



Professional legal information, resources, and services

A Monthly Newsletter from the Hamilton County Law Library

July 2010

Simon, Arpadi, LeRoy, and the Scope of Lawyers' Immunity from Malpractice Liability

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Introduction

Lawyers in Ohio enjoy qualified immunity from liability to non-clients for legal malpractice. The two exceptions to immunity are (1) when the lawyer is guilty of malice, fraud, bad faith, or collusion, and (2) when the non-client was in privity with the client. [*Simon v. Zipperstein* \(1987\), 32 Ohio St. 3d 74, 76](#); [*Scholler v. Scholler* \(1984\), 10 Ohio St. 3d 98](#), paragraph one of the syllabus. The Supreme Court of Ohio has adhered to a rule of "strict privity," taking a narrow view of the privity exception. In [*LeRoy v. Allen Yurasek & Merklin*, 114 Ohio St. 3d 323, 2007-Ohio-3608](#), oral argument (Apr. 3, 2007) at <http://www.sconet.state.oh.us/videostream/archives/2007>, the Supreme Court of Ohio clarified the privity exception, holding that a transfer of stock by a close-corporation majority shareholder does not, in and of itself, implicate any fiduciary duty toward minority shareholders. Thus, a minority shareholder is not in privity with the majority shareholder, and the majority shareholder's lawyer is immune from suit by minority

shareholders, over a stock transfer.

LeRoy clarified and distinguished [*Arpadi v. First MSP Corp.* \(1994\), 68 Ohio St. 3d 453](#), in which the court held that "those persons to whom a fiduciary duty is owed are in privity with the fiduciary such that an attorney-client relationship established with the fiduciary extends to those in privity therewith **regarding matters to which the fiduciary duty relates.**" *Id.* at paragraph three of the syllabus (emphasis added). The court in *Arpadi* held that limited partners are in privity with their general partners and may sue general partners' lawyers for malpractice related to partnership business deals.

This article synthesizes *Simon, Arpadi, and LeRoy* and presents the questions lying in their wake.

Arpadi: Fiduciary duty as privity

Under the strict privity rule, lawyers generally owe their fiduciary duty to only their client. So generally only clients can sue for malpractice.

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Tech Tip: What you get with your subscription to the Hamilton County Law Library

By Julie Koehne, Assistant Law Librarian—Systems

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¹ 100% firms have a firm membership, which provides membership benefits to all professionals at the firm. An individual at a firm can also be a member, with fewer privileges.

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³ The Law Library's Fastcase.com service is not restricted by firm size but is only available to members in Hamilton County, or in counties in Indiana, Ohio, and Kentucky that are contiguous to Hamilton County.

(Immunity, continued from page 1)

Simon, 32 Ohio St. 3d at 76; Scholler, 10 Ohio St. 3d 98, paragraph one of the syllabus. Behind this general proposition, however, have lurked at least two questions. The first question was whether a decedent's estate-planning lawyer is immune from liability to a non-client who is an intended beneficiary of the estate plan.

In Simon, the court said yes. The second question was, what exactly is a "matter to which the fiduciary duty relates," such that there is privity? In LeRoy, the court clarified that in the context of business associations, such matters are only matters related to the conduct of business.

In Arpadi, the defendant lawyers had provided legal services to a limited partnership with respect to a private placement memorandum for a real estate deal that later went bad. Because a partnership is not a business association separate from its partners, the supreme court deemed the "client" to be the general partner. The plaintiffs were the limited partners. The supreme court held that the general partner's lawyer was not immune from suit by the limited partners, because the limited partners were in privity with the general partner by virtue of the fiduciary duty general partners owe limited partners. The court held: "[T]hose persons to whom a fiduciary duty is owed [limited partners] are in privity with the fiduciary [general partner] such that an attorney-client relationship established with the fiduciary [general partner] extends to those in privity therewith regarding matters to which the fiduciary duty relates." Arpadi, 68 Ohio St. 3d 453, paragraph three of the syllabus (emphasis added). The court ruled that because the real estate deal was such a matter, the general partner's lawyer was not immune.

Anti-Arpadi measures

Arpadi "provoked an uproar among trust and estate lawyers." Deborah A. Coleman and M. Patricia Culler, "Arpadi Dilemma Not Revived, But New Ethics Rules May Mean New Duties for Lawyers," 17 Ohio Prob. L.J.

