Do Estate Planning Attorneys Have a Duty to Advise Their Clients Regarding Trustee-Owned Life Insurance?

By Barry D. Flagg and Neil E. Schoenblum

Introduction

When an attorney represents a client with respect to the client's estate plan, the attorney owes that client certain duties and contractual obligations. These duties and obligations constitute the basis of the attorney's liability in tort, fiduciary, and contract law. That liability is imposed when the attorney fails to render advice or renders incorrect or inadequate advice that results in damage to the client, be it the settlor or the trustee. Liability may also extend to the settlor's intended beneficiaries.

Life insurance is a central component of many carefully crafted estate plans. The life insurance is often trustee-owned life insurance (TOLI), with the ownership vehicle being an irrevocable life insurance trust (ILIT) created during the life of the settlor.[1] Thus, one might assume that the law regarding the nature and extent of the attorney's duties and contractual obligations with respect to life insurance, TOLI, and ILITs has been spelled out carefully in case law and commentary. In fact, however, there is a surprising dearth of authority and commentary respecting these matters.

Several relatively recent developments have accentuated the need for addressing these matters. First, life insurance products and the mechanisms for owning them are becoming increasingly popular and, in some cases, quite sophisticated.[2] Second, estate planning attorneys may well involve themselves, or be drawn in episodically or continuously, perhaps as a result of client pressure, into the design, implementation, oversight, and termination of these policies and the administration of trust vehicles for owning and managing them. Third, the Uniform Prudent Investor Act (UPIA), which has been widely adopted, appears to have heightened the standard of care owed by a trustee with respect to life insurance. This has a number of implications for the estate planning attorney and his or her own exposure to liability. Fourth, in response to the UPIA, certain states have enacted statutory relief, essentially exculpating trustees from liability with respect to TOLI. To the extent the trustee is "off the hook," the dissatisfied settlor or beneficiary can be expected to look elsewhere to be made whole when the policies or trust vehicle fails to deliver the anticipated benefits. An inviting target is the estate planning attorney. In this regard, the recent New York Court of Appeals decision in *Estate of Schneider v. Finmann*[3] indicates a more expansive conception of the duties and obligations owed by the estate planning attorney with respect to life insurance tax planning and TOLI. On the other hand, the precise scope of attorney duty and contractual obligation remains ill-defined. Fifth,

Barry D. Flagg, CFP, CLU, ChFC, is the inventor and founder of Veralytic, Inc., the only patented online publisher of life insurance pricing and performance research and product suitability ratings. Mr. Flagg was the youngest Certified Financial Planner (CFP) in history, a Chartered Life Underwriter (CLU), and Chartered Financial Consultant (ChFC). He received his degree at the W. Paul Stillman School of Business at Seton Hall University, and is a member of the Society of Financial Service Professionals (SFSP), the Financial Planning Association (FPA), the National Association of Insurance and Financial Advisors (NAIFA), the Top of the Table (MDRT TOT), the Association of Advanced Life Underwriters (AALU), and the Beta Gamma Sigma National Scholastic Honor Society.

Neil E. Schoenblum is General Counsel and Senior Trust Officer for Provident Trust Group in Las Vegas, Nevada. He received his J.D. degree from Cornell Law School, where he served as the Managing Editor of the *Cornell Law Review*, and an LL.M. degree in Estate Planning from the University of Miami School of Law.

there still exist critical barriers to the estate planning attorney's liability, notwithstanding the arguable expansion of the attorney's duty of care. Two notable barriers, privity and the statute of limitations occurrence rule, are not what they once were, as courts have chipped away or, in some cases, demolished these stalwart defenses to liability. Yet, they still may afford the estate planning attorney protection, notably vis-à-vis trust beneficiaries.

The purpose of this article is to highlight for the estate planning attorney, who deals with life insurance and TOLI, the exposure to contract, negligence, and fiduciary liability. The estate planning attorney simply cannot afford to ignore the changing, but still ambiguous, landscape of duty concerning this evolving area of law. The article seeks not only to flesh out the current parameters of the jurisprudence, but to detail those everyday planning situations that could give rise to unanticipated duties and obligations.

I. The Estate Planning Attorney's Traditional Role with Respect to Life Insurance

Life insurance has been and remains a central tool in estate planning. It provides post-mortem liquidity to survivors and is a replacement fund for a portion of the estate lost to taxes. It may also serve as a source of liquidity and borrowing during the insured's life.[4]

Tax considerations have been recognized as central to the effective use of life insurance in estate planning.[5] Because proper estate planning permits avoidance of estate taxation of the proceeds upon the insured's death, as well as income taxation, the return on the investment in life insurance can be maximized. Traditionally, estate planning attorneys have advised their clients to establish ILITs so as to remove the life insurance from the insured's federal gross estate and, thereby, avoid the estate tax.[6] If the insured already owns the policy, the attorney will oversee its transfer, if possible, within the limits of the annual exclusion and lifetime exemption. Either way, the attorney is likely to provide advice regarding the use of *Crummey* letters with respect to the transfer of the interpolated terminal reserve value of the policy and with respect to future premium payments.[7] Quite commonly, this ends the attorney's involvement.

Of course, the attorney's efforts here are intended to maximize the after-tax return on investment. Nonetheless, this near singular focus of many estate planning attorneys on tax avoidance may be misplaced, and may make those attorneys vulnerable to new liabilities. Taxation is not the only cause for loss of the anticipated return on the life insurance investment. Another, and potentially more common, cause of loss is rooted in the prevailing and questionable life insurance industry sales practice of comparing illustrations of hypothetical policy values.[8] Such illustrations are a commingling of the insurer's actual cost representations intermixed with some often arbitrary assumption for the rate of return on invested assets underlying policy cash values. This scrambled form makes it difficult, if not impossible, for the client or the estate planning attorney to understand what is actually being charged, and, as such, instead gives the false impression that the illustrated premium is the cost of the policy.

However, unless guaranteed, the premium is no more the "cost" of a life insurance policy than is the $2,000 contribution to an Individual Retirement Account (IRA). In both cases, the cost is the amount deducted from the life insurance premium and/or IRA contribution. In addition, the higher the assumed policy interest/earnings rate reflected in these illustrations, the more policy costs are presumed to be paid by policy interest/earnings, and the lower the premiums that appear to be required. For this reason, many life insurance policies sold to clients using these illustrations of hypothetical policy values based on financial assumptions did not pan out over time.[9]

For example, in the 1980s, when interest rates were near all-time highs, prevailing industry marketing practices were focused on the sale of universal life and other interest-sensitive type products because point-of-sale illustrations commonly given to clients and their estate planning attorneys showed apparently low premiums. However, these low illustrated premiums were calculated presuming then high interest rates would remain the same forever (as silly as this sounds in hindsight). When interest rates declined back to historical levels, policies risked lapsing before the decedent's death, unless timely action was taken to infuse the policy with additional cash or to substitute a new policy based on more realistic illustrations, actual guarantees, and a reduced death benefit.

The "flavor of the day" marketing practice continued in the 1990s with a shift in focus to selling variable life products when stock market returns were near all-time highs and when point-of-sale illustrations were again given to clients and their estate planning attorneys showing apparently low premiums. Nevertheless, these low illustrated premiums were still calculated presuming then high assumed policy earnings rates would remain the same forever. When the stock market corrected, clients either received unexpected calls for additional premiums or risked policies lapsing without value and without paying a claim. In both cases, these artificially high, and historically unsustainable, rates of return often masked high policy costs and led to unfulfilled client expectations, consumer complaints, arbitration, and litigation.

The failure of the policy to perform properly as an investment may also be attributed in some situations to the particular insurer. For instance, over time, the insurer may not be able to maintain original pricing representations, may suffer from poor investment performance, or for other reasons may not be able to meet all its obligations, even though, at the acquisition of the policy, it was rated highly. The failure of the policy to perform over time may also be the result of the insured's behavior. The insured may borrow from the trust that holds the policy. The trustee, seeking to accommodate the insured, may borrow against the policy in order to raise the funds to lend to the insured. Alternatively, if the policy is not self-sustaining, the failure of the insured to continue making contributions to the trust to fund the policy will jeopardize the original return on investment and even the very existence of the asset.[10]

In short, minimization of the tax burden is only one facet of an overriding strategy of maximization of net return on investment. A proper recognition that tax savings are part and parcel of the more central inquiry into the appropriateness and viability of life insurance as a trust investment is critical.[11] Furthermore, this is not a one-time inquiry, but one of continuous monitoring and evaluation throughout the life of the insured and the existence of the trust.

While term insurance is ordinarily not considered as having an investment component for purposes of federal taxation,[12] it, too, implicates investment decisions in terms of the asset mix of the trust portfolio. Indeed, over time, reliance on term life insurance may prove unduly costly with respect to the intended return and may be unaffordable or nonrenewable. The open question is whether the estate planning attorney has a duty to advise the client as to whether the terms of the policy under consideration will yield the return at the anticipated cost. At present, there is no certain answer to this question, which may be largely fact dependent.

