STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1899

Faegre & Benson LLP and Eckland and Blando LLP,
Interpleader Plaintiffs and Respondents,
vs.

R&R Investors, Curtis Hogenson, Diane Larson, Eileen M. Berger, Shirley J. Arvidson, David Klug, Mary Klug, Paul Strangis, the Estate of Norman K. Arvidson, and the Estate of Gerald Berger,
Interpleader Defendants,
vs.

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 as successor tenant-in-partnership in 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 in R&R Investors I - UPA Partnership consisting of Curtis Hogenson, Diane Larson, Gerald Berger (deceased) and Norman Arvidson (deceased),
Counterclaimants/Cross-Claimants and Appellants,
vs.

R&R Investors and Paul Strangis,
Interpleader Defendants/Cross-Claim Defendants and Respondents,

and

Faegre & Benson LLP and Eckland & Blando LLP,
Defendants on Counterclaims and Respondents.

APPELLANTS' REPLY BRIEF AND SUPPLEMENTAL APPENDIX

(All Counsel Listed on Following Page)

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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Since the Strangis Partnership is a different entity than the Hogenson R&R Investors Partnership, the only false hope that counsel for the Strangis Partnership provides is that the Klugs 2000 Partnership acquired the chose in action by either the 2000 purchase documents or the 2003 deeds.

First, the Affidavit of David Klug unequivocably states that the 2000 purchase documents and the 2003 deeds did not transfer any chose in action to the Klugs 2000 Partnership:

> It was never intended as part of the sale that Mary or I would acquire any claims that the R&R Investors general partnership from which Mary and I purchased the Marantha Inn, or its general partners, owned prior to the sale of the Marantha Inn. I am quite confident of this since the purchase agreement and underlying sale documents do not mention the transfer of any claims held by the R&R Investors general partnership from which Mary and I purchased the Marantha Inn. Moreover, the purchase price Mary and I paid for the Marantha Inn was based entirely on an analysis of the rents which the Marantha Inn could generate under the FmHA's low income housing program and not on any claims against the FmHA. Neither Mary nor I paid any consideration for any claims held by the R&R Investors general partnership from which Mary and I purchased the Marantha Inn, or its general partners.

App. 326-327. The Strangis Partnership provides no support in the record to contradict the contractual understanding of <u>both</u> parties to the 2000 purchase documents and 2003 deeds: the chose in action was not transferred to the Klug 2000 Partnership.

Second, in 2004, David Klug sent a letter to Diane Larson recognizing the former partners, their partnership, their ownership of the chose in action and that the "former" partnership was still operating per their partnership agreement:

> January 9, 2004
>
> Diane Larson
>
> Former Partner, R&R Investors, ET. AL
>
> Dear Diane:
>
> In the event that R&R Investors, now owned by me, receives any Funds through litigation started by past partner, Gerald Berger, I will assign any and all interest received to those checks and to any law suit proceeds to the original partners of R&R Investors.
>
> *At the time any funds are received from me, I will direct the return of any funds to you, so that you may do disbursal according to your partnership agreement.*
>
> Sincerely,
> David Klug
> Managing Partner
> R&R Investors

App. 544 (emphasis added). It is important to note that Klug's letter was sent after the 1989 Hogenson R&R Investors had filed their claim in the U.S. Court of Federal Claims in 2003, after delivery of the 2003 deeds and before the Klugs 2000 Partnership was sold to the Strangis Partnership. Again, the Strangis Partnership provides no support in the record to contradict the contractual understanding of both parties to the 2000 purchase documents and 2003 deeds – as stated by Klug in his letter.

Third, in 2000, there was no "chose in action" asset. Black's Law Dictionary defines an asset as "an item that is owned and has value."[1] Neither the 1989 Hogenson R&R Investors nor the Klugs 2000 Partnership knew in 2000 that there was a "chose in action" asset.

What the parties knew was being transferred was what the Klugs had paid for as itemized and delineated in the purchase agreements. For the amount of money the Klugs paid, the Klugs knew what they were getting.

In fact, it was in 2002, prior to the close of the transactions with the Klugs by delivery of the 2003 deeds, the 1989 Hogenson R & R Investors discovered the claim and filed it on its own behalf in 2003.

It is undisputed that the chose in action, a breach of contract claim against the United States, is an asset. That is undisputed. But,

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[1]Bryan A. Garner, Black's Law Dictionary, 125 (8th ed. Thomson/West 2004).

it was an asset no one knew of in 2000. Therefore, the chose in action was not itemized, no consideration was paid, and no identification of it was made as an asset of value.

It thus remains an asset of the 1989 Hogenson R&R Investors.