45A (West Nov./Dec. 2006). Applying Arpadi to lawyers representing estates and trusts involving multiple beneficiaries could create an inherent conflict of interest. See *id.*

The Ohio State Bar Association prompted the General Assembly to add Section 5815.16 to the Ohio Revised Code, which protects lawyers representing trustees and fiduciaries of decedents' estates from the exposure that Arpadi recognized. Section 5815.16 provides: "Absent an express agreement to the contrary, a lawyer who performs legal services for a fiduciary [defined as a "trustee under an express trust or an executor or administrator of a decedent's estate"], by reason of the attorney performing those legal services for the fiduciary, has no duty or obligation in contract, tort, or otherwise to any third party to whom the fiduciary owes fiduciary obligations." Ohio Rev. Code § 5815.16(A) (enacted in 1998 as Ohio Rev. Code § 1339.18(A)).

The supreme court itself recognized the problem Arpadi created and adopted Ethical Consideration 5-16 into the now superseded Code of Professional Responsibility. Former EC 5-16 provided: "A lawyer representing a fiduciary [defined as 'a trustee under an express trust or an executor, administrator, or personal representative'] that owes fiduciary duties to third parties does not solely by representation of the fiduciary engage in multiple representation even if the third parties' interests conflict with the interests of the fiduciary or other third parties."

But outside the trusts and estates context, the question remained: what did the *Arpadi* court mean by "matters to which the fiduciary duty relates"? Part of the answer came in *LeRoy*.

LeRoy

A. An Introduction to LeRoy

LeRoy was a Civil Rule 12(B)(6) case. The complaint alleged that the defendant lawyers conspired with a son and grandson to

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transfer controlling shares in the family corporation from the grandmother to the grandson. The grandmother, the son, and the two plaintiff daughters were the only four shareholders in the corporation. The complaint alleged that the lawyers purported to simultaneously represent the corporation, the grandmother, the son, and the grandson.

The court of common pleas dismissed the sisters' complaint on the ground that the lawyers were immune under Simon. The court of appeals reversed on the ground that two exceptions to the rule of lawyer immunity applied. The first was that the complaint pled malice. The second was that the fiduciary obligation owed by the grandmother as a controlling shareholder to the daughters as minority shareholders (see [*Crosby v. Beam* \(1989\), 47 Ohio St. 3d 105](#)) gave rise to privity such that the grandmother's lawyers owed duties to those minority shareholders with respect to this transfer of stock. The supreme court affirmed the reinstatement of the complaint on the basis of malice. But the court expressly rejected the court of appeals' privity analysis.

B. The court clarifies “privity . . . regarding matters to which the fiduciary duty relates.”

The defendants in *LeRoy* argued that exercise of the controlling shareholder's power is the only type of “matter to which the controlling shareholder's duty relates.”

Transfer of stock is not an exercise of the power with which a control share is imbued. The defendants argued that the court of appeals' decision effectively created a new cause of action for disgruntled minority shareholders against majority shareholders who transfer their shares. The OSBA in an amicus brief argued that affirming the court of appeals would essentially extinguish the lawyer-immunity rule and result in lawyers for shareholders frequently finding themselves in conflicts of interest.

The plaintiffs argued that the transfer of a controlling interest in the corporation **must** be a “matter to which the controlling shareholder's duty relates,” because there is no matter more closely related to the fiduciary duty owed among close-corporation shareholders than the matter of who owns the controlling stake in the corporation - the very thing that gives rise to the duty.

The court, siding with the defendants, ruled that the plaintiffs' claims fell outside the scope of “matters to which the fiduciary duty relates.” For purposes of argument, and without deciding the issue, the court assumed that *Arpadi* applies with full force to close corporations. The court distinguished *Arpadi* on the facts. The malpractice in *Arpadi* concerned “partnership matters” - a real estate deal of the partnership. The malpractice in *LeRoy* concerned a transfer of corporation stock, not any part of the corporation's business.

A private transfer of stock does not, in and of itself, implicate any fiduciary duty on the part of a majority shareholder toward minority shareholders. [¶] The transfer of stock [challenged] in this case is fundamentally different from the legal work at issue in *Arpadi*, in which the alleged legal malpractice that occurred was for legal representation specifically done regarding partnership matters. The transfer of stock was a purely private matter, personal to [the decedent], and was not done on behalf of [the corporation]. For that reason, the legal work done by defendants regarding that transfer does not implicate the fiduciary duties discussed in

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either Arpadi or Crosby. LeRoy at ¶¶27-28. The fact that the defendant lawyers were also the long-time lawyers for the corporation was not a factor in the court's privity analysis. The significance of LeRoy is its clarification that under the strict privity rule, "matters to which the fiduciary duty relates" consist of only the entity's business activities.