II. Uniform Prudent Investor Act and the Evolving Conception of Life Insurance

Traditionally, life insurance trusts, unlike other trusts, have been funded with a single principal type of asset—life insurance. Often, the trustee owns a single policy, with, perhaps, some cash left over after payment of the periodic premium that has been contributed by the settlor. Other than the payment of a premium following contributions by the insured annually, or payments out of the cash buildup in the policy itself, the trust rarely involves activity or monitoring by the trustee. The expectation is that the policy will pay as promised at death. The trustee is often a relative, personal friend, or a professional, such as the estate planning attorney.[13] Not uncommonly, the trustee's minimal services are provided gratis. Those minimal services may well involve no more than receipt and deposit of contributions from the settlor, the sending out of *Crummey* letters to beneficiaries, and after the passage of the requisite time period, payment of the annual premium to the insurer.[14]

Unfortunately, the precise fiduciary duty owed by a trustee of an ILIT to its beneficiaries has never been clearly spelled out and still remains an unresolved question. Without a specific statute detailing that duty, if any, the practice has been to assume, without any serious inquiry, that the ILIT is a fiduciary-duty free zone. Now that virtually all states have enacted the Uniform Prudent Investor Act, this blasé attitude is giving way to more reflective consideration of the matter. Furthermore, the wealth of life insurance options, many of which do not comport with the usual low balance for risk associated with a primary goal of a fixed amount of death proceeds, enhances the need for investigation and monitoring from the acquisition of the life insurance to the date of payoff.[15] A number of commentators have emphasized that life insurance must now be selected, managed, investigated, and monitored just like other assets.[16] While the poor performance of a single asset is no longer a basis for liability, the argument has been made that the failure to consider life insurance in the context of the overall portfolio and in comparison to other possible life insurance policies that could be acquired can result in a breach of fiduciary duty and surcharge.[17]

The question whether the duties of the ILIT trustee regarding the portfolio are *sui generis* or, indeed, are not unlike those of the trustee of any other trust governed by the UPIA remains unclear. Some indications of where the law is heading can be derived from an Indiana court of appeals decision, *In re Stuart Cochran Irrevocable Trust*[18] (*Cochran*), which involved a suit by the children of the insured-settlor, contending that the trustee of an ILIT, KeyBank, had breached its fiduciary duty under Indiana's version of the UPIA. The trust was formed in the 1980s to hold several then "popular" interest-sensitive-type products with a collective death benefit of $4,753,539 and where cash values are required by regulation (as a practical matter) to be invested in high-grade bonds and government-backed mortgages. However, as interest rates declined in the 1990s and the equity markets boomed with dot-coms, these interest-sensitive products fell out of "flavor" and were replaced with two variable universal life policies with a combined death benefit of $8,000,000, where cash values were invested in various equity-type mutual-fund-like separate accounts. After a period of poor market performance, the variable universal life policies also fell out of "flavor" and were replaced with a single guaranteed universal life policy with a death benefit of $2,536,000. Following the death of the insured, the beneficiaries argued breach of fiduciary duty seeking damages of more than $5,000,000 (i.e., the difference between the $8,000,000 death benefit of the variable life policies versus the $2,536,000 death benefit from the guaranteed universal life policy). The court boiled down the issue to whether it was "prudent for the Trustee to move the trust assets from insurance policies with significant risk and likelihood of ultimate lapse into an insurance policy with a smaller but guaranteed death benefit?"[19]

The *Cochran* court held that the trustee had acted prudently. In particular, it emphasized that appropriate review and careful consideration of less than perfect alternatives had been undertaken. The court also emphasized that there had been no inappropriate delegation of the trustee's ultimate decision-making responsibility, despite retention of consultants, and noted that the trustee had engaged its own outside, independent expert with no economic stake in the outcome of the suitability determinations. But, even though the court did not hold KeyBank liable, the decision is of critical significance because the court reinforced the need for trustees of ILITs (1) to monitor performance of the trustee-owned life insurance as long as it is an asset of the trust, (2) to investigate the suitability of the policy as it relates to possible alternatives particularly when the TOLI holding encounters funding problems and is likely to lapse before the insured's death, and (3) to choose among alternative policies and to implement the chosen solution in a prudent manner. While the action taken may not prove correct in hindsight, the fact that the process followed evidences fulfillment of the trustee's fiduciary duty and was sufficient to insulate the trustee from liability.

Another recent decision, by the Delaware Chancery Court, *Paradee v. Paradee,*[20] stands for the proposition that the trustee of an ILIT must act rigorously on behalf of the trust beneficiaries with respect to the management of life insurance held in trust and must not use it for the benefit of the settlor and in a fashion that undercuts the return to the trust beneficiaries. *Paradee* involved a suit by a beneficiary of an ILIT against the trustee of an ILIT for breach of trust. The trustee had entered into an unsecured, fixed-rate loan to settlor and his spouse. The proceeds for the loan were obtained by the trustee by borrowing from the otherwise paid-up Manufacturers Life Insurance Company policy held in trust. As a result, the policy value was drawn down and the policy eventually lapsed. Because of the reduced net policy value, the trustees also received fewer shares of Manufacturers Life Insurance Company when it demutualized. The Delaware Chancery Court found the trustee liable for breach of his fiduciary duty, holding that he had violated the duty of loyalty and the duty to manage the trust "with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in like capacity and familiar with such matters would use to attain the purposes of the account."[21] The case emphasizes the need for the trustee not simply to act as the agent of the settlor, even though this is largely what is expected by the settlor in the typical ILIT arrangement. Once in trust, the assets must be managed exclusively for the benefit of the beneficiaries consistent with the settlor's original intent and value may not be diverted for the settlor's subsequent personal benefit. The trustee of an ILIT must exercise care, skill, prudence and diligence, just like the trustee of any other trust.

While *Cochran* and *Paradee* afford guidance regarding the fiduciary duty of the trustee of an ILIT under the UPIA and the comparable Delaware Code, there is no authority yet that explicitly grapples with the uniqueness of the ILIT and whether this calls for special treatment and exemption from some of the requirements that are generally imposed on trustees. This puts the estate planning attorney who is advising the trustee, whether by express or implied contract,[22] in a difficult position.

Until the ILIT trustee's duty of care is spelled out, the safest course for those estate planning attorneys advising ILIT trustees is that the trustee ought to behave as any other trustee would in selecting and managing the trust portfolio. At a minimum, this means that the estate planning attorney must stay abreast of the ongoing developments with respect to fiduciary duty of the ILIT trustee and proactively advise that the trustee do no less than the trustee in *Cochran. Paradee*'s concern with conflict of interest is also of critical importance to the estate planning attorney. Not only must the attorney bring the issue of conflict of interest to the attention of the trustee, but the attorney must also be careful not to breach his or her own fiduciary duty[23] of loyalty and confidentiality by representing expressly or impliedly the various interested persons in the TOLI.

III. State Statutory Relief for Trustees

Notwithstanding the immediately foregoing recommendation, the typical ILIT is fundamentally different than other trusts. The imposition of the same duties on ILIT trustees as are imposed on trustees of other trusts consistent with Modern Portfolio Theory will raise the costs of oversight prohibitively and discourage the typical, uncompensated, nonprofessional trustee from serving. In an effort to achieve the trust's stated goals, regulation could destroy it to the point where the ILIT may well become uneconomical.

An increasing number of states have recognized this conundrum and are addressing it by statute. These statutes err on the side of relieving ILIT trustees of the duties imposed by the UPIA or potential liability under a comparable statute.[24] Although the goal of these statutes is fundamentally the same, each statute's distinctive language adds nuance that may be significant in determining the precise nature of the ILIT trustee's remaining investment-related duties, if any, with respect to trustee-owned life insurance.[25] For example, North Carolina Code § 36C-9-903.1(a) explicitly states that the trustee has no duty with respect to a contract of life insurance upon the life of a settlor "(i) to determine whether any such contract is or remains a proper investment; (ii) to exercise policy options, including investment options, available under any such contract; or (iii) to diversify any such contract." Florida Statutes Annotated § 736.0902, however, is more expansive in its release of the ILIT trustee from duties that, presumably, would otherwise be imposed. That statute provides:

> "(1) Notwithstanding the provisions of s. 518.11 or s. 736.0804, with respect to any contract for life insurance acquired or retained on the life of a qualified person, a trustee has no duty to:
>
> (a) Determine whether the contract of life insurance is or was procured or effected in compliance with s. 627.404;
>
> (b) Determine whether any contract of life insurance is, or remains, a proper investment;
>
> (c) Investigate the financial strength of the life insurance company;
>
> (d) Determine whether to exercise any policy option available under the contract for life insurance;
>
> (e) Diversify any such contract for life insurance or the assets of the trust with respect to the contract for life insurance; or
>
> (f) Inquire about or investigate the health or financial condition of any insureds.
>
> (2) For purposes of this section, a 'qualified person' is a person who is insured or a proposed insured, or the spouse of that person, who has provided the trustee with the funds used to acquire or pay premiums with respect to a policy of insurance on the life of that person or the spouse of that person, or on the lives of that person and the spouse of that person."

