-107). Hogenson has declared: “As part of the sale of the Maranatha Inn [the Hogenson Group] sold their ownership interests in the Partnership to the Klugs.” (R.A. 186). Berger remained a partner in R&R Investors with a one percent interest. (FAC ¶ 85 at R.A. 32 and R.A. 106-107).

In February of 2003, Mr. Berger and certain members of the Hogenson Group signed fee agreements with Faegre, which identified the parties to the contract as the law firm and “R&R Investors.” (R.A. 264). The fee agreement begins:

THIS AGREEMENT entered into the 15 day of February 2003 by and between the Law Firm of FAEGRE & BENSON LLP . . . and R&R INVESTORS, hereafter referred to as Client, with respect to the following property or properties owned by Client: Maranatha Inn (25 units).

(Id.)

All the Hogenson Group individuals signed as general partners of R&R Investors. (R.A. 266). Pursuant to this fee agreement, Faegre was retained to represent R&R Investors as a plaintiff in the Tucker Act litigation. (FAC ¶ 87 at R.A. 32 and R.A. 210). R&R Investors is identified as a partnership in the Tucker Act litigation complaint. (R.A. 283).<sup>5</sup>

By December 2003, Berger transferred his one percent interest in R&R Investors to the Klugs, leaving them as sole owners of R&R Investors, which is the sole owner of the property. (FAC ¶ 85 at R.A. 32 and R.A. 107). In this litigation, the Hogenson Group claimed that its ownership interest in the Tucker Act claims were not transferred when the Klugs took ownership of R&R Investors and the property. (FAC ¶¶ 89-93 at R.A. 32-33). They assert that the claims were retained as the sole asset of a partnership also called R&R Investors. (*Id.*). There are no facts alleged in the FAC or transactional documents attached to the FAC supporting that the claims were carved out from the transfer of R&R Investors and the property to the Klugs.

In 2004, the Klugs transferred their interest in R&R Investors to Paul Strangis and/or an entity owned by him (Strangis). (FAC ¶ 86; R.A. 32). Faegre and Eckland were not counsel for any party in connection with any of the transfers of ownership of R&R Investors or the property. (*See generally* FAC).

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<sup>5</sup> There is no dispute that R&R Investors is a partnership. The description, however, as a “limited” partnership in the complaint is in error. (A. 18).

In September 2004, Eckland replaced Faegre as counsel of record for R&R Investors in the Tucker Act litigation. (FAC ¶ 63(n) at R.A. 25).<sup>6</sup> In November of 2004, Strangis signed a fee agreement with Eckland on behalf of R&R Investors. (R.A. 355). Mr. Strangis signed an addendum to the fee agreement in December of 2005. (R.A. 358). All signatures were as general partner of R&R Investors. (Id.) Again, the client is identified as R&R Investors “with respect to the following property . . . owned by Client: . . . Maranatha Inn, Apts. 25 - units.” (R.A. 355).

On December 31, 2005, Faegre renewed its appearance as counsel for R&R Investors in the Tucker Act litigation, representing R&R Investors jointly with Eckland. (R.A. 358). Accordingly, notwithstanding any changes in ownership, Attorneys’ client in the Tucker Act litigation has been R&R Investors. (R.A. 264, 355).

**D. Tucker Act Litigation Settled in 2007.**

In June 2006, current and former partners of R&R Investors, or their surviving spouses, executed settlement consent forms authorizing the Attorneys to settle the Tucker Act litigation on behalf of R&R Investors. (R.A. 151-159). Specifically, Curtis Hogenson, Diane Larson, Eileen Berger (spouse of the late Gerald Berger) and Shirley Arvidson (spouse of the late Norman Arvidson) (the Hogenson Group) and Strangis each signed a consent form. (Id.) The settlement consent forms provide that each signer (1) had a reasonable time to review and consider the settlement agreement in the Tucker

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<sup>6</sup> When Attorneys Eckland & Blando left Faegre to form Eckland & Blando LLP, R&R Investors was for a time represented by the new law firm, and eventually agreed to be represented by both firms as co-counsel in the Tucker Act litigation. (R.A. 355).

Act litigation; (2) carefully read and fully understood the settlement agreement; (3) understood that by signing the settlement agreement he or she released all claims raised in the Tucker Act litigation; and (4) authorized the Attorneys to execute the settlement agreement on R&R Investors' behalf. (Id.).

On May 18, 2007, pursuant to the authorization provided in the settlement consent forms, the settlement agreement was executed by the Attorneys. (FAC ¶ 48 at R.A. 20, R.A. 548). The settlement agreement provides for the settlement proceeds (the Funds) to be disbursed to the Attorneys on behalf of R&R Investors. (R.A. 559).