Fourth, only the 1989 Hogenson R & R Investors at the time of the breach of contract in 1997 was in privity of contract with the United States – as mortgagor under a federally-subsidized loan. The breach harmed the partners of that existing partnership. Thus, the claim that the 1989 Hogenson R&R Investors filed in 2003 is owned by the 1989 Hogenson R&R Investors. It is impossible to conceive of how the 2004 Strangis Partnership could own a claim it could not file because it was not in privity of contract with the United States at the time of the 1997 breach.

Fifth, the Strangis Partnership has failed to satisfy the requirements for a valid assignment of a claim against the United States. 31 U.S.C. §3127 (b) – the Federal Anti-Assignment Act – limits assignments of claims against the United States only if specific procedures are followed:

> An assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued. The assignment shall specify the warrant, must be made freely, and must be attested to by 2 witnesses. The person making the assignment shall acknowledge it before an

> official who may acknowledge a deed, and the official shall certify the assignment. The certificate shall state that the official completely explained the assignment when it was acknowledged. An assignment under this subsection is valid for any purpose.[2]

The Strangis Partnership, according to their own brief, runs afoul of the Federal Anti-Assignment Act. It presents an argument for a purported assignment via the 2000 purchase documents which is premature, untimely and therefore invalid – such an assignment could only be made after events that have not yet occurred for the 1989 Hogenson R&R Investors claim: the specific amount of the settlement has not yet been decided and the warrant for payment of the claim has not been issued.

Moreover, the Strangis Partnership's purported assignment via the 2000 purchase documents does not meet the form requirements of 31 U.S.C. §3127 (b). (1) The purported assignment does not specify the warrant for payment. (2) The purported assignment was not made freely and attested to by 2 witnesses. (3) The 1989 Hogenson R&R

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[2] The purpose of the Federal Anti – Assignment Act is to prevent the United States from being subject to multiple claims, to ensure that the United States is able to avail itself of rights of setoff or cross-claims against original claimants and to prevent persons of influence from buying up claims against the United States and then improperly urging them on officers of United States. *U. S. v. Improved Premises Located at Northwest Corner of Irving Place and Sixteenth St.*, 204 F.Supp. 868 (S.D.N.Y.1962).

Investors did not acknowledge the purported assignment before a notary public and a notary public did not acknowledge the purported assignment. (4) The assignment does not state that the notary public completely explained the assignment when it was acknowledged. For these reasons alone, the Strangis Partnership's assignment arguments must be rejected.

Sixth, only the 1989 Hogenson R&R Investors was economically damaged by the 1997 breach. The Hogenson original purchase price for Maranatha Inn Apartments in 1984 of $610,000 and subsequent sale to the Klugs in 2000-2003 for $485,000 represented a $125,000 loss. Eventually, Strangis would purchase the property in 2004 for $550,000 less the principal balance on the USDA loan ($287,363.13) and the MHFA loan ($41,551.00) for a net sale price of $223,547.19 to the Klugs. Considering the U.S. Court of Federal Claims settlement of somewhere around $450,000[3] and deducting what Strangis paid out-of-pocket for the building to Klugs in 2004, the Strangis Partnership would net an instant profit off the building purchase of $226,452.81. Meanwhile, the 1989 Hogenson R&R Investors lost $125,000 and more due to the governmental breach and, according to the Strangis argument, receives no compensation from the U.S. Court of Federal

[3] Mot. Hrg. Tr. at 48, Mar. 6, 2008.

Claims settlement. Strangis' desired outcome is an unjust result that this Court should not let stand.

Seventh, Counsel for the Strangis Partnership[4] and the lower court have misapplied governing partnership law to the facts of the instant case and have misinterpreted and misapplied contract law[5] to the unambiguous transactional documents and the partnership agreement of the Hogenson R & R Investors partnership. For instance, it is incorrect, under the law governing Minnesota's Uniform Partnership Act of 1921, to suggest "R & R Investors" exists as a single entity since the inception of the original R & R Investors partnership of Robert and Ruth Janski because a continuation of business does not impede the rights of partners under the MUPA. To do so is to disregard the associations of partners and their respective governing partnership agreements defining those relationships between the partners in the creation, dissolution, and winding-up of each partnership.

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[4] Strangis partnership's counsel repeatedly seeks to obfuscate the facts and the law with ill-advised attempts at wit and ad hominin ridicule. The paucity of supportable case law and misguided logic to support its bald assertions brings to mind a Harry S. Truman quote, "When unable to convince, confuse."

[5] Partnership agreements are subject to general principles of contract law. *Robbins v. Salem Radiology,* 145 N.H. 415, 764 A.2d 885 (2000).