The fact that a state has enacted a statute does not assure exculpation from liability. A careful consideration of these exculpatory statutes reveals gaps and limits of coverage. For instance, the Florida statute requires that trustees not be compensated for services not performed. This begs the question that, if a trustee is no longer providing particular services pursuant to the Florida exculpatory statute, did that trustee correspondingly reduce its trustee fees, and, if not, does such exculpatory language protect the trustee after all? Furthermore, exculpatory statutes are generally read narrowly and interpreted against the party claiming relief from liability. Accordingly, an advisor would be mistaken to assume that the trustee of an ILIT need not be concerned about the duties imposed by the UPIA or comparable statute.

An obvious solution to the problem of ill-defined ILIT trustee duty-of-care is to include an exculpatory provision in the trust instrument itself. One problem with this approach, however, is the difficulty of proper drafting. A correct balance needs to be struck between relieving the trustee from onerous or uncertain obligations on the one hand, and assuring that the trust policy or policies experience appropriate management and oversight over the years. Moreover, even when the objective is the inclusion of a far-reaching exculpatory provision in the instrument, such clause may not be enforced. The provision may be held to be at odds with what a court determines to be the public policy mandates of the UPIA or comparable state statute.[26]

Ironically, the estate planning attorney, if representing the settlor, may well have a duty to alert the settlor to the existence of such statute and to take action to assure that it does not apply. While the statute affords relief to trustees, it puts the trust estate itself in jeopardy. A trustee will simply not have to be concerned about exercising the sort of oversight that would be required in the case of the ordinary trust.

What, then, would the estate planning attorney's duty entail in this situation? To the extent a duty is owed to the settlor, the duty might well involve discussing the exculpating statute with the settlor and, if the settlor is so inclined, including a provision in the trust instrument that does not exculpate the trustee. Alternatively, a provision could be included in the instrument requiring the trustee to consult from time to time with an independent, expert reviewer.

Most critically, the issue cannot simply be ignored. Especially since the settlor's goal is to maximize the benefits, relative to acceptable levels of risk, ultimately available to the intended beneficiaries at the settlor's death, a waiver of trustee liability coupled with the trustee's inattention to the life insurance, could result in the beneficiaries receiving considerably less than originally anticipated and defeating the very plan incorporated in the documents drafted by the estate planning attorney.

If representing the settlor, the attorney may owe a duty to include a clause overriding the statutory waiver or establishing a mechanism for ongoing oversight, not only to the settlor, but directly to the beneficiaries[27] as well. In addition, to the extent the attorney is engaged directly in estate planning for a beneficiary or in representing the beneficiary with respect to the settlor's estate planning, the attorney who is made aware of the beneficiary's ILIT interest, ought to insist on the inclusion of a clause overriding the statutory exculpation of the trustee. If the trust is already operational, then the attorney ought to insist on an immediate review as well as the inclusion of a mechanism for ongoing review. This request may, in turn, bring the settlor's original estate planner back into the fold. If that attorney takes on the responsibility for responding to the request by the beneficiary's attorney, then he or she may see the duties owed to the settlor expand with respect to the TOLI.

IV. Basis for Attorney Liability

Although there has been increasing focus on the duties of the ILIT trustee, there has been virtually no consideration of the duties owed by the estate planning attorney with respect to the selection of life insurance or the creation and administration of an ILIT.[28] In determining whether the attorney owes some sort of duty, the nature of that duty, and to whom it is owed, the scope of representation must first be considered. In this regard, importantly, the duty of the *attorney* may exist whether or not a state statute relieves the *trustee* of any duty to exercise oversight over the policies held in trust. The attorney is generally regarded as owing three separate types of duties—those founded in contract, those founded in tort law, and those founded in fiduciary law. Each theory of law imposes its own preconditions to liability, understanding of whom is owed the duty, burdens of proof, calculus of relief, and statute of limitations. While many courts invoke the three theories when imposing liability on attorneys, they often fail to analyze and apply the theories distinctly, thereby creating a great deal of analytical confusion and uncertainty as to what is required of an attorney in representing the client. Nevertheless, a cautious attorney ought to be aware of the nature and consequences of the application of each theory, assuming that a court does apply them in an analytically distinct fashion.

A. Contract

The relationship between the estate planning attorney and his client is clearly a matter of contract law, whether express or implied. Thus, to the extent there is an engagement letter and it is carefully drafted, the attorney's responsibility with respect to life insurance or, for that matter, any other topic, can be excluded from the contract. Therefore, one consideration for the estate planning attorney is to carefully define the limits of his duties, taking care to exclude responsibility with respect to the suitability of policies being acquired by the trustee or transferred into trust. Moreover, the estate planning attorney must take care not to alter the contract implicitly by subsequently taking on matters that indicate a departure from the original terms of the engagement letter. Limiting the scope of estate planning representation may be easier said than done. To begin with, the scope of the contract may be held by a court to extend beyond its express terms. Even if the attorney is careful not to provide advice beyond the terms of the express contract, an implied contract may be recognized as existing with respect to those matters that are not mentioned, but which may be rationally implied from the terms of the contract.[29] In addition, some courts may impose an implied obligation to perform the express terms in a competent and professional manner.[30] Other courts reject the imposition of such obligation based on contract law and simply require performance of the express contract terms. Nevertheless, the estate planning attorney cannot be certain which approach will apply in his or her instance of representation. If an obligation of competent and professional representation is implied, this leads to the separate and completely unanswered question of what constitutes competent and professional representation with respect to life insurance and ILIT estate planning.

Entirely apart from obligations imposed by the law, there is the very practical problem that the client is likely to expect comprehensive advice and will not be satisfied with an attorney who conceives of his role as no more than the drafting of governing instruments.[31] Indeed, this is the whole point of estate planning—there are many threads, some involving law, some taxes, some finances and preservation, enhancement and transition of wealth. The purely legal ones cannot be neatly segregated; nor would any self-respecting planner seek to do so.[32] Life insurance is a classic example of one of those threads regarding which, in practice, the legal/tax/financial components are inextricably intertwined. For example, when the client asks the attorney to review and advise as to the agent's or broker's policy recommendations, the estate planning attorney will have a difficult time begging off, or limiting his advice to the actual life insurance contract's "legal" issues and still retain the client.

Assuming then that the estate planning attorney believes life insurance is an integral part of the estate planning services he or she offers to a client who is the settlor-insured, will the estate planning attorney be expected to advise on such matters as the inner workings of the policy, its comparability and competitiveness to other policies from a financial standpoint, the long-term reliability of the insurer, and the policy's appropriateness in terms of the settlor's objectives in maintaining the policy and in owning it in trust?[33] To the extent that the estate planning attorney consults with and responds to queries of the family member serving as trustee or family members who are beneficiaries, will there be a *continuing* obligation to oversee the trust administration, including the trustee's new duties under the UPIA? Even if not formally agreed to, voluntary involvement in these issues may well give rise to a finding of implied contractual obligations. Even without active involvement in these matters, they may be deemed to be implied contractual obligations as a natural extension of the advice that the estate planning attorney dealing with life insurance and TOLI is otherwise required to render.

B. Tort Law: Professional Malpractice and Ordinary Negligence

Apart from contract law, the attorney faces exposure to tort liability in the semblance of professional negligence or malpractice. The attorney is required to exercise the proper skill and professional judgment under the conditions existing at the time the advice was given. The duty imposed on the attorney arises out of the same attorney-client relationship that gives rise to a contract claim. But, while the contract theory of liability is based on the consensual understanding reached by the attorney and client[34] and that is voluntarily undertaken, the professional malpractice claim is not based on the agreement of the parties. Rather, a standard of care that is independent of the parties' understanding is imposed on the attorney. It arises out of social responsibility for the protection of others and depends on an analysis of "foreseeability, the likelihood of injury, the nature of risks, the magnitude of the burden of guarding against injury, and the consequences of placing the burden upon the defendant."[35]

With respect to professional negligence, the plaintiff will have to establish (1) a duty of care owed by the attorney to the particular plaintiff; (2) the breach of that duty arising from the scope of the attorney-client relationship; (3) the failure of the attorney to act in a reasonable and prudent manner; (4) injury; (5) the extent of the damages suffered; and (6) proximate causation whereby the breach caused the injury.[36] But if there is no duty of care, the further issues are not implicated.