**E. Two Factions of R&R Investors Assert Competing Claims for Settlement Proceedings.**

In June 2007, the Hogenson Group and Strangis each asserted they were entitled to receive the Funds on behalf of R&R Investors. (A. 75; R.A. 161-165). The Attorneys did not take a position regarding which faction was entitled to receive the Funds. Instead, the Attorneys sought the agreement of all parties to place the Funds into an escrow account pending resolution of the dispute. (Id.).

**F. In October 2007, Hogenson Group Seeks Substitution of Counsel in Tucker Act Litigation and Interpleader Action Brought in State Court.**

On October 5, 2007, counsel for the Hogenson Group brought a motion in the Tucker Act litigation for a substitution of counsel, seeking to substitute Erick Kaardal for the Attorneys as counsel of record for R&R Investors. (FAC ¶ 59 at R.A. 21-22). In light of the competing claims to the Funds and the actions taken by counsel for the Hogenson Group, on October 9, 2007, this interpleader action was filed by Attorneys seeking to

deposit the funds with the court pending judicial determination of their ownership. (FAC ¶ 60 at R.A. 22 and R.A. 126-136; A. 73).

On October 29, 2007, the Attorneys filed R&R Investors' opposition to the Hogenson Group's motion to substitute counsel in the Tucker Act litigation. (FAC ¶ 62 at R.A. 22-23 and R.A. 137-146). On behalf of R&R Investors, the Attorneys requested that the motion for substitution of counsel be stayed or denied pending the Minnesota District Court's decision in the interpleader action. (R.A. 141).

**G. Hogenson Group Asserts Tort/Breach of Contract Claims Against Attorneys and Attorneys Seek Rule 12 Dismissal.**

Prior to the January 3, 2008 hearing on the motion to deposit the settlement proceeds into court, the Hogenson Group, claiming to be R&R Investors I - UPA Partnership, filed an answer, counterclaim and cross-claim. (A. 80, 81). On December 31, 2007, the Hogenson Group asserted its amended counterclaims against Attorneys. (FAC ¶¶ 119-206 at R.A. 37-67). Claims asserted against Attorneys include:

- violation of Minn. Stat. § 481.07 and .071 for attorney deceit (Counterclaims 1 and 2) (R.A. 38-54);
- intentional fraud and misrepresentation (Counterclaim 3) (R.A. 54-62);
- breach of contract, negligence, breach of fiduciary duty and legal malpractice (Counterclaims 4, 5, 6, 7) (R.A. 62-65);
- civil conspiracy (Counterclaim 8) (R.A. 65-66); and
- conversion (Counterclaim 9) (R.A. 66-67).

In response, the Attorneys sought a Rule 12 dismissal of the counterclaims asserted against them. (A. 4). The Attorneys asserted the claims are deficient on their face because the Hogenson Group cannot pursue fraud without reliance. There can be no malpractice in the face of informed consent to settle or conversion arising from an interpleader action. And as to all claims, the Hogenson Group cannot establish it sustained a loss as a result of claimed Attorney actions.

By Order filed January 10, 2008, the trial court authorized Attorneys to place in an interest-bearing escrow account the settlement funds. (R.A. 564).

Various motions, in addition to Attorneys' Rule 12 motion, were brought before the trial court. Eckland and Faegre sought Minn. R. Civ. P. 11 sanctions and Eckland also sought sanctions under Minn. Stat. § 549.211. (A. 4). The Hogenson Group sought partial summary judgment on its declaratory judgment claim, which Eckland opposed on the grounds it was improperly pleaded and sought relief inappropriate for a declaratory judgment. The Hogenson Group and Strangis brought cross-motions for summary judgment. Two hearings were held and the order addressing all of the various motions was issued on September 2, 2008. (A. 4-5).

#### **H. Trial Court Grants Rule 12 Dismissal.**

By consolidated Order dated September 2, 2008, the trial court granted the Attorneys' Rule 12.02(e) motions to dismiss but denied their motions for sanctions. (A. 6-7). The trial court granted the Strangis' motion for summary judgment and denied that of the Hogenson Group. (A. 6). The trial court ruled that "R&R Investors -- to be

clear, the entity that has always owned the Tucker Act Claim, and of which Mr. Strangis is currently a partner – is entitled to the Tucker Act litigation proceeds.” (A. 38). The trial court denied the Hogenson Group’s motion to amend its Complaint and for declaratory judgment. (A. 6-7). Judgment was entered and the Hogenson Group has appealed. (A. 317).