Eighth, Minnesota law provides that "a partnership is dissolved by a 'change in the relation of the partners caused by any partner ceasing to be associated in the carrying on [of business] as distinguished from the winding up of the business.'"[6] This reflects the aggregate theory of partnerships as applied to Minnesota's UPA, meaning that the partnership does not have a separate life from the member partners.[7] One example of the aggregate theory is found in *Fairway Development Co. v. Title Insurance Co.* where the court found the property insurance policy coverage of a dissolved partnership did not provide coverage of a continuing partnership with reconstituted partners.[8] While the MUPA may moderate the aggregate theory by providing for the continuation of a business specifically as it relates to liabilities of persons continuing the business in certain cases,[9] it did not abrogate the meaning of a "dissolved partnership" and the "winding up"

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[6] *Enger v. States Realty Co.*, 223 Minn. 305, 310-11, 26 N.W. 2d 464, 468 (1947).

[7] *See, id.*

[8] *Fairway Development Co. v. Title Insurance Co.*, 621 F.Supp. 120 (N.D. Ohio 1985). The Revised Uniform Partnership Act, later adopted by Minnesota, substantially changed dissolution rules. But the RUPA is not applicable to the Hogenson R & R Investors partnership at issue here.

[9]Minn. Stat. § 323.40.

of that dissolved partnership pursuant to its partnership agreement and governing law.

Ninth, the lower court's decision disregards the obligations of the Hogenson partnership considering the "transactional documents demonstrate ...the partnership business was never wound-up, and the partnership was continued even upon dissolution with a substitution of partners."[10]

The Hogenson R & R Investors partnership could not wind up because of outstanding affairs between its partners as per their partnership agreement. This would involve the Klugs — transfer of the quit claim deeds in 2003 — and any payments the Klugs made to the Hogenson partners in 2000 to 2003. The lack of discovery has precluded the entry of evidence that the Klugs partnership made additional payments to the Hogenson partners in 2000, 2001, 2002 and 2003 – prior to the transfer of the property by deed in 2003.

Tenth, the Hogenson partnership agreement will not terminate their partnership under § 17 until the distribution of "any remaining assets of the partnership." Here, the pursuit of the breach of contract claim against the United States accrued during the existence of that partnership in 1997 and subsequently commenced after the dissolution

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[10] Distr. Ct. Order and Memorandum at p. 25.

and during the continuing winding up period of the Hogenson partnership is a chose in action asset – which money has not yet been collected and distributed.

Eleventh, the lower court conflates, through a conceptualist analysis, the partnership under the MUPA with that of a corporation. The court analysis, in short, finds that because the partnership owns partnership property, it must own such property as a separate legal person. Yet partnerships and corporations and the rights and obligations of partners and those of shareholders are not the same. Regardless of the lower court's validity of the legal person model of the corporation, partnerships do not have all the legal-person entity attributes of a corporation — the prototypical legal person.

The lower court misapplies governing UPA law. Under the lower court's theory of partnership as a legal person, any change in membership should not affect partnership property because the partnership entity owns the property rather than the partners. However, under the aggregate concept of partnership — the law of Minnesota (Minn. Stat. § 323.24: "a partner is a co[-]owner with the other partners of specific partnership property holding as tenant in partnership") — any change in the composition of the partners necessarily involves a change in the ownership of partnership property.

Twelfth, the substitution of partners is change in the "relation of the partners." In 2000, when the Klugs substituted the Hogenson partners, the act dissolved the Hogenson R & R Investors Partnership — the old partnership as one way to describe it — creating a new partnership between David and Mary Klug.[11] The Klugs carried on the business of the Maranatha Inn but the dissolved Hogenson partnership agreement required the winding up of affairs between the Hogenson R & R Investors partners: "[u]pon dissolution, the partnership assets will be distributed according to the following priority: ...(c) Distribution to the partners in accordance with their percentage of contribution...."[12] The Strangis partnership counsel and the lower court failed to appreciate the unambiguous contractual terms in their partnership agreement and the continuing relationship between the Hogenson partners in 2000, 2001, 2002, 2003 and counting.

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[11] *See Outlaw v. U.S.,* 204 Ct. Cl. 152, 494 F.2d 1374, 1386 (1974) (In dicta discussing why, considering the facts, a trust was not a partnership, the court found "no partnership [existed] because the death of a partner or the assignment of his interests dissolves the partnership." The court further discussed that even with a substitution of partners by the assignment of the interest of the other partners, the old partnership dissolved and a new one formed between the new partners.)

[12] App. p. 401, § 17 of Hogenson Partnership Agreement.