The initial question—what is the duty of care of an estate planning attorney today with respect to the selection and performance of trustee-owned life insurance—is a question of law.[37] Courts determine the duty of care based on an amorphous connection of various policy considerations.[38] There is simply no way to predict when and how an attorney's duty of care with respect to life insurance will alter and in what sense. To date, courts have shown little interest in expanding the attorney's duty beyond the drafting function, at least when the attorney has chosen not to go beyond the provision of the instrument.[39] Furthermore, several judicial decisions have made clear that the attorney has no continuing duty to monitor or to investigate performance of the plan over time.[40] This viewpoint is reflected in the ACTEC Commentaries on the Model Rules of Professional Conduct 1.4, in which the conception of "dormant representation" is set forth. After the initial drafting phase and the transfer of assets into trust, the attorney has no further duties with respect to the estate plan, presumably including life insurance and the ILIT. Representation enters a dormant phase until renewed by a client contact at a later date to which contact the attorney is responsive. Other judicial decisions have held that the attorney has no duty to confirm client information provided by conducting an independent investigation[41] or to investigate the extent of the client's assets.[42] Indeed, even when the attorney has represented the family overall and has a continuing association, there is no obligation to follow up with respect to the estate plan.[43]

Even when the attorney has actively advised as to investments and, in doing so, has not exercised appropriate due care and diligence, the attorney has been held not to be liable for malpractice. In one earlier case, the New York Surrogate's Court held that the trust beneficiaries lacked privity to bring suit and that only the trustee had standing to do so. However, even if the trustee sued, there would be no liability unless the trustee could establish "that the investment losses were proximately caused by the failure to properly advise him and that but for such failure the loss would not have occurred."[44] In addition to echoing this same theme, a more recent decision, *Zinn v. Salomon, Smith Barney, Inc.*,[45] found that the attorney could not be held liable because the client, too, had been actively involved in monitoring the trustee's investment decisions. Thus, when the attorney represents a client who remains actively involved in portfolio performance and investment choice, the attorney cannot be held liable for investment decisions the client has effectively made.

These decisions should provide little comfort to the estate planning attorney. First, the strict privity rule is in decline as a means of limiting the persons to whom the attorney owes a duty.[46] Second, the "but for" causation is a minority position. As long as the advice or lack thereof of the estate planning attorney could be shown to have been a substantial factor with respect to the client's or intended beneficiary's loss, this may suffice. Third, in many cases, the client will not be actively involved in insurance-related decisions, so that the attorney will not be able to shift responsibility to the client.

To the extent that the estate planning attorney is performing tasks typically not within the accepted view of the attorney's scope of legal representation, the estate planning attorney's potential exposure to liability may be even greater than in the case of legal malpractice. Assume that the attorney actively participates in the review and selection of an appropriate life insurance policy or policies for the trust and advises on the most tax-advantaged methodology for structuring and financing it over time. The more aggressively the attorney involves himself in the life insurance facet of the planning process and it is deemed distinct from and not inextricably tied to legal advice, the more likely the attorney may have liability imposed based on his function as an independent advisor or consultant and not as an attorney.[47] In this situation, the elements of negligence and the proof necessary to establish a claim may be considerably more lenient than in the case of professional malpractice. Furthermore, defenses to liability, especially with regard to claims by third parties, may be far less formidable.[48] Perhaps, most troubling, the attorney may be placing in jeopardy his or her malpractice insurance coverage. While many policies are written broadly to cover advice that is not technically "legal" in nature, there can be no assurance that is the case with respect to a particular policy or that the insurer will not seek to adopt a narrow reading of the contract language.[49] Additionally, the attorney may be regarded as volunteering services and holding himself out as an expert, upon which the client has every reason to rely. In this case, the scope of the attorney's duties may, indeed, morph beyond what the law traditionally imposes on him, and require him to sort through the relevant issues and guide the client. There is a considerable disparity of case law from one state to another on whether the attorney owes any duties to the ILIT trustee or the trust beneficiaries with whom he has not met. This disparity is discussed below.[50] However, duties extending to persons other than the settlor may well be recognized as a matter of law if the attorney actually is advising the trustee. In the typical ILIT situation, this is a quite commonplace occurrence, especially when a close relative is serving as trustee or co-trustee.[51] If other family members, who are trust beneficiaries, are also involved in discussions or the planning process, the attorney's duty may well extend to them. Even if they are not directly involved, the beneficiaries could be foreseeably harmed by the selection of an inappropriate policy or by a failure to oversee the policy during the period of trust administration.

No doubt, the estate planning attorney would be well advised to shy away from matters that are clearly non-legal in nature. Even when the non-legal is clearly tied to the legal, the attorney should not render advice with respect to matters in which he or she lacks expertise. If the attorney lacks the expertise to do the analysis, he or she must make this clear and may be able to satisfy the client by recommending the retention of an independent consultant who can do so. The addition of such person to the team may actually enhance the attorney's credibility over time, especially if the result is the achievement of the intended financial results and distributions sought at the front-end.

C. Tort Law: Fiduciary Duty

A third basis for the estate planning attorney's liability is breach of fiduciary duty. Of all bases for liability, this is the most ill-defined and controversial.[52] For a majority of courts, this basis for liability stands on equal footing with professional negligence. While professional negligence is based on a breach of a standard of care, breach of fiduciary duty is said to be based on a standard of conduct. The distinction between a standard of care and a standard of conduct is not really defined. More to the point, the great majority of fiduciary duty cases are concerned with an attorney's violation of the duty of loyalty when there is a conflict of interest in representation.[53]

With respect to life insurance, a typical situation in which a breach of fiduciary duty might be alleged is one in which the attorney, representing the settlor, also proceeds to advise the trustee or other family members as well. The trustee's interest and that of the settlor are not precisely the same. Certainly, they may differ once the policies are held in trust. To the extent that the trustee routinely seeks advice from the attorney, such as whether the *Crummey* letters have been handled properly, two questions must be addressed. First, as a matter of duty of care, must the attorney also review the continued viability of the policies in light of the goals of the settlor as set forth in the governing instrument, the current economic condition of the policy against the backdrop of general economic conditions, and familial circumstances? Most likely, the answer to this first question is "No." Of course, if the attorney volunteers responses to questions about the policy itself, this can open the door to broader duties in terms of ordinary negligence.[54] A second question that also must be addressed is one that invokes the issue of breach of fiduciary duty. By now advising the trustee, is the attorney caught up in a conflict of interest between the interests of the trustee and the beneficiaries the trustee represents on the one hand and the interests of the settlor, the attorney's original client?

The possibility for conflict of interest is especially rife in the context of life insurance planning. One need only consider the diverse investment goals of the various parties.[55] As the attorney may very well be involved in discussions with all these parties, the fiduciary duties owed each will almost certainly clash. A notable example is when a state statute waives the duties that might otherwise be imposed on the trustee by the UPIA.[56] The attorney will be required to preserve trustee freedom from liability at the same time assuring it in serving the interests of the settlor and, possibly, the beneficiaries. This is a situation ripe with unavoidable conflicts of interest.

V. Significance of *Estate of Schneider v. Finmann*

Recognizing that the principal basis for legal liability for estate planning advice will be professional negligence, the estate planning attorney must also recognize that the concept of duty is not a static one. As more attorneys are alerted to issues surrounding TOLI and more of them address these issues on behalf of their clients, the judicial opinion of what constitutes the scope of an attorney's duties with respect to TOLI may alter. Estate planning attorneys may be expected, at a minimum, to undertake or advise the client to obtain an expert initial analysis of the policies under consideration. Support for this expansion of the estate planner's duty with respect to trustee-owned life insurance can be found in the recent decision of the New York Court of Appeals in *Estate of Schneider v. Finmann.*[57]

In *Estate of Schneider,* the personal representative of a decedent's estate sued the decedent's attorney for malpractice. The personal representative alleged that the attorney had "negligently advised decedent to transfer, or failed to advise decedent not to transfer, the [life insurance] policy which resulted in an increased estate tax liability."[58] Specifically, a $1,000,000 policy had been transferred from one entity of which the insured was the principal owner to a second entity of which the insured was the principal owner, and finally back to the insured in the year prior to his death. The court held that the estate could sue the attorney for having "caused harm to the estate. The attorney estate planner surely knows that minimizing the tax burden of the estate is one of the central tasks entrusted to the professional."[59]

There had been no previous decisions recognizing in such clear-cut terms the estate planning attorney's duty regarding tax savings. The language of a well-known, earlier decision imposing malpractice liability, *Bucquet v. Livingston*,[60] was carefully limited in scope so as to apply only to the tax aspects of the marital deduction. The court emphasized the unique awareness that California attorneys should have of marital deduction planning, based on the dubious rationale that the marital deduction was enacted as a response to the advantage enjoyed by decedents of community property states like California.