### ARGUMENT

**I. BASED ON THE RULE 12 RECORD AS APPLIED TO MINNESOTA LAW, THE RULE 12.02 DISMISSAL SHOULD BE AFFIRMED.**

**A. Hogenson Group Concedes That If Strangis Prevails on Appeal, the Dismissal of Claims Against Attorneys Must Stand.**

The issue of which individuals are entitled to the Funds is between the Hogenson Group and Strangis. Instead of taking a position as to which faction should receive the Funds, the Attorneys sought and received the district court’s permission to interplead the Funds pursuant to Minn. R. Civ. P. 22. (A. 9-10; R.A. 564). The district court has ruled that Strangis is entitled to the Funds. (A. 38). The Hogenson Group on appeal appears to concede that if the district court’s determination in that regard is affirmed, the dismissal of the claims against the Attorneys must stand. (Appellants’ Principal Brief, p. 69). The Hogenson Group cannot have been damaged by not receiving settlement funds to which it was not legally entitled. (A. 52).

**B. Even if Court Reverses as to Strangis’ Entitlement to the Proceeds, Dismissal of Attorneys Should Be Affirmed.**

The Hogenson Group is incorrect that if this Court should reverse the district court’s decision that Strangis is entitled to the Funds, then the claims against the

Attorneys must be reinstated. Even if this Court should reverse as to which faction is entitled to the settlement funds, the Rule 12.02 dismissal of the Attorneys must be affirmed. There can also be no harm or loss if the Hogenson Group is ultimately awarded the settlement funds.

**C. Standard of Review of Rule 12 Dismissal Is De Novo.**

The Court reviews a dismissal on the pleadings pursuant to Minn. R. Civ. P. 12.02(e) de novo. Bodah, 663 N.W.2d at 553. A motion to dismiss for failure to state a claim provides the mechanism for testing the legal sufficiency of the claims as pleaded. The allegations of the pleadings must be taken as true and viewed in favor of the nonmoving party. Id.

As previously stated, the Court may consider the whole of a document referenced in the complaint and still stay within the scope of Rule 12. In re Hennepin County 1986 Recycling Bond Litig., 540 N.W.2d at 497. Under Rule 12.02(e), a pleading will be dismissed for failure to state a claim upon which relief may be granted if there are no facts which could be introduced consistent with the pleading that would support the relief demanded. Doyle v. Kuch, 611 N.W.2d 28, 31 (Minn. Ct. App. 2000).

It must be possible for a plaintiff to prove every element of a claim to survive a motion to dismiss under Rule 12.02. Noske v. Friedberg, 670 N.W.2d 740, 743 (Minn. 2003). A complaint which fails to allege one or more of the essential elements of a cause of action is deficient as a matter of law. Martens v. Minnesota Mining & Mfg. Co., 616 N.W.2d 732, 748 (Minn. 2000). Further, pleadings will be dismissed when “it appears to

a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded.” N. States Power Co. v. Franklin, 265 Minn. 391, 122 N.W.2d 26, 29 (1963).

**D. Dismissal of Claims for Civil Conspiracy and Conversion Are Not Before This Court and the Hogenson Group Is Not Challenging the Denial of Its Motion to Amend Their Counterclaim.**

The Hogenson Group fails to articulate why the district court was purportedly wrong in dismissing its claims against Attorneys based on the pleadings. And it is not altogether clear from the Hogenson Group’s brief as to what claims it asserts should be reinstated against Attorneys or why. The Hogenson Group does not mention Counterclaims 8 or 9 – civil conspiracy and conversion. Accordingly, at minimum, the dismissal of those claims are not before this Court. Melina v. Chapman, 327 N.W.2d 19, 20 (Minn. 1982) (issues not briefed on appeal are waived). As to the remaining counts pled, Eckland will address the Hogenson Group’s assertions based on the Rule 12 record.

The Hogenson Group also makes irrelevant assertions such as their statement that “obtaining their litigation files [from Attorneys] was next to impossible.” (Appellants’ Principal Brief, pp. 70-71). Their assertion, in addition to being contrary to the record, is irrelevant to the Rule 12 dismissal before the Court. (A. 66). The issue regarding access to the file was addressed in response to the Hogenson Group’s motion to amend the complaint. *See* Affidavit of Diane Odeen dated February 28, 2008 (R.A. 569) and Interpleader Plaintiff Faegre & Benson LLP’s Memorandum of Law in Opposition to Counterclaim Motion to Amend, pp. 3-4, dated February 28, 2008. On appeal, the

Hogenson Group has not challenged the denial of its motion to amend its counterclaims. (A. 6, 66). Accordingly, any issue with regard to amendment is also waived on appeal.

**E. Attorneys Have Always Represented Entity R&R Investors and the Hogenson Group Has Been Denied Nothing Due to Attorneys' Purported Actions.**

The Hogenson Group counterclaim against the Attorneys is a mishmash of inappropriate claims that do not exist and may not as a matter of law be pursued. Ironically, the sufficiency of the settlement with the U.S. Government in the Tucker Act litigation – the sole commitment of the Attorneys to the R&R Investors<sup>7</sup> – is not now contested.