Thirteenth, both the Strangis partnership counsel and the lower court confuse what the Klugs purchased — first, partnership interests are not assets but include that partner's share of the profits and surplus — personal property.[13] Strangis in particular seeks to expand partnership interests to include other assets, "[t]he transaction documents for the transfers of partnership interests also transferred the known (and unknown) personalty owned by partnership."[14] But the documents do not reflect this assertion. Regardless, the profits and shares transferred embodied those derived from known assets at the time of the sale in 2000. The Hogenson partnership did not know of a chose in action asset at the time. Therefore, the Klugs paid no consideration for future profits or surplus derived from a Hogenson partnership asset because of its later discovery; the assignment of a chose in action is not embodied within the 2000 purchase documents.

Fourteenth, the Klugs purchased real property — the Maranatha Apartments and specific personal property — as itemized. The Klugs did not purchase a chose in action asset — a separate, distinct asset of

[13] Minn. Stat. § 325.25.

[14] Strangis partnership Response Br. at 25.

the Hogenson R & R Investors partnership.[15] None of the 2000 purchase documents or 2003 deeds can be interpreted to include the chose in action asset.

Fifteenth, the chose in action was not discovered and litigation started until after dissolution and during the winding up of the Hogenson R & R Investors (winding up continues until *all assets* are distributed in accordance with section 17 of the Hogenson partnership agreement). If indeed the Klug partnership owned the chose in action —which it does not — the Strangis Partnership has failed, as has the lower court, to explain Klugs' non-entry as the initiating party in the U.S. Court of Federal Claims action.

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[15] The Strangis partnership argues unpersuasively, that the elements of the Klug 2004 transaction with Strangis can be superimposed upon the elements of the sale between the Hogenson partnership and the Klug partnership. Strangis Response Br. at 27. The sale and agreements between the Klugs and the Strangis partners are irrelevant to the transaction between Hogenson partners and the Klugs. The Klugs could not convey to Strangis something that partnership never had — the chose in action asset. The Hogenson R & R Investors principal brief explained the Klug and Strangis transaction for the purpose of showing its complexity, the different laws that apply to that transaction, and to show how Strangis had no privity of contract with the United States government at the time of the breach, reflecting the Strangis partnership's lack of standing in federal court, not to mention the partnership's problems with the statute of limitations, proving that only the Hogenson's R & R Investors partnership had standing and owned the breach of contract claim.

Sixteenth, as demonstrated below, unfortunately, the lower court sought to cure this oversight — Klugs' non-entry in the U.S. Court of Federal Claims litigation — with a factual misstep of an otherwise unambiguous agreement. The lower court continued to assign Berger with a 1% partnership interest in the Klugs partnership in 2003, although his termed partnership relationship with the Klugs ended in 2001 (13 months after the sale of the Maranatha Inn Apartments in 2000).[16] In doing so, the lower court creates a factual fiction that Berger could bring an action on behalf of the Klug partnership because of his 1% interest. Since his term ended, he could not.

Seventeenth, the purchase agreement dated January 12, 2000 identifies three addendums – none of which support the Respondents' claims.[17] The first addendum, "Addendum 'A'" identifies the legal description of the real property.[18] No chose in action is described. Furthermore, the Hogenson partners did not transfer the real property by deeds until 2003. As previously mentioned, this fact implicates that further payments were made by the Klug partnership to the Hogenson

[16] App. p. 415.

[17] App. p. 412.

[18] App. p. 413.

partnership in 2000, 2001, 2002 and 2003 – prior to the delivery of the 2003 deeds.

The second addendum, "Addendum 'B'" identifies personal property and the value listed.[19] The property listed included electric ranges, refrigerators, range hoods, air conditioners, coin washers, and coin dryers.[20] The addendum also states, "[a]ll other personal property *on the premises* now belonging to owner and used in the operation of Maranatha Inn Apartments. Not limited to shovels... and other miscellany items."[21] The allocated value — "[$]2,000." The chose in action is not listed. If the Strangis partnership suggests the "miscellany items" embodies the chose in action, the question arises as to where the consideration for a multi-thousand dollar claim lies. The value should have reflected at least the $125,000 loss incurred with the sale to the Klugs partnership.

The addendum continues to state that an inventory "of all *items*" shall be taken at prior to closing and agreed upon by buyer and seller.[22] If the Strangis partnership contends the chose in action was

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[19] App. p. 414.

[20] *Id.*

[21] *Id.*

[22] *Id.*.

inventoried, no list has been provided to date. This would be an issue of material fact. Nevertheless, Addendum B is unambiguous and does not include the Hogenson partnership's chose in action asset.

Addendum C dated January 12, 2000 further details the purchase between the Hogenson partnership and the Klug partnership. Paragraph 1 reflects the Klug's assumption of the Hogenson's partnership's first and second mortgage debts with the United States.[23] The language is unambiguous. Furthermore, there is no mention of the chose in action asset.