In *Bucquet*, the attorney had drafted a two-trust estate plan, one of which was intended to qualify for the marital deduction. The other trust was intended to be a nonmarital family trust with a life estate going to the surviving spouse. However, in drafting the nonmarital trust, the attorney included a provision giving the surviving spouse a general power of appointment. After the settlor's death, the attorney was retained to handle probate and related matters. He failed to advise the surviving spouse of the tax consequences of the general power of appointment and that she could disclaim it and, thereby, avoid California inheritance tax. She subsequently sued him successfully for professional malpractice.

The court in *Bucquet* emphasized that powers of appointment are a significant part of trusts and estates law generally and that the marital deduction is one of the "best known estate planning devices." Thus, even if the attorney's role is circumscribed narrowly to simply include traditional trusts and wills drafting, there is a basis for concluding that potential tax problems from faulty drafting are within the ambit of a reasonably competent and diligent practitioner.

Estate of Schneider v. Finmann is an important decision because it mainstreams life insurance tax planning in the same manner that *Bucquet* mainstreams marital deduction and power of appointment tax planning. In each case, a court has determined as a matter of law that the attorney engaged in estate planning is required to exercise due care and diligence with respect to such issues as part of his overall representation of the client.

Taking this reasoning one step further, if "minimizing the tax burden" is a duty that an attorney engaged in estate planning must consider in connection with life insurance on the client's life, then why is not the appropriateness and long-term investment quality of that life insurance also within the scope of the attorney's duty? There would not appear to be any point in requiring an attorney-advisor to create a trust or utilize some other tax-saving technique with respect to life insurance, if there is no duty to advise with respect to the prudent management and preservation of the underlying asset itself or the achievement of the settlor's initial investment and distributional goals. Or at least a duty to advise clients and/or beneficiaries as to their right to seek advice about the prudent management and preservation of the underlying asset. The tax savings will be of little benefit, for example, if the policy will not yield the promised net return or may not even survive the lifetime of the insured client.

No doubt, a distinction can be drawn between an attorney's awareness of the tax law and an attorney's facility to engage in financial and investment analysis and advice. However, "minimizing the tax burden" connotes considerably more than a dry dissertation on the tax consequences of a course of conduct chosen by the settlor. The quoted language indicates an affirmative duty, the need to engage proactively to obtain a particular result for the client that is net positive from a financial standpoint.

Furthermore, tax law is recognized as a specialty and few attorneys, including those who engage in wills and probate, would claim expertise. Yet, they are expected now in California and New York to be able to advise with respect to the tax consequences of key components of estate planning. What, then, should the attorney do, if he or she simply lacks the skills to engage in tax or financial analysis? One possible solution is for the attorney to inform the client upfront that this sort of advice is invariably necessary when dealing with the life insurance component of estate planning and that outside expertise will be required. Informing the client after he is "all in" may be too late. At that point, the client may rightfully believe that the attorney should be responsible for such additional costs.

VI. Role of Privity

No matter how expansive the attorney's duties may be as a result of the evolving conception of how TOLI must be administered, the attorney need have little concern if he cannot be sued. Much of the opinion in *Estate of Schneider* actually addresses the standing of the estate and trust beneficiaries to bring suit against the estate planning attorney following the death of the insured. Historically, only the actual client could sue the attorney for professional negligence.[61] This was known as the privity requirement, designed to limit the universe of persons to whom the attorney would be deemed to owe a duty of care, an especially important consideration in light of the attorney's fiduciary duty of loyalty owed to his or her client. Thus, in a strict privity state, a trustee or trust beneficiary could not sue the attorney for losses sustained due to inadequate or incorrect advice regarding the ILIT and any policies the trustee owns.[62] The beneficiaries of the trust could not even sue the attorney for the trustee.[63] Thus, privity in its strict form constitutes a powerful neutralizer of any potential liability the attorney might otherwise have. Indeed, once the insured client is deceased, he can no longer sue; nor can anyone else, as they were not in privity with the estate planning attorney.

New York has rigorously enforced a strict privity rule. In *Estate of Schneider,* the New York Court of Appeals changed all that. It confirmed that privity still barred suit by the beneficiaries of the decedent's estate. However, it also held that the decedent's estate could sue the attorney. The Court of Appeals, relying in part on an earlier decision of the Texas Supreme Court,[64] held that the estate essentially stands in the shoes of the decedent. Accordingly, since the client might have sued the attorney, the estate may sue.[65]

The court in *Estate of Schneider* did not consider the reach of the holding. Specifically, if the estate is truly in the shoes of the decedent, the recovery against the estate planning attorney ought to be quite limited. After all, during his life, the client would have likely suffered no consequences other than a defective plan requiring re-working. Thus, the recovery would be limited to the fees paid the attorney for a defective product. On the other hand, if as appears to be the case, the estate can bring a malpractice action, for injuries suffered when the plan became fixed at the decedent's death, then the recovery would include the taxes unnecessarily paid because of the poor handling of life insurance in the estate. Still, the problem with this result is that the estate is standing in the shoes of the decedent, not the beneficiaries.

In the case of a trust, including an ILIT, the question is whether the beneficiaries, as well as a trustee have the right to sue. If the attorney simply represented the settlor, the trustee's standing to sue will turn on whether the privity rule is observed.[66] If it is observed, then the trustee will not have a right to sue since there was no contractual relationship with the attorney. Even if the trustee is the proper party with standing to sue the attorney, a sharp distinction may be drawn between the interests of the trust itself and the trustee individually. Courts have disagreed as to whether the trustee in his individual capacity may sue the attorney in order to recoup damages paid to beneficiaries for improper management of assets, based on the attorney's advice.[67]

As for the right of the beneficiaries, their standing is likely to be even more uncertain than that of the trustee. Even when the attorney has provided counsel to the trustee, and not just the settlor, so that privity is not an issue, the courts have been divided on the standing of the beneficiaries.[68] Some have expressed concern that permitting the beneficiaries to sue clashes with the principle that the trustee's interests may at times be in conflict with those of some or all of the beneficiaries.[69] The beneficiaries' only solution, if the trustee fails to sue the attorney, is a suit against the trustee.[70]

The effect of *Estate of Schneider*, with respect to the strict privity rule, unless narrowly construed by later decisions, may well be to bring New York more or less in line with the majority of states where the privity barrier has fallen.[71] In those states, where there has been a clean break with the privity doctrine, the effect is to extend the duty owed to the client to the intended beneficiaries or to the trustee, acting on behalf of the interests of the beneficiaries.[72] Since trusts may have numerous beneficiaries, some with present interests and others with future vested or contingent interests, the attorney's liability exposure for breach of duty to persons other than the client with whom he contracted is not insignificant.[73]

However, the assumption should not be made that the abandonment of the privity rule with respect to wills applies to *inter vivos* transfers as well, as in the case of an ILIT. A striking example is Florida. In *Lorraine v. Grover, Ciment, Weinstein & Stauber*,[74] the court made clear that privity still applied: "Generally, an attorney is not liable to third parties for negligence or misadvice given to a client concerning an *inter vivos* transfer of property." The court reasoned that the abandonment of privity with respect to wills was a "limited exception…to the privity requirement in legal malpractice actions."

VII. The Effect of the Statute of Limitations

Another barrier that has traditionally worked in the attorney's favor against liability for flawed estate planning representation is the statute of limitations. The traditional rule is that the statute begins to run when the error occurs (the occurrence rule), which is more often than not at the completion of the drafting process or, possibly, when property is irrevocably transferred into trust.[75] Especially when the statute is abbreviated in length, such as a year or two, the ability of persons other than the contractual client to sue is severely limited, if not impossible. This is the case, even if there is no privity requirement. For example, if the statute of limitations begins to run with an ILIT at the time the policy is acquired by the trustee, there is little likelihood that the settlor, trustee, or any of the beneficiaries will discover the issue before they will be time-barred from suing.

Just as the abandonment of privity, in many states, has eliminated a formidable barrier to lawsuits against attorneys who engage in estate planning, dramatic alterations in the jurisprudence relating to the statute of limitations have magnified the exposure of the attorney. The majority of jurisdictions now hold that the statute of limitations begins to run only when a beneficiary discovers or reasonably could be expected to discover the breach of duty by the attorney.[76] In the case of beneficiaries who are not adults or not yet ascertained, this discovery rule leaves the door open to malpractice claims for years following the completion of the estate planning. Even with respect to competent adult beneficiaries of an ILIT, in many cases they will not reasonably be able to discover flaws in the trust or the monitoring of the policies until the insured's death. This could be years after the ILIT was established and the policy acquired. As a consequence, the liability of the estate planning attorney could have a very long and very large tail risk.