The Attorneys have always represented the entity R&R Investors and not the individual constituents. (A. 59; R.A. 264, 355). There is no allegation that Attorneys ever represented the individual members of R&R Investors. Nor could there be. The fee agreements executed clearly state that Attorneys were retained solely on behalf of R&R Investors. (R.A. 264, 355; *see also* FAC ¶¶ 87-88, 167-168, 172-173, 178-179, 184-185 at R.A. 32, 62-63, 64-65).

The Attorneys did not represent the partnership R&R Investors in its real estate transactions. Their representation of R&R Investors was limited to representing R&R Investors in “the following matter: FmHA Tucker Act Housing claims.” (R.A. 264,

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<sup>7</sup> The settlement was the result of over a decade of groundbreaking litigation. The Attorneys managed and settled over 700 Tucker Act claims for plaintiffs throughout the country beginning in 1996. R&R Investors joined the litigation in February 2003, piggybacking on over seven struggling years of litigation, including a hotly contested U.S. Supreme Court victory by Eckland in Franconia Assoc. v. U.S., 536 U.S. 129 (2002).

355). R&R Investors was to be joined and was joined in a lawsuit in the U.S. Court of Federal Claims with other existing clients with similar Tucker Act claims. (R.A. 264, 271, 355).

Nor have Attorneys represented any of the individual partners in the matter of their participation in or purchase of a partnership interest in R&R Investors.<sup>8</sup> As the Minnesota Supreme Court has long recognized, “a partnership’s status as a legal entity” is “separate from that of its partners.” Opus Corp. v. Int’l Business Machines Corp., 956 F.Supp. 1503, 1508 (D. Minn. 1996), citing Monson v. Arcand, 244 Minn. 440, 70 N.W.2d 364, 366 (1955); Toenberg v. Harvey, 235 Minn. 61, 49 N.W.2d 578, 581 (1951); Keegan v. Keegan, 194 Minn. 261, 260 N.W. 318, 319 (1935). When representing the partnership, the attorney’s client is the partnership alone, not its partners. Opus Corp., 956 F.Supp. at 1508. While there may be fiduciary duties between the constituents of the organization, in this case the partners, the lawyer for the organization “has no duty to protect one constituent from another.” Restatement (Third) of Law Governing Lawyers § 96, cmt. (g), citing Lane v. Chowning, 610 F.2d 1385, 1389 (8th Cir. 1979).

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<sup>8</sup> As the record reveals, Attorney Michael Vadnie represented Gerald Berger, one of R&R Investors’ general partners and a member of the Hogenson Group. (Affidavit of Vadnie dated February 28, 2008). This affidavit was submitted by the Hogenson Group and, as Eckland informed the trial court, since the Hogenson Group volunteered the Vadnie affidavit, Eckland had no objection to its consideration under Rule 12. It confirms that Attorneys were counsel for the entity R&R Investors and not the individual past and present partners. (Counterclaim Defendant Eckland & Blando LLP’s Reply Memorandum of Law in Support of Its Motion to Dismiss, p. 4, dated March 3, 2008). *See also* A. 51 – “The Hogenson Group has not contested that they were represented by Vadnie.”

The Attorneys here owed no fiduciary duty to any individual partner or group of partners. They had no duty to construe their agreements as to substitute partners and no duty to assess whether a given asset or Tucker Act claim had been sold or retained. All they could do was secure the entitlement of R&R Investors to damages based on the Government's breach of contract, which they did.

Contrary to the Hogenson Group's assertions, Eckland has not staked out any position on the entitlement among the various partners. (A. 73). Instead, the Attorneys interpled the proceeds when faced with conflicting claims and left it to the court to resolve the competing claims to the Funds. (Id.) No claim against Attorneys arises merely because they have consistently declined to take sides in the partnership dispute.

Nor does the Hogenson Group complain now about the damages obtained by Attorneys for the partnership R&R Investors. While the Hogenson Group asserts claims its labels as fraud, malpractice, etc., in its essence the sole claim alleged against the Attorneys is that they have somehow denied the Hogenson Group its share of the settlement award. Its counterclaims are meritless on their face.

The issue here, contrary to the Hogenson Group's understanding, is not the Hogenson Group's failure to assert a specific dollar amount for damages in its counterclaims (Appellant's brief, p. 70), but the fact that it has suffered no loss as a result of Attorneys' actions. None of the individual partners, past or present, has been denied anything by the Attorneys. The alleged and undisputed facts establish the Hogenson Group experienced no loss as a result of the Attorneys' acts. Any amount to which R&R

Investors is entitled was deposited into court in this interpleader action.<sup>9</sup> Nothing has been lost. No partner may claim that he or she will get a lesser share than their respective entitlement under the law as determined by the court in the interpleader action. In accord with N. States Power Co., 122 N.W.2d at 29, no facts consistent with the pleadings exist which would support granting the relief demanded.