Paragraph 2 reflects the obligations the Klug partners will take regarding the terms of the mortgage agreements with the United States.[24] No mention is made of the chose in action asset.

Paragraph 3, reflects the transfer of $50,000 in "cash assets that will transfer at closing."[25] There is no mention of the chose in action asset.

Paragraph 4, reflects a further arrangement to "facilitate the sale" through the purchase of the existing partnership, known as R & R Investors. This is consistent with MUPA provisions governing the

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[23] App. p. 415.

[24] *Id.*

[25] *Id.*.

continuation of the business, whereby the Klugs accepted the debts and obligations of the Hogenson partnership existing at the time of closing, namely the mortgages on the real property.[26] Nevertheless, this did not dismantle the Hogenson partnership agreement and fiduciary obligations between the Hogenson partners, namely the distribution of "any remaining assets of the partnership."[27] Furthermore, a dissolved partnership remains obligated to distribute contributions received as a creditor as well as having the authority to litigate claims accrued during the existence of that partnership.

Because discovery is incomplete, evidence of payments made by Klugs in 2000, 2001, 2002 and 2003 to the Hogenson R & R Investor partners on the purchase of the property are missing. Such payments would explain the 2003 transfer of quit claim deeds from the Hogenson partners to the Klugs and not a "belated" delivery of the deeds as Strangis suggests.[28] Holding deeds until full payment of a note or loan is common in real estate transactions.

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[26] Minn. Stat. § 323.40.

[27] App. p.401, ¶17 of Partnership Agreement.

[28] Strangis Response Br. at p. 38.

Existence of such payments would be further proof of the dissolved partnership winding up its affairs as required under its partnership agreement.

In addition, the "purchase of the existing partnership" does not include a chose in action asset because there was no chose in action asset in 2000. It would be over two years before the asset is discovered and claimed in the Federal Court of Claims. Nevertheless, this paragraph, titled "Remaining Partner,"reiterates the real property ownership through R & R Investors partnership of Marantha Inn Apartments, and to facilitate the transfer of the property, requiring one Hogenson partner, Berger, to maintain a 1% interest for the specific term of 13 months.[29] But here lies another misnomer.

The lower court failed to recognize, though unambiguous in the addendum agreement, a Hogenson partner's term of 13 months with the Klugs' partnership.[30] Asserting that when Berger signed a contingency fee agreement in 2003 with Faegre & Benson, the court found "he was purportedly still [retained] a 1% partner in R & R

[29] App. p. 415.

[30] Berger was later identified as the termed partner.

Investors."[31] Likewise, the Strangis partnership argued that Berger "did not part from the partnership until executing a quitclaim deed in 2003."[32] Neither position as a statement of fact, comports to the actual agreement and is contrary to the unambiguous transactional document. The term ended 13 months from the January 2000 sale – i.e. in 2001.

The remainder of Addendum C does not in any way refer to a chose in action as an asset or the payment of consideration for such an asset.[33] As previously mentioned, at the time of the partnership sale, the chose of action was not known to exist as an asset. In addition, there is no language in the purchase agreements that embody a chose in action as an asset transferred from the Hogenson partnership to the Klugs partnership.

That the execution of the agreement in which provides "for the sale and transfer of ... shares consisting of 99% of the total partnership" does not embody a chose in action. There is no definition of "shares" in the document. The assets are previously identified in the purchase agreements and none embody a chose in action. If the asset were partnership property as co-owners and tenants in partnership,

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[31] Distr. Ct. Op. at 25.

[32] Dist. Ct. Op. at p. 25; Strangis Partnership Response Br. at 40.

[33] App. pp. 415-16.

upon the identification of the chose in action as an asset and commencement of litigation, all of the Hogenson partners would have had to convey their interest to the Klugs partnership. This did not happen. The 2000 purchase documents were completed two years before the discovery of the chose in action asset in 2002. Again, winding up of the Hogenson partnership still remained.

Eighteenth, the Strangis Partnership argues Strangis cured any defect in the retention of Faegre and Eckland with the signing of a later retainer agreement.[34] Strangis could not ratify Berger's and Hogenson's hiring of Faegre and Eckland for the Hogenson partnership through the signing of a second retainer agreement. Berger was never a partner of the Strangis Partnership. Thus, Berger could not bring an action on behalf of the Strangis partnership.

At the time Hogenson and Berger hired Faegre and Eckland, Berger was not a partner of the Klug Partnership. Therefore, Berger could not bring an action on behalf of the Klug partnership. Unfortunately, the lower court failed to appreciate this critical fact and Strangis Partnership counsel's exploitation of the incorrect fact is understandable but for the unambiguous 13 month termed interest of

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[34] Strangis Response Br. at p. 40-41, and n. 132.