For instance, ILIT trustees generally have a duty to incur only those costs that are reasonable and appropriate for the purposes of the trust. However, because prevailing life insurance industry marketing practices revolve around the use of illustrations of hypothetical policy performance, and because these illustrations reveal neither costs nor whether those costs are justified relative to peer-group product alternatives, ILIT trustees will often lack the ability to demonstrate that they have investigated policy costs as required. Unfortunately, for the trustee and possibly the estate planning attorney, this deficiency may most likely be discovered upon the death of the insured, potentially a long time after the completion of the estate plan and the trust invested in the policy. As such, trustees may be vulnerable to accusation by trust beneficiaries that they were over-charged for the amount of insurance they actually received and to the claim that, had they not been over-charged, they would have received more death benefits for the same premiums. Even worse, comparing illustrations of hypothetical policy performance for different policies can be considered "misleading" and "improper" by the chief regulatory body of the financial services industry and the chief actuarial body of the life insurance industry, respectively. As a result, estate planning attorneys may also be vulnerable to accusation by trust beneficiaries that they were improperly advised about their rights under prudent investor statutes. In addition, trust beneficiaries may again assert that they were over-charged for the amount of insurance actually received, and that had they not been over-charged, they could have received more death benefits for the same premiums.

Nevertheless, the statute may still run for an abbreviated period of time beginning from the time of discovery—perhaps, only one year. Here is where the characterization of the attorney's advice may prove significant. If the attorney is liable for ordinary negligence, because the advice rendered is not "legal" in nature, then the statute of limitations may actually be for a longer period of time following discovery than in the case of professional negligence.[77]

The estate planning attorney may also face continuing exposure to liability, notwithstanding the statute of limitations, for another reason. Under the continuing representation doctrine, the cause of action may not accrue for statute of limitations purposes until the representation of the client, with respect to the same matter in which the legal malpractice occurred, terminates. This doctrine is especially troublesome in the ILIT setting, because the attorney's informal response to queries during the existence of the trust may justify a finding of continuing representation. Indeed, some states, such as Ohio, may require "an attorney to provide actual notice to a client of the termination of the attorney-client relationship" and that "[i]n the absence of a clear-cut affirmative act by either party which terminates the relationship, the parties' subjective intent and reasonable expectations should be considered."[78]

There is one wrinkle in the statute of limitations analysis that requires further consideration. Unlike an estate, the ILIT established during the life of the insured may be operational for many years. If the trustee fails to bring suit in a timely fashion after assuming the trusteeship or within the allowable period following the time when he should have discovered flaws in the policies held in trust, the trustee will no longer be able to sue.[79] What recourse will the beneficiaries have later on? Certainly, if the beneficiary knows of the acts by the trustee constituting the breach, the beneficiary can sue the trustee. While the beneficiary may have to defer to the trustee to sue the attorney, the beneficiary can seek to compel the trustee to sue and may, in certain circumstances, even sue the attorney in equity for restoration of losses if the trustee has refused to sue.[80] However, the statute of limitations will begin to run for the beneficiary as well from the time that the beneficiary discovered or could have discovered information as to the attorney's challenged conduct.[81]

Conclusion

Life insurance plays a vital role in many clients' estate planning. The estate planning attorney will need to address the topic at some point in the representation of the client. What remains unsettled is, just what are the estate planning attorney's duties and obligations to the client and other interested persons with respect to life insurance? There may also be uncertainty as to who the client is, a matter that may alter over time when dealing with the establishment and oversight of an ILIT. All this uncertainty puts the estate planner in a rather precarious posture, especially as lawsuits for attorney malpractice are now commonplace and show no signs of abating. Too constricted a view of the requisite advice can expose the attorney to liability; too liberal a view of the requisite advice can result in the same. The attorney faces liability under three distinct theories of law, contract, express or implied; the tort of legal malpractice or professional negligence; and the tort of breach of fiduciary duty. At a distance, each of these seems redundant. Closer consideration reveals that each has its own ins and outs—thereby increasing the likelihood that an attorney, despite seeking to sidestep the liability trap, may actually get caught in it.

The exposure to liability now confronting the estate planning attorney dealing with life insurance and TOLI is to a considerable degree the consequence of a number of relatively recent developments. These include the widespread enactment of the UPIA with its application of Modern Portfolio Theory principles to ILITs, the increasing diversity and complexity of life insurance products, the growing enactment of statutes exculpating trustees from the application of the UPIA, *Schneider*'s expansion of the attorney's duty of care to include the task of advising how to minimize the taxation of life insurance, and the declining significance of the defenses of privity and the occurrence rule. When coupled with the willingness of courts to impose liability for ordinary negligence on lawyers rendering "non-legal" advice and the readiness of some courts to find implied contractual obligations and/or continuing representation on the basis of marginal ongoing contact with the interested parties, the estate planning attorney dealing with life insurance is in a truly exposed position.

One possible solution is a carefully crafted agreement with the client as to the scope of representation. However, the attorney's subsequent conduct may override the express terms. Moreover, various obligations and duties may be implied from the express terms in not always easily anticipated ways. Another alternative is for the estate planning attorney to advise the client to retain the appropriate expertise to deal with those "non-legal" aspects of life insurance that are not within the attorney's expertise. Even then, the estate planning attorney must be careful to avoid conflicts of interest and to avoid activities and communications that could expand the universe of persons he or she is deemed to represent. Attorneys ought to be liable for the injuries they cause. However, the costs imposed should not be so high as to discourage the rendering of valuable legal advice on account of risk aversion. When it comes to life insurance products and ILITs, the exposure of the estate planning attorney is especially significant for the reasons set forth above. Hopefully, this article has provided some valuable insights regarding this burgeoning problem.

Endnotes

1 Trustee-owned life insurance is not limited to ILITs, but they are the standard form for holding life insurance in trust.

2 In the most recent issue of the ACTEC Law Journal, two articles addressed some of these more sophisticated products and vehicles. See Paul S. Lee et al., Innovative CLAT Structures: Providing Economic Efficiencies to a Wealth Transfer Workhorse, 37 ACTEC L.J. 93 (Summer 2011); Richard Kagan & Jon Gallo, A Short, Practical Private Placement Life Insurance Primer: Or Why Estate Planners Need to Understand Things Like Facultative Reinsurance, 37 ACTEC L.J. 165 (Summer 2011).

3 15 N.Y.3d 306, 933 N.E.2d 718, 907 N.Y.S.2d 119 (2010).

4 See David Westfall et al., Estate Planning Law & Taxation ¶ 5.03. Another use of life insurance is in connection with closely-held businesses and, in particular, buy-sell agreements. See, e.g., Joshua E. Husbands, Life Insurance Planning for Closely-Held Businesses, 36 Est. Plan. 3 (Oct. 2009). The present article does not focus on this use of life insurance, although many of the same considerations with respect to the estate planning attorney's duty of care would apply.

5 See Westfall et al., supra note 4.

6 See, e.g., A. James Casner & Jeffrey N. Pennell, Estate Planning § 8.2; John R. Price & Samuel A. Donaldson, Price on Contemporary Estate Planning § 6.24; Howard M. Zaritsky & Stephan R. Leimberg, Tax Planning with Life Insurance: Analysis with Forms ¶ 5.03.

7 See Farhad Aghdami, Income, Gift, and Estate Tax Planning with Life Insurance, at III.A.2.c.(1), in ALI-ABA, Fundamentals of Estate Planning (June 11-12, 2009), reprinted in Westlaw, at SPO62 ALI-ABA 479.

8 Both the Financial Industry Regulatory Authority (FINRA) and the Society of Actuaries (SOA) prohibit and caution against the comparison of illustrations of hypothetical policy values for the purposes of determining product suitability to a given client situation because doing so can be "misleading" and is considered "improper," respectively.

9 See Richard M. Weber & Gordon A. Schaller, Stress Test Life Insurance Now to Avoid Future Heartache, 38 Est. Plan. 3, 12-13 (Apr. 2011).

10 For a thorough discussion of the issues that arise in selecting and maintaining TOLI, see Christopher P. Cline & Barry D. Flagg, Fiduciary Pitfalls with Trust-Owned Life Insurance, reprinted in Koren Estate and Personal Financial Planning Update, Sept. & Oct. 2007 (two parts). See also Marya P. Robben & Bob Cohen, Estate Planning with Life Insurance Policies: Reduce Potential Liability Claims While Improving a Client's Estate Plan, 24 Prob. & Prop. 59 (Jan.-Feb. 2010).

11 That life insurance is an investment requiring standard risk-return analysis is recognized by the IRS as well as commentators. See, e.g., Rev. Rul. 2009-13, 2009-21 I.R.B. 1029 ("Both the Code and the courts acknowledge that a life insurance contract, although a single asset, may have both investment characteristics and insurance characteristics."); Christopher P. Cline, Trustee Investments, § II.F., BNA Tax Mgmt. Port. No. 861-1; Duncan E. Osborne & Mark E. Osborne, Asset Protection: Trust Planning, at III.L.2.e., in ALI-ABA, Planning Techniques for Large Estates (May 16-20, 2011), reprinted in Westlaw, at SSO39 ALI-ABA 1, 29 (referring to "the investment of trust assets in life insurance"). The "investment" character of life insurance also is evident from the secondary market that has developed in terms of stranger-owned life insurance (SOLI). See Michael Lovendusky, Illicit Life Insurance Settlements, 40 Brief 46 (Spring 2011); J. Alan Jensen & Stephan R. Leimberg, Stranger-Owned Life Insurance: A Point/Counterpoint Discussion, 33 ACTEC L.J. 110 (Fall 2007).