“Damage is an essential element to every cause of action. Where there is no damage, pecuniary or otherwise, there is no cause of action. Consequently, whether plaintiff sues in conversion, negligence or otherwise, [he] is not entitled to recover anything [if he] suffered no loss.” Sneve v. First Nat’l Bank & Trust Co. of Minneapolis, 195 Minn. 77, 261 N.W 700 (1935).

The same is true of a claim for fraud or misrepresentation: a plaintiff is required to show harm caused by the defendant’s actions. Martens, 616 N.W.2d at 747. Without this, the claim fails. “In fraud and deceit cases, damage is of the essence of the action – an essential element of the cause, not merely a consequence flowing from it.” Bishop v. Fillenworth, 220 Minn. 118, 121, 18 N.W.2d 775, 776 (1945).

The Attorneys have not denied the Hogenson Group any share in the settlement award. As the record reflects, the Attorneys have not staked out any position on the quarrel over entitlement among the partners and are not doing so on appeal. The Attorneys deposited the settlement proceeds due R&R Investors into court and

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<sup>9</sup> It is anticipated that another \$400,000 to \$450,000 will be forthcoming. (A. 9). The Interpleader addresses those future proceeds as well. (A. 75-76).

interpleaded the parties contesting for the Funds. Interpleader was the perfect solution to the problem of entitlement to the Funds because it assures a just allocation of the Funds. The Hogenson Group has suffered no loss caused by Attorneys' acts. The Hogenson Group obtains that to which it is entitled based on the court's award in the interpleader action.

The dismissal of all counterclaims must be affirmed.<sup>10</sup>

**F. The Fraud-Based Counterclaims Fail to State a Claim.**

The dismissal of the claims asserted against Attorneys should be dismissed for other reasons as well. Counterclaims 1 and 2 of the FAC assert claims for violation of Minn. Stat. §§ 481.07 and 481.071. (R.A. 38, 46). These statutory sections codify the penalties for an attorney's deceit or collusion in a judicial proceeding. It does not create a new cause of action. Love v. Anderson, 240 Minn. 312, 61 N.W.2d 419, 422 (1953) (dismissing § 481 claim for failure to allege reliance, and holding that "the common law gives the right of action and statute the penalty"). In order to proceed, the plaintiff must plead all the elements of actionable fraud. Id.

The Hogenson Group also asserts as Counterclaim 3 a counterclaim labeled "intentional fraud and misrepresentation." (R.A. 54). These three counterclaims for fraud fail to state a claim upon which relief can be granted.

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<sup>10</sup> The trial court held that the malpractice counts were dismissed on this ground, but the same is true also for the counts sounding in fraud. (A. 52-53). This Court can affirm on any ground raised, even if not relied on by the district court. *See, e.g., Simplex Supplies, Inc. v. Abhe & Svoboda, Inc.*, 586 N.W.2d 797, 799 (Minn. Ct. App. 1998).

Minn. R. Civ. P. 9.02 requires that in averments of fraud, “the circumstances shall be stated with particularity.” As this Court has recognized, that requires that “all elements of a fraud cause of action must be pleaded.” Seafirst Commercial Corp. v. Speakman, 384 N.W.2d 895, 899 (Minn. Ct. App. 1986), citing Alho v. Sterling, 266 Minn. 71, 122 N.W.2d 869 (1963).

To assert a claim for fraud, the Hogenson Group must specifically allege each of the following elements: (1) a misrepresentation; (2) an action taken in reliance on the misrepresentation; and (3) damages. Martens, 616 N.W.2d at 747. Failure to plead any of the essential elements is a fatal defect which results in dismissal of the fraud claim pursuant to a Rule 12.02(e) motion. Id. at 747-48.

The Hogenson Group’s counterclaim for fraud was not pleaded with particularity. The Hogenson Group asserted the United States agreed to settle the R&R Investors’ claim based on the 2003 complaint. (FAC 47 at R.A. 19-20). The Hogenson Group asserts that Attorneys took the “erroneous and/or deceitful position” that “they were representing the Strangis R&R Investors in the Tucker Act litigation” when they were, in fact, representing the Hogenson Group in the U.S. Court of Claims. (FAC 126, 128 at R.A. 39-40).

But as the trial court recognized, even if the Attorneys had misrepresented that Strangis is the key contact person in the Tucker Act litigation, the Hogenson Group does not allege that it took any action in reliance on the alleged misrepresentation to its pecuniary damage. “To constitute actionable fraud, among other things, the party deceived must be induced to act in reliance upon the fraud to his pecuniary damage.”