Berger with the Klug Partnership as identified in the purchase documents.[35]

Nineteenth, Strangis' counsel did not challenge Hogenson counsel's privity of contract argument – because no counter-argument exists. Only the Hogenson partnership had privity of contract with the United States in 1997 to claim a breach of contract. Only the Hogenson partnership had standing to sue before the U.S. Court of Federal Claims. Only the Hogenson partnership brought a claim within the statute of limitations. Thus, the Strangis partnership has no claim to the settlement recovery for three reasons: no privity of contract with the United States at time of breach; no standing to bring claim against the Untied States; and failure to file claim within the statute of limitations.

Even if the Strangis Partnership sought to hire Faegre and Eckland in 2004 to litigate its "claim" before the United States, it could not because the statute of limitations had run. Strangis sought to impose his partnership and interests in the litigation knowing that the Hogenson partnership was the only partnership in privity of contract with the United States at the time of the 1997 breach and had filed its claim within the statute of limitations. In fact, but for Berger's and

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[35] App. p. 415.

Hogenson's actions to commence the litigation, the claim would have been lost forever. Respondents' briefs fail to appreciate these facts.

Twentieth, as argued in Hogenson's principal brief, the settlement agreement itself requires that no proceeds can be disbursed to a party *who had not assumed the loan prior to* "the 1992 [Congressional] Legislation."[36] The Strangis partnership is hauntingly silent regarding this specific statement. Strangis assumed the mortgage loans on the Maranatha property in 2004. Likewise, the Klugs assumed the same loans in 2000. Neither party — the Klug R & R Investors or the Strangis R & R Investors —had standing to sue in federal court. If they had no standing to sue, they have no chose in action asset – and no right to settlement proceeds.

Finally, it is necessary to point out that the Respondents collectively have embraced the lower court decision as confirming their "good" work. In reality, the Respondents have synchronized and performed a self-interested and self-serving "swiping" of a claim and settlement that the 1989 Hogenson R&R Investors partners owned, filed and are entitled to.

In short, the Respondents' collective actions are a travesty. Fortunately, the Respondents' collective view is not how the law

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[36] App. p. 534, Part II, ¶ 5 (b).

functions and not how people, law firms and lawyers ordinarily do business.[37]

II. The attempt of Faegre and Eckland to obfuscate their role in representing the Strangis partnership in conflict with their original client to avoid legal malpractice claims do not avoid liabilities associated with claims of fraud, deceit, or collusion.

The response briefs of Faegre & Benson and Eckland & Blando represent the embodiment of the very misconduct regarding the attorney-client relationship the Hogenson R & R Investors partnership alleged in its underlying complaint: "[Eckland] here had no fiduciary duty to any individual partner or group of partners,"[38] but apparently admits that it had no obligation to know which partnership it represented. At least Faegre & Benson admits that "each member of the Hogenson Group authorized Faegre & Benson to represent the Hogenson Group in the Tucker Act litigation...."[39]

More importantly, the positions of both Faegre and Eckland now taken are incomprehensible in light of their previous proclamations to the court that Paul Strangis is the current owner and managing

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[37] *See* Strangis Response Br. at p. 24.

[38] Eckland & Blando Resp. Br. at 16.

[39] Faegre & Benson Resp. Br. at 28.

partner of R & R Investors.[40] It reflects an acknowledgment of representation of a partnership diametrically opposed to their original and existing client — the 1989 Hogenson R & R Investors partnership. Nevertheless, although the Hogenson partnership hired Faegre and Eckland as counsel, what it did not bargain for was the duplicity of the firms' subsequent representation of the Strangis partnership.

A relationship of client and lawyer arises when a person manifest's to a lawyer an intent to have the attorney provide legal services for him or her, and either

> (a) the lawyer manifests to the person consent to do so; or
>
> (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services . . .[41]

Put simply, according to the law governing lawyers, whom Faegre or ~~Eckland thought it was representing is irrelevant.~~ Under the Restatement (Third) of the Law Governing Lawyers and the Restatement (Third) of the Law of Agency, it is the client-principal who determines who the client-principal is, not the attorney-agent.

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[40] Eckland and Faegre Response to Motion to Substitute Counsel of Record at p. 2; Supp. App. p. 2.

[41] First, Restatement (Third) of the Law Governing Lawyers, § 14.