12 See Charlene Davis Luke, Beating the "Wrap": The Agency Effort to Control Wrap-around Insurance Tax Shelters, 25 Va. Tax Rev. 129, 138-39 (2005).

13 See Kathryn A. Ballsun et al., Trustee Administration of Life Insurance, 31 ACTEC L.J. 280, 286 (Spring 2006).

14 See, e.g., Melvin A. Warshaw, ILIT Trustees: Bridge Out Ahead…Lock in Your Navigation System Now, 24 Prob. & Prop. 32, 32 (July/Aug. 2010).

15 See Weber & Schaller, supra note 9, at 12-13 (noting also the role of technology and financial analysis software in revealing the weakness in standard assumptions for various types of insurance being offered even currently).

16 See, e.g., Warshaw, supra note 14, at 32 (acting as a passive trustee under a "buy and hold" strategy is "no longer adequate for a trustee [of an ILIT]. Today, an ILIT trustee must do more than pay the premiums and send out annual Crummey notices to beneficiaries.").

17 See Ballsun et al., supra note 13, at 282-83.

18 901 N.E.2d 1128 (Ind. Ct. App. 2009).

19 Id. at 1134.

20 2010 WL 3959604 (Del. Ch. Oct. 5, 2010).

21 Id. at *10. The court relied on 12 Del. Code § 3302(a). Delaware is one of the few states that has not enacted the UPIA.

22 See discussion infra Part IV.A.

23 See discussion infra Part IV.C.

24 See, e.g., 12 Del. Code § 3302(d). Although Delaware has not enacted the UPIA, it has its own statute which sets forth the standard of care to be exercised by a fiduciary with regard to investments. The trustee of an ILIT is excused from a series of specified actions with respect to the life insurance so long as the limitation of the trustee's duties is disclosed in the governing instrument or a separate writing delivered to each insured at the inception of the life insurance contract or before an event giving rise to a claim.

25 As an alternative, exculpatory language could be included in the governing trust instrument. This could take the form of freeing the trustee from observing rules such as diversification of investments. However, such language may not be effective, especially if it deviates from the scope of permissible waiver expressed in the statute. See Ballsun et al., supra note 13, at 291 (expressing doubt as to the efficacy of such provision). See also Robert B. Barnett, Jr. & Brandon A. Borgmann, Thorny Issues under the Ohio Uniform Prudent Investor Act for Trustee-Owned Life Insurance: Working Toward Relief, 19 Ohio Prob. L.J. 221 (2009). Another type of clause might simply exculpate the trustee from liability with respect to life insurance investments, as long as the trustee had not acted in bad faith or with reckless disregard. The language would have to be carefully drawn so that it did not conflict with general investment language in the trust instrument and would have to make clear that it was overriding the UPIA or similar statute. It still might not be enforceable on public policy grounds. Note that, unlike some other statutes, 12 Del. Code § 3302(e) explicitly permits the duty of care of the trustee of an ILIT to be expanded or reduced. Generally, other exculpatory statutes do not include such a provision, thus leaving the matter unsettled.

26 See Ballsun et al., supra note 13, at 290-91.

27 See the discussion infra Part VI., regarding the decline of the privity rule, thereby giving standing to sue to beneficiaries who can claim that the attorney failed to carry out the settlor's intent when drafting the governing instruments.

28 Only one previous article appears to have considered the topic in some depth. See Edward L. Weidenfeld, Professional Liability Issues for Estate Planning Attorneys Working with Life Insurance Products, 24 Tax Mgmt. Est., Gifts & Tr. J. 250 (1999).

29 See Ray Ryden Anderson & Walter W. Steele, Jr., Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle, 47 SMU L. Rev. 235, 244 (1994), and the cases discussed therein.

30 Id. at 252-53.

31 See, e.g., Jon J. Gallo, Life Insurance Due Diligence for Dummies: What the Attorney Preparing a Life Insurance Trust Ought to Know, 44 Pract. Law. 75 (1998).

32 Obviously, the more complex the work the attorney does, larger fees can be charged. This is, no doubt, another inducement to not hold back and narrowly limit the scope of representation.

33 See Weidenfeld, supra note 28.

34 See discussion supra Part IV.A.

35 See Anderson & Steele, supra note 29, at 247.

36 The majority of jurisdictions only require that the professional negligence was a "substantial factor." However, a minority of jurisdictions require a showing that the injury would not have been suffered, "but for" the negligence of the attorney. See Charles W. Wolfram, A Cautionary

Tale: Fiduciary Breach as Legal Malpractice, 34 Hofstra L. Rev. 689, 697-98 (2006).

[37] See, e.g., Blair v. Ing, 95 Haw. 247, 253, 21 P.3d 452, 458 (2001).

[38] See, e.g., id. 95 Haw. at 259, 21 P.3d at 464 ("In considering whether to impose a duty of reasonable care on a defendant, we recognize that duty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection…Legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done.") (citing Waugh v. University of Hawaii, 63 Haw. 117, 135, 621 P.2d 957, 970 (1980); Kelley v. Kokua Sales & Supply, Ltd., 56 Haw. 204, 207, 532 P.2d 673, 675 (1975)) (quoting Tarasoff v. Regents of the Univ. of Cal., 17 Cal.3d 425, 434, 131 Cal. Rptr. 14, 22, 551 P.2d 334, 342 (1976)).

[39] See, e.g., Leavenworth v. Mathes, 661 A.2d 632 (Conn. App. Ct. 1995) (the attorney only has a duty to draft in accordance with the client's wishes, having the best interests of the client in mind). But see Weidenfeld, supra note 28 (conceiving a broader wealth preservation and transmission function for the estate planning attorney and, accordingly, reaching the conclusion that a broader duty should be imposed). Likewise, James D. Schwartz et al., Due Diligence in Life Insurance Selection, 8 Prob. & Prop. 39 (Mar.-Apr. 1994), argued that the duty of the estate planning attorney had evolved to the point that there might well be a duty imposed that would exceed the drafting function and include review and analysis of life insurance policies associated with ILITs. However, notwithstanding the prediction, eighteen years later this has not yet occurred.

[40] See, e.g., Pizel v. Zuspann, 247 Kan. 699, 803 P.2d 205 (1990); Davis v. Somers, 140 Or. App. 567, 915 P.2d 1047 (1996); Leavenworth v. Mathes, 661 A.2d 632 (Conn. App. Ct. 1995); Stangland v. Brock, 747 P.2d 464 (Wash. 1987).

[41] See, e.g., Leak-Gilbert v. Fahle, 55 P.3d 1054 (Okla. 2002).

[42] See,e.g., Leavenworth v. Mathes, 661 A.2d 632 (Conn. App. Ct. 1995).

[43] See, e.g., Mali v. De Forest & Duer, 160 A.D.2d 297, 298, 553 N.Y.S.2d 391, 392 (1990).

[44] See, e.g., In re Newhoff's Will, 107 Misc.2d 589, 598, 435 N.Y.S.2d 632, 639 (Sur. Ct. 1980).

[45] 14 A.D.3d 354, 355-56, 787 N.Y.S.2d 309, 310-11 (1st Dep't 2005).

[46] See discussion infra Part VI.

[47] Courts have recognized that certain advice may inextricably involve a dual purpose, only one of which is legal, the other being commercial or financial. In this situation, the determination of whether the attorney is rendering legal advice may turn on whether it is "evident that the attorney is presenting the issues and analyzing the choices on the basis of his legal expertise and with an obvious eye to the constraints imposed by applicable law." See, e.g., Note Funding Corp. v. Bobian Investment Co., 1995 WL 662402, at *3 (S.D.N.Y. Nov. 9, 1995)(involving question whether there is attorney-client privilege with respect to certain documents). The question is whether the advice rests "predominantly" on the attorney's "assessment of the requirements imposed, or the opportunities offered, by applicable rules of law," in which case "he is performing the function of a lawyer." See id. But where the functions can be disentangled, they will be treated as distinct. See, e.g., LeFever v. Lefkowitz, 18 Misc.2d 278, 280, 178 N.Y.S.2d 172, 174-75 (Sup. Ct. 1958) (With respect to an attorney who also keeps corporate record books, the attorney "acts in a dual capacity toward such a client. In the giving of advice or performance of legal services, he is its attorney; but as custodian of its records, he is its agent."); Gallagher v. Akoff Realty Corp., 197 Misc. 460, 461, 95 N.Y.S.2d 796, 797-98 (Sup. Ct. 1950) ("where it is shown that a lawyer acted for his client in a dual capacity, that is, both professionally and as a negotiator seeking to bring about an agreement in consummating a transaction, the rules applicable to agents govern his actions as negotiator"). See generally Paul R. Rice, with Steven J. Gerber, Attorney-Client Privilege: State Law--New York § 7:3 (2010 update). The "inquiry is necessarily fact-specific." See Note Funding Corp., 1995 WL 662402, at *3 (citing Rossi v. Blue Cross and Blue Shield, 73 N.Y.2d 588, 593, 540 N.E.2d 703, 705, 542 N.Y.S.2d 508, 510 (1989)).