Love, 61 N.W.2d at 422. Failure to plead facts of reliance or pecuniary damage renders the pleadings defective.” Slezak v. Ousdigian, 260 Minn. 303, 110 N.W.2d 1, 4 (1961).

Here, the Hogenson Group’s complaint does not allege that it relied on a false representation to its pecuniary damage. Finding no such “reliance” in its pleadings, even after taking into account the “Hogenson Group analysis of what the FAC alleges,” the trial court ordered the fraud claims dismissed. (A. 44-47). Eckland respectfully requests the trial court be affirmed.

The Hogenson Group does not address in its brief the fact that it did not plead reliance in its fraud counterclaims. In fact, the Hogenson Group fails to acknowledge its own pleading as well as its deficiencies. On appeal, the Hogenson Group asserts that it relied on the Attorneys to represent “the Hogenson partners’ interest in the litigation” and “[d]uring this period, [the Attorneys] took the position that the Strangis partnership owned 100% of the Hogenson partnership’s claim filed in 2003 – leaving the Hogenson partnership with 0%.” (Brief, p. 73).

As previously stated, the allegation that the Attorneys have sided with Strangis is untenable on its face. The record shows the Attorneys have consistently maintained their neutrality with regard to which faction is entitled to the Funds. (A. 73; R.A. 138). As the Court of Federal Claims was informed: “Mr. Eckland will not dispute the Minnesota court’s decision with respect to whether Mr. Strangis or Mr. Hogenson is entitled to speak for R&R.” (R.A. 141). Instead, Eckland asserted the pending interpleader action is the adequate vehicle for resolving the dispute between the Hogenson Group and Strangis.

(R.A. 145). The Attorneys left the determination of entitlement to the Funds in the hands of the Minnesota court. (A. 73).

Further, and as the trial court also recognized, the pleadings fail as to the first element of fraud – there must be a deception or misrepresentation. The pleadings are flawed in that whether the Attorneys should have or should not have represented “Strangis R&R Investors,” they were never deceitful about who they represented. They have always stated they represented the entity – R&R Investors – in the Federal Court of Claims. (A. 42-43, 61). As to the statutory fraud claims (Counterclaims 1 and 2 at R.A. 38-54), and as the trial court acknowledged, “the [Attorneys] did not lie when they told the Court they represented the R&R Investors entity.” (A. 60). The same is true with regard to Counterclaim 3 at R.A. 54-62. “There can be no fraud or misrepresentation as to who the [Attorneys] represented when they made clear all along that they represented R&R Investors.” (A. 61).

The fraud counterclaims were appropriately dismissed pursuant to Rule 12.02(e).

**G. Counterclaims 4 Through 7 Fail to State a Claim Against Attorneys.**

Counterclaims 4 through 7 of the FAC allege causes of action for breach of contract, negligence, breach of the fiduciary duty of loyalty and legal malpractice. (FAC ¶¶ 167-188 at R.A. 62-65). Each of these claims sounds in malpractice. The breach of contract claim arises out of the fee agreement between R&R Investors and Attorneys. (FAC ¶¶ 167-168 at R.A. 62-63). The negligence and fiduciary duty claims are premised on Attorneys’ duties as the attorneys for R&R Investors. (*Id.*, ¶¶ 174, 180 at R.A. 63, 64).

Each of these claims asserts the essential element of malpractice that, but for Attorneys' alleged misconduct, R&R Investors would have obtained a more favorable result in the "Takings Act litigation it commenced." (FAC ¶¶ 170, 176, 182, 188 at R.A. 63, 64, 65).

In response to the allegations of the complaints, Attorneys asserted that Minnesota law has dealt directly with the not infrequent remorse of clients over their settlements after the deal is done. The Minnesota Supreme Court has repeatedly rejected the opportunity to "allow a client who has become dissatisfied with the settlement to recover against an attorney solely on the ground that a jury might have awarded him more than the settlement." Rouse v. Dunkley & Bennett, P.A., 520 N.W.2d 406, 410 n. 6 (Minn. 1994); *see also* Glenna v. Sullivan, 310 Minn. 162, 245 N.W.2d 869, 873 (1976) ("to allow a client who has become dissatisfied with the settlement to recover against an attorney solely on the ground that a jury might have awarded them more than the settlement is unprecedented"). The Minnesota Supreme Court has recognized that legal malpractice cases involving voluntary settlements are potentially "ticking time bombs" that are appropriately disposed of by dispositive motion. Cook v. Connolly, 366 N.W.2d 287, 292-93 (Minn. 1985).