In 2003, Hogenson and Berger hired Faegre and Eckland to represent the Hogenson R & R Investors partnership interests in a Tucker Act litigation claim. But, as declared before the United States Court of Federal Claims on October 29, 2007, the firms abandoned their original client to associate with Strangis:

> During the pendency of this action, Mr. Paul Strangis purchased a controlling interest in R & R and is now the managing partner. Mr. Hogenson was formerly a partner in R & R, but has no interest in R & R today. [42]

They cannot now assert neutrality and escape liability for their actions. They are not ignorant of their predicament. Faegre and Eckland cannot explain how, the 1989 Hogenson R & R Investors partnership either through Hogenson or Berger, could have engaged counsel and commenced litigation in the U.S. Court of Federal Claims on behalf of another partnership such as the Klugs or Strangis when neither were partners in the Klug or Stangis partnership.

At all times, Faegre and Eckland knew of the Hogenson R & R Investors partnership relationship to the asserted Tucker Act claim:

> This property was purchased on December 4, 1984 by our general partnership called R & R Investors Partnership which was comprised of Gerald Berger (managing partner), Diane Larson, Curtis Hogenson, Norman Arvidson (now

[42]Response to Substitute Counsel of Record filed by Faegre and Eckland in U.S. Court of Federal Claims dated October 29, 2007 at p. 3 -- attached as Hogenson Reply App. p. 3.

> deceased) and Robert Abel (now no longer partner). The purchase price at the date of purchase was $610,000.
>
> R & R Investors subsequently sold Maranatha Inn on April 1, 2000 for the selling price of $485,000...The selling agent was sternly told ... that the USDA mortgages on the property could not be prepaid, in order to take the property out of the [FmHA § 515] program....[43]

Berger also sent a letter to Eckland about two months before the February 2003 contingency fee contract forwarding the buying and selling documents, Berger described the losses the 1989 Hogenson R & R Investors partnership incurred as a result of the federal government's 1997 breach of contract:

> Without factoring in any price increase over the years of inflation in the real estate market, the direct losses are substantial and created by the government's action in eliminating mortgage pay off.[44]

The evidence is contrary to Eckland's representation to this Court that "the allegation that the Attorneys have sided with Strangis is untenable on its face."[45] Yet, the untenable fact is the Hogenson R & R Investors lost legal representation of Faegre and Eckland to Strangis regardless of what Faegre or Eckland thought.

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[43] Hogenson Principal Brief at p. 19; App. p 499.

[44] Hogenson Principal Brief at p. 20; App. p. 506.

[45] Eckland Resp. Br. at 20.

Moreover, if Faegre and Eckland now claim the Hogenson R & R Investors are no longer their client, fiduciary obligations to the "nonclient" come to bear. As found under Restatement (Third) of the Law Governing Lawyers, §51 – Duty of Care to Non-Clients, liability can occur when reliance of the lawyer's legal services are relied upon by the "nonclient:

> For purposes of liability under § 48, a lawyer owes a duty to use care within the meaning of § 52 in each of the following circumstances...
>
> (2) to a nonclient when and to the extent that:
>
> (a) the lawyer or (with the lawyer's acquiescence) the lawyer's client *invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies*; and
>
> (b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection;

Under § 51, at the very least, Faegre and Eckland "invited" the 1989 Hogenson R & R Investors partnership to rely on Faegre's and Eckland's provision of opinions and other legal services and leading the Hogenson partnership to believe it had representation. But as Faegre and Eckland have readily admitted, they represented the Strangis' R&R Investors partnership at least from the time the Strangis partnership executed their November 1, 2004 contingency fee agreement – all done unbeknownst to the Hogenson partnership.[46]

From November 2004 until 2008, the Hogenson partnership relied on Faegre's and Eckland's continued misrepresentation of legal representation because Faegre and Eckland never notified the 1989 Hogenson R & R Investors partnership of the Strangis representation. In their collective view, the 2004 Strangis partnership superceded the 1989 Hogenson R & R Investors partnership 's original Tucker Act claim in the U.S. Court of Federal Claims. Faegre and Eckland perpetrated four years of deception upon the Hogenson partnership.

Ultimately, Faegre and Eckland violated numerous provisions of the Rules of Professional Conduct and their fiduciary duties when they undertook representation of Strangis and plunged the Hogenson R & R Investors partnership into the underlying interpleader litigation and its attendant consequences.

III. Faegre and Eckland violated the Rules of Professional Conduct when they failed to disclose to the Hogenson R & R Investors partnership the signing of the 2004 Strangis partnership regarding the same litigated claim thereby creating an immediate conflict unbeknownst to the existing client.

[46] The Strangis partnership entered into a second contingency fee agreement with Faegre and Eckland on December 31, 2005.

Faegre's and Eckland's failure to understand whom they represented as the client intended — here the 1989 Hogenson R & R Investors partnership — lays waste to arguments that the partnership had not been harmed. First, but for the action of the Hogenson partnership to attempt the substitution of counsel in the U.S. Court of Federal Claims, Faegre and Eckland would have given to the 2004 Strangis partnership the full settlement recovery of the 1989 Hogenson R & R Investors partnership's original Tucker Act claim.