In the wake of Simon, Arpadi, and LeRoy Simon, Arpadi, and LeRoy leave at least two related issues. First, the strict privity rule of Simon is vulnerable. Ohio is in the minority on this issue. Depending on one's characterization of the term "strict privity," only two to eight other states adhere to the strict privity rule. See *Connely v. McColloch* (Wyo. 2004), 83 P.3d 457, 463 (identifying Ohio and two other states); *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.* (Tex. 2006), 192 S.W.3d 780, 783 n.1 (identifying Ohio and eight other states). The majority of states have adopted different versions of a general rule that estate-planning lawyers can be liable to their deceased clients' intended beneficiaries. These states have relied on both contract law (third-party beneficiary theory) and tort law (foreseeability of injury). See *Connely*, 83 P.3d at 461-63.

LeRoy did not present the Supreme Court of Ohio with the opportunity to revisit Simon. See LeRoy at ¶17. But the court has twice in the last eight years accepted appeals to revisit the strict privity rule of Simon. In 2000, the court accepted the appeal in *Dykes v. Gayton* (2000), 90 Ohio St. 3d 1442, to consider overruling Simon. But the case was dismissed after a settlement. See 91 Ohio St. 3d 1418, 1466. Currently pending are two appeals seeking the overrule of Simon: *Schlegel v. Gindlesberger*, 5th Dist., 2006-Ohio-6917, appeal accepted for review,

2007-Ohio-1986, oral argument (Jan. 8, 2008) at [http://](http://www.sconet.state.oh.us/videostream/archives/2008/)

www.sconet.state.oh.us/videostream/archives/2008/, and *Ryan v. Wright*, 10th Dist., 2007-Ohio-942, appeal accepted for

review, 2007-Ohio-3699. The second issue in the wake of Simon, Arpadi, and LeRoy is whether the Arpadi holding applies with equal force to close corporations. The court in LeRoy expressly declined to address that question, LeRoy at ¶29, which holds the potential for inconsistent results in the estate-planning context. The supreme court has not yet addressed the strict privity rule in the increasingly common context of business associations as estate planning tools, and neither Arpadi nor LeRoy presented a traditional estate-planning-malpractice scenario. Under Arpadi, limited partners may sue general partners' lawyers over partnerships' business matters. Nothing in Arpadi or LeRoy suggests that the strict privity rule should be applied any differently to a limited partnership created primarily as an estate-planning device, as opposed to one created to operate a traditional business. If the Arpadi holding applies to only partnerships, then under otherwise identical facts, the qualified immunity of estate planning lawyers is a function of whether the estate plan makes use of a limited partnership versus some other type of business association. This issue might survive decision of *Schlegel and Ryan*, neither of which involves business associations as estate-planning tools.

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What We're Blogging About

If you haven't looked at the Law Library's blog recently, please visit. You may want to subscribe to help you stay up to date on legal issues, especially those facing Ohio. We also post news about upcoming events, including CLEs, at the Law Library.

<http://www.hamilton-co.org/cinlawlib/blog/default.asp>

Here are some of the recent topics about which Chuck Kallendorf has been blogging:

- Ohio uniform domestic relations forms
- Cincinnati sued over panhandling rules
- Ohio bans "transfer fee covenants"

Real-Time News and Social Searching

By Mary Jenkins, Law Librarian & Director

Say you're looking for the latest news and opinions on a merger, a natural disaster, a sporting event, or a political issue – or some other newsworthy, popular topic de jour. A traditional search engine will generate results on the topic but may not catch real-time news, the up-to-the-minute developments and comments on that issue. There are many options now for people who want the very latest updates on a topic; results that take into account the time stamp or recency of a post and the popularity of the topic.

The three mainstream most popular search engines, [Google](#), [Yahoo](#), and [Bing](#), now offer real-time searching (information that's findable as soon as it's posted). In Google, for example, you can do a search and then click on Updates on the left navigation pane. Instead of the usual results from sources like [Wikipedia](#), government and corporate sites, and the like, you'll get the latest tweets and posts on the topic from various social media sites. That's what I mean by real-time: the latest buzz or social activity around a topic. You might consider this frivolous if the topic is just the latest fan chatter about Hollywood but consider the newsworthiness of on-the-scene public reporting via social media from a protest, the site of a severe weather event, or a crime scene.