Here, the Hogenson Group, on behalf of R&R Investors, voluntarily entered into a settlement agreement in the Tucker Act litigation. (R.A. 331, 348-352). It explicitly agreed in writing that it had adequate time to review the settlement, understood the terms, and realized that by agreeing to the settlement it released all claims in the Tucker Act

litigation. (R.A. 344, 348-352).<sup>11</sup> The Hogenson Group's assertions in Counterclaims 4, 5, 6 and 7 that it "would be obtaining a more favorable result in the Tucker Act litigation" absent the conduct of Attorneys does not, as a matter of law, support a claim for legal malpractice. (A. 49-50).

In response to Attorneys' motion to dismiss where the Hogenson Group was presented with the above-stated Minnesota law and the impact of the consents to settle, the Hogenson Group altered its theory of the case from that actually pled in its counterclaims. The Hogenson Group now asserted that its primary argument against Attorneys is that the Attorneys had not remained neutral, but rather had taken the position that the Hogenson Group is not entitled to the Funds. (A. 50). They further asserted that the alleged malpractice stems not from the result achieved in the Tucker Act litigation, but rather from the Attorneys' simultaneous representation of the members of the Hogenson Group and Strangis, as individuals with conflicting interests in the Funds. These arguments are contrary to the facts as pleaded in the FAC. (A. 50-51).

In the FAC, the malpractice-based claims are asserted in the name of the Partnership, not the individual members of the Hogenson Group, and the gravamen of the claims is that but for the Attorneys' alleged misconduct, the partnership would have achieved a better result in the Tucker Act litigation. (FAC ¶¶ 87-88, 166-188; R.A. 32, 62-65). There is no allegation that the Attorneys represented the individual partners. As

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<sup>11</sup> As to this claim, the trial court rejected any claim of need for further discovery, noting the Hogenson Group did not request further information surrounding the settlement details when the members signed the consent agreements. (A. 50).

the trial court recognized, “The FAC and exhibits referenced therein show the [Attorneys] represented R&R Investors the entity.” (A. 52). Therefore, the “Hogenson Group fails to state a claim of ‘conflicting representation’” or that the Attorneys “failed to clarify representation.” (A. 52). The claims of malpractice, negligence, breach of fiduciary duty or breach of contract fail to state a claim upon which relief can be granted.

**H. Declaratory Judgment Claim Action Is Moot and Is Not a Proper Claim in This Action.**

The Hogenson Group sought partial summary judgment on its declaratory judgment claim, which was denied. (A. 7). The Hogenson Group asserted that this motion would resolve “one element of Counterclaim Plaintiffs’ causes of action in those underlying tort claims – whether an attorney-client relationship existed solely with the Counterclaim Plaintiffs as opposed to Strangis.” (Counterclaim Plaintiffs’ Reply Memo in Support of Their Motion for Summary Judgment – Reply to Counterclaim Defendants Faegre & Benson and Eckland & Blando’s Response Memorandum at 4, dated March 3, 2008). The Hogenson Group clarified then further, stating “the declaratory judgment act claim is to clarify who [Attorneys] contracted with on February 10, 2003 to represent as client when [Hogenson Group members Berger and Hogenson and Attorney Eckland] signed the contingency fee agreement Faegre drafted.” (*Id.* at p. 7). “In turn, who was [Attorneys’] client the day they filed the claim in the U.S. Court of Federal Claims on September 30, 2003?” (*Id.*) The trial court denied the Hogenson Group’s motion for partial summary judgment on its declaratory judgment claim. (A. 7, 70-71).

On appeal, the Hogenson Group raises the declaratory judgment claim and asserts that “[b]ecause of [Attorneys’] breach of contract for legal representation with the [Hogenson Group] as a matter of law, the Hogenson partnership is entitled to a declaratory judgment.” (Appellants’ Principal Brief, p. 51). The Hogenson Group ignores that all that was before the trial court was its motion for partial summary judgment on its declaratory judgment claims. There was no trial, so the standard of review they cite is inapplicable. (See Appellants’ Principal Brief, p. 51). As to summary judgment, the Hogenson Group was the moving party. In challenging the denial of summary judgment, the facts are viewed in a light most favorable to Respondents, the nonmoving parties. Hopkins v. Fire and Marine Ins. Co., 474 N.W.2d 209, 212 (Minn. Ct. App. 1991). To the extent the Hogenson Group may be asserting that this Court on appeal should grant partial summary judgment on the Hogenson Group’s declaratory judgment claim and somehow impose tort liability on the Attorneys, such relief cannot be granted on this record. As set out previously, and in accord with Rule 12.02, all claims against the Attorneys were properly dismissed, and any assertion of declaratory relief by which the Hogenson Group seeks to impose tort liability on Attorneys is moot.

Moreover, and for the reasons articulated in Eckland’s Memorandum in Opposition to Declaratory Relief dated February 21, 2008, the Hogenson Group’s assertion of any entitlement to declaratory judgment relief should be denied because this claim is improperly pleaded and seeks relief inappropriate for declaratory judgment.