Second, only when new counsel for the Hogenson partnership filed a motion for the substitution of counsel in federal court on October 11, 2007, did Faegre and Eckland file an interpleader action in Hennepin County District Court on October 25, 2007. Contrary to Eckland's and Faegre's assertion and implications of the Hogenson partnership's "remorse over the Tucker Act settlements," the Hogenson partnership's claims are steadfast in describing the overt deception and misrepresentation of Faegre and Eckland.

Thus, Faegre and Eckland violated numerous Rules of Professional Conduct based on their actions including secretly undertaking representation of the Strangis partnership and giving it the Hogenson partnership Tucker Act claim and settlement recovery. Faegre's and Eckland's actions expose them to malpractice liability.

The violated Rules of Professional Conduct include: Rule 1.1 – Competence; Rule 1.2 – Scope of Representation; Rule 1.4 (a)(2) governing consultation with the client regarding client objectives and the means by which to accomplish the objectives; Rules 1.4 (a)(2) and (3) by not immediately consulting and informing the Hogenson partnership that Faegre and Eckland signed in 2004 and 2005 contingency agreements with the Strangis partnership; Rule 1.6 – Confidentiality of Information; Rule 1.7 – Conflict of Interest. See also Comment 2 to Rule 1.7 (clearly identifying the client), Comment 3 (declining representation when conflicts of interest arise); Comment 4 (withdrawal of attorney upon discovering a conflict); and Comment 6 (loyalty to current client).

Faegre and Eckland further violated Rule 1.13 (e) when, knowing the 2004 Strangis partnership signed Faegre's and Eckland's contingency fee agreements, and paying a retainer while knowing that the 1989 Hogenson R & R Investors partnership as former owners of the Maranatha Inn Property, and subsequently failed to "explain the identity of the client."

In addition, Faegre and Eckland violated their fiduciary duties to the 1989 Hogenson R & R Investors partnership under the "standard of care" and "standard of conduct" owed. Accepting the 2004 Strangis partnership as a client in the Tucker Act litigation and taking a position hostile to the interests of an existing client violated Faegre's and Eckland's "duty of loyalty" owed to their Hogenson partnership client.[47]

Faegre and E&B also violated their duty to deal honestly with their client under Restatement (Third) of the Law Governing Lawyers §16, Comment e: "[a] lawyer may not knowingly make false statements to a client and must make disclosures to a client necessary to avoid misleading the client." Indeed, Faegre and Eckland did mislead the 1989 Hogenson R & R Investors partnership by not telling them of the Strangis client relationship immediately in 2004.

IV. Contrary to Eckland's Response Brief asserting that a declaratory judgment claim is improper, fails to appreciate the governing statute under Minn. Stat. 555.

When facts are not in dispute and a party is entitled to judgment as a matter of law, a determination of a declaratory judgment is proper. Likewise, if there are disputed facts a trial may be held on the declaratory judgment action.[48]

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[47] *See Pine Island Farmers Coop, v. Erstad & Riemer, P.A.*, 636 N.W.2d 604 (Minn. App. 2002).

[48] Minn. Stat. § 555.09.

The Hogenson R & R Investors partnership raising a declaratory judgment as a counterclaim is acceptable practice.[49] Contrary to the claim that a declaratory judgment will accomplish nothing,[50] Eckland misses the point of the underlying litigation of the counterclaim plaintiffs. The issue for determination is whether the attorney client relationship existed solely with the Hogenson R & R Investors partnership as opposed to the Strangis partnership. The determination of an existing contractual relationship, should this Court agree, will bind all parties of the underlying action. After such a determination, it will provide and complete one element necessary for the tort claims including malpractice and conversion.

CONCLUSION

The lower court misapplied the principles and governing law of Minnesota's Uniform Partnership Act to the underlying facts of the instant case. As a matter of law, the lower court's decision should be reversed granting summary judgment to the Appellants. Furthermore, this Court should reverse the lower court and grant Appellants' motion for declaratory judgment.

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[49] *Reliable Mach. Works, Inc. v. Unger,* 144 F. Supp. 726 (S.D. 1956).

[50] Eckland Resp. Br. at 27-28.

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CERTIFICATE OF COMPLIANCE

Pursuant to Minnesota Rule of Civil Appellate Procedure 132.01, subd. 3, the undersigned hereby certifies, as counsel for Appellants, that this brief complies with the type-volume limitation as there are 5,882 words of proportional space type in this brief. This brief was prepared using Microsoft Word 2007.

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