An example: As I write this, social media sites and the news media are lit up with stories of the execution of the convicted murderer in Utah. A traditional search on that topic brings up, primarily stories from news organizations and press releases from various agencies and organizations. When using the real-time or updates feature, I get the very latest Twitter, YouTube, Facebook, and blog posts on the topic. That can be good, bad, or ugly, but the point is that it represents the most current buzz on the matter. I am able to dip my toe into the raging river of public information and opinion.

Further, because many of the search engines now include context or geographic location, I can see the origination point for posts.

But beyond those big three sites, there are a number of other interesting and/or good search applications to try out, depending on your need for information. Here are a few reliable search engines to try out:

[Collecta](#): This search engine pulls stories from mainstream media and social media including blogs, Flickr, Twitter, and more. It provides a time stamp on all results. Collecta is getting loads of venture capital to develop its product so it may emerge as a major player.

[Yauba](#): Does all of this regurgitation of personal content make you queasy? First, remember the searches pull up publicly posted material. Second, turn to Yauba for privacy. Yauba has been around for about a year and it collects no data about the searcher. It claims exceptionally relevant results and complete respect for your privacy.

[Booshaka](#): Use Booshaka for social searching, specifically Facebook posts as it is built on the FB platform. Assuming the people or topics you're searching have intentional or unwittingly public presences, you'll find the pulse with Booshaka.

[OneRiot](#): OneRiot searches those posts to Twitter, Digg, Facebook, mobile apps, etc. that contain a link. In searching shared links, it points users to the latest hot topics and social buzz.

[Scoopler](#): Like other services mentioned here, Scoopler searches across Twitter, Digg, Delicious, Flickr, and other sites and applies an algorithm that values relevancy and popularity of the terms. Like Collecta and Twazzup, Scoopler has access to everything on Twitter.

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(Real Time, Continued from page 6)

Finally, there are many tools available to help you aggregate and manage the content you are tracking; mash ups, Twazzup, Tweet-meme, and HootSuite among them. And TweetDeck now tracks Facebook and MySpace status updates in addition to tweets. If you would like to discuss those options, please contact me. Think of all of these newer applications as one more set of research tools and as complementary to more traditional news and trend-spotting sites.

Credits: I was introduced to some of these sites by Stephen Arnold, author of the forthcoming book, *Google Beyond Text* and of the blog *Beyond Search* <http://arnoldit.com/wordpress/> during a Special Libraries Association program on emerging technologies.

For more information, read "Myths, Realities & the Future of the Real-Time Web" on ReadWriteWeb at http://www.readwriteweb.com/archives/myths_realities_the_future_of_the_real-time_web.php or search www.slideshare.net for presentations on the topic.



Free seminar: Helpful Smartphone Apps for Legal Professionals

Impress clients and shock opposing counsel by expertly using the legal applications available via your iPhone or other wireless device. On Thursday, July 22, Emily Janoski-Haehlen from Chase College of Law will offer an introduction to legal applications. According to Emily, "If you have a smartphone, whether it's an iPhone, BlackBerry, Palm or Droid, there are thousands of apps to help you stay connected."

What: Helpful Smartphone Applications for Legal Professionals

Why: To learn about the different applications available to you via your mobile device. *This class does not offer CLE credit.*

When: Thursday, July 22 @ 12:30

Where: Hamilton County Law Library Boardroom

How: Call 513.946.5300 to register, or email gherald@cms.hamilton-co.org



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Offering library users appropriate, current, and reliable information is our goal. Therefore, we value your input! Please share with us with us any suggestions you have regarding our print and electronic resources. Contact library director Mary Jenkins at mjenkins@cms.hamilton-co.org or 513.946.5300 with your ideas. We look forward to hearing from you.

Mark Your Calendars For These Upcoming Events!

- ◆ **Helpful Smartphone Apps for Legal Professionals**
Thursday, July 22 @ 12:30
- ◆ **Access Public Records Low Cost/No Cost**
Wednesday, August 11 @ 12:30

For more information, or to register, call 513.946.5300 or email gherald@cms.hamilton-co.org

July Holiday

The law library will be closed on Monday, July 5 in observance of Independence Day.



July 2010 Law Library Newsletter

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