The declaratory judgment claim upon which the Hogenson Group sought partial summary judgment determination was both technically and legally unsound. The declaratory judgment claims are not included in the Hogenson Group's pleading caption of the First Amended Answer, Counterclaim and Cross-Claim (FAC). (R.A. 1). No parties are identified in the caption as being the target of the declaratory judgment claims. *See* Minn. R. Civ. P. 7.01, 8.01.

Nor does the text of the FAC clarify the matter. The counterclaims and cross-claims against specific parties are clearly labeled. The counterclaims against the Attorneys, as interpleader plaintiffs, begin on page 37 of the FAC. (R.A. 37). The cross-claims against Paul Strangis and R&R Investors begin on page 68. (R.A. 68). "Claims for declaratory judgment" begin on page 69, but no parties are listed and it is unclear from the FAC whether the Hogenson Group sought recovery against the Attorneys, against Strangis and Strangis R&R Investors or all of them. (R.A. 69-71). While the memorandum in support of the motion identified the Attorneys as an opposing party on the declaratory judgment action, it is not at all clear that the claim was pleaded this way.

What appears to have been requested in the FAC is a determination of client status based upon the fee agreements signed in 2003 by Hogenson, Larson, Berger and Arvidson as general partners of R&R Investors. (FAC ¶ 222; R.A. 70). As previously stated, and as presented on partial summary judgment, the question was, according to the Hogenson Group, "who was [Attorneys'] client the day they filed the claim in the U.S. Court Federal Claims on September 20, 2003?"

Such a request goes beyond where a declaratory judgment may go. The Minnesota Uniform Declaratory Judgment Act provides that any person or entity may seek to determine the rights, status or other legal relationship of a party to a contract. Minn. Stat. § 555.02. The purpose of a declaratory judgment “is to settle and to afford relief from uncertainty and insecurity with respect to rights, status or other legal relations.” Minn. Stat. § 555.12.

Declaratory judgments are not available to settle disputes already pending before a court. In essence, “a declaratory action provides a litigant with an opportunity to have a dispute resolved by a court before a claim has ripened into a controversy requiring final relief such as damages.” 2 Minn. Prac. Civil Rules Annotated R. 57 (4th ed. 2008), § 57.1; Holiday Acres No. 3 v. Midwest Fed. Savings & Loan Ass’n of Minneapolis, 271 N.W.2d 445, 447 (Minn. 1978), *reh’g denied*. And a court has the discretion to grant or deny declaratory judgment. Minn. Stat. § 555.06.

Here, the interpleader action presented to the trial court the determination of entitlement to the settlement funds.<sup>12</sup> The controversy over the division of funds was the ultimate issue in this interpleader action. The Hogenson Group in that same action had set out specific tort claims against Attorneys by which it sought damages. The requested

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<sup>12</sup> Also, the requested declaratory relief impermissibly sought to determine facts embedded in the interpleader action. Stark v. Rodriguez, 229 Minn. 1, 37 N.W.2d 812, 813 (1949). Although facts may be determined on a motion for declaratory judgment, if it involves “a disputed fact [which] would be determinative of issues . . . the case is not one for declaratory judgment.” Id., quoting 16 Am. Jur. Declaratory Judgments § 20.

declaratory relief did not accomplish anything and the request is contrary to the purpose of declaratory judgment.

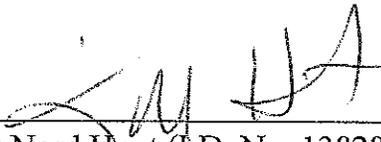
Further, the issue the Hogenson Group sought to “clarify” with the declaratory judgment claim – who was the Attorneys’ client – is, as the trial court acknowledges, R&R Investors. The Attorneys in fact represented R&R Investors throughout the Tucker Act litigation. Declaring that the Hogenson Group members were the signatories to the 2003 fee agreement does not determine entitlement to the settlement funds. And this Court, applying the summary judgment standard, cannot declare that the Hogenson Group was Attorneys’ client. The purported claim of entitlement to declaratory relief is not only moot, it accomplishes nothing.

**CONCLUSION**

Respondent Eckland & Blando LLP respectfully requests that the trial court’s dismissal of the counterclaims asserted against it by the Appellants be affirmed.

Dated: January 26, 2009

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

BY   
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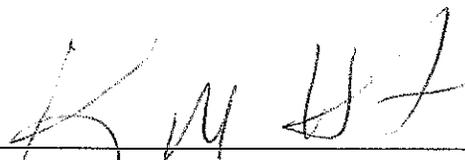
**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 7,201 words. This brief was prepared using Word Perfect 12.

Dated: January 26, 2009

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