[48] For a thorough discussion, see Kyle Kveton, Advice and Counsel: The Question of Whether a Lawyer Has Given Legal or Nonlegal Advice is Highly Fact-Specific, 28 L.A. Law. 31 (Sept. 2005). For a case dealing with the issue, see also Wasmann v. Seidenberg, 202 Cal. App. 3d 752, 248 Cal. Rptr. 744 (1988).

[49] See generally Kveton, supra note 48.

[50] See discussion infra Part VI.

[51] See, e.g., Stanley L. and Carolyn M. Watkins Trust v. Lacosta, 321 Mont. 432, 437, 92 P.3d 620, 625 (2004)("The Trust may be considered a client based upon the legal services provided by Lacosta to the Trust and its Trustees, services which involved Trust assets and transactions.").

[52] The effort by the Reporter of the Restatement of the Law Governing Lawyers reports how the advisors resisted the reporters' efforts to eliminate the separate cause of action for breach of fiduciary duty. Their view was that "the fiduciary breach concept generally lacked independent content as a liability rule and that it should be mentioned only as another way of conceptualizing the 'duty' element of professional negligence, the broad notion that a lawyer must conduct representation of a client as would a lawyer of ordinary care and prudence." See Wolfram, supra note 36, at 690. The fiduciary duty theory is now reflected in section 49 of the Restatement, while the professional negligence theory is reflected in section 48.

[53] For a majority of courts, the fiduciary duty claim, as with the professional negligence claim, must be proved by expert testimony. Likewise, the causation standards are the same. See Wolfram, supra note 36, at 717. See also 2 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 15.2 ("a cause of action for fiduciary breach corresponds to a cause of action for negligence, substituting the fiduciary duty for the standard of care"). Nevertheless, there are outlier decisions, suggesting that fiduciary duty claims may require a lesser standard of proof in terms of both expert testimony and in terms of causation. See, e.g., Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537, 543-44 (2d Cir. 1994) (the more demanding "but for" causation standard was not applied because the plaintiff pled breach of fiduciary duty, with the court holding that the more lenient "substantial factor" standard, therefore, applied). Subsequent Second Circuit and New York cases appear to have rejected the holding of the Milbank decision. See, e.g., LNC Investments, Inc. v. First Fid. Bank, N.A. New Jersey, 173 F.3d 454, 465-66 (2d Cir. 1999); Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 780 N.Y.S.2d 593, 596 (App. Div. 2004)("We have never differentiated between the standard of causation requested [sic] for a claim of legal malpractice and one for breach of fiduciary duty in the context of attorney liability. The claims are co-extensive."). See generally Wolfram, supra note 36, at 744-45.

[54] See discussion supra Part IV.B.

[55] Of course, even the beneficiaries may have conflicting interests, as in the case of income beneficiaries on the one hand and remainder beneficiaries on the other hand.

[56] See discussion supra Part III.

[57] 15 N.Y.3d 306, 933 N.E.2d 718, 907 N.Y.S.2d 119 (2010). It is also apparent in the work of some commentators. See, e.g., Aghdami, supra note 7; Robben & Cohen, supra note 10. These commentators assume that the attorney should be prepared to advise the insured and/or the trustee, but do not consider the exposure that the attorney might have from doing so, or whether the attorney is required to provide such services as part of the estate planning he or she does.

[58] 15 N.Y.3d at 308, 933 N.E.2d at 719-20, 907 N.Y.S.2d at 120-21.

[59] 15 N.Y.3d at 309-10, 933 N.E.2d at 721, 907 N.Y.S.2d at 122.

[60] 57 Cal. App. 3d 914, 129 Cal. Rptr. 514 (1976).

[61] With respect to a claim based on a contract theory, an intended beneficiary might sue on a third-party beneficiary theory. This would bypass the privity requirement. However, the plaintiff could only recover damages under the contract, which would very possibly be limited

to the attorney's compensation. See Leyba v. Whitley, 120 N.M. 768, 907 P.2d 172 (1995).

62 See, e.g., Barcelo v. Elliott, 923 S.W.2d 575 (Tex. 1996) (attorney who drafted defective inter vivos trust and failed to see to its funding was not liable to trust beneficiaries). The rule in Barcelo has been altered somewhat to give the estate of the client the opportunity to bring suit against the attorney under certain circumstances. See supra text accompanying notes 58-59.

63 See, e.g., Thompson v. Vinson & Elkins, 859 S.W.2d 617, 621-23 (Tex. Ct. App. 1993).

64 Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 787 (Tex. 2006).

65 For additional support, the court also relied on N.Y. Est. Powers & Trusts Law § 11-3.2(b), which permits the personal representative to bring suit for injury to the person or property of the decedent.

66 See Stanley L. and Carolyn M. Watkins Trust v. Lacosta, 321 Mont. 432, 92 P.3d 620 (2004).

67 See, e.g., Harmon City, Inc. v. Nielsen & Senior, 907 P.2d 1162, 1171 (Utah 1995)(permitting suit against attorneys for malpractice by trustees to proceed, including for failure to advise as to need for diversification under ERISA). But see Carr v. Bankers Trust Co., 546 N.W.2d 901 (Iowa 1996) (essentially holding to the contrary on the ground that the attorney could not have foreseen the trustee's reliance on the attorney's performance in terms of effect on the trustee's individual reputation and finances). Significantly, Carr involved the attorney's failure to include provisions that would have required monitoring of trust assets that arguably would have prevented their misappropriation by the trust's investment advisor and his investing in violation of the trust's investment policy.

68 Compare Roberts v. Fearey, 162 Or. App. 546, 986 P.2d 690 (1999)(beneficiaries cannot sue attorney, but rather must seek relief from the fiduciary) and In re Newhoff's Will, 107 Misc.2d 589, 435 N.Y.S.2d 632 (Sur. Ct. 1980) (beneficiaries of trust did not have action against attorneys who counseled trustee about imprudent investments; only the trustee could bring action) with Blair v. Ing, 95 Haw. 247, 21 P.3d 452 (2001) (beneficiaries can proceed against the attorney).

69 See Charleson v. Hardesty, 108 Nev. 878, 839 P.2d 1303 (1992) (allowing such suits by beneficiaries). But see Spinner v. Nutt, 417 Mass. 549, 553, 631 N.E.2d 542, 545 (1994) (not permitting such suits and criticizing Charleson as "unpersuasive"). But see also Levine v. Gross, 177 A.D.2d 290, 575 N.Y.S.2d 864 (1st Dep't 1991) (attorney was not liable to beneficiaries for improper advice regarding value of property and for encouraging its sale, inasmuch as the property was sold by the trustee; the attorney was advising the testamentary trustee). But see generally Leyba v. Whitley, 120 N.M. 768, 774, 907 P.2d 172, 178 (1995).

70 See, e.g., Carr v. Bankers Trust Co., 546 N.W.2d 901, 907 (Iowa 1996). But see infra text accompanying notes 79-81.

71 15 N.Y.3d 306, 308 n.1, 933 N.E.2d 718, 720 n.1, 907 N.Y.S.2d 119, 121 n.1 (2010). Although the privity rule has fallen, there are still some limits as to who can sue the attorney. For example, a balancing test may be imposed. See Lucas v. Hamm, 56 Cal. 2d 583, 15 Cal. Rptr. 821, 364 P.2d 685 (1961) (en banc), cert. denied, 368 U.S. 987 (1962). Alternatively, the privity requirement may be eased "when an attorney renders services that the attorney should have recognized as involving a foreseeable injury to a third-party beneficiary of the contract." Pizel v. Zuspann, 247 Kan. 54, 63, 795 P.2d 42, 48 (1990).

72 See, e.g., Blair v. Ing, 95 Haw. 247, 21 P.3d 452 (2001).

73 Among states that have abandoned privity, there is still disagreement, in the professional malpractice setting, as to whether extrinsic evidence may be introduced to establish the intent of the transferor not otherwise evident from the explicit terms of the governing document. See Blair v. Ing, 95 Haw. at 261, 21 P.3d at 466 (discussing the case law and permitting the admission of such evidence); Hale v. Groce, 304 Or. 281, 744 P.2d 1289 (1987) (admitting such evidence); Ogle v. Fuiten, 102 Ill. 2d 356, 363-64, 466 N.E.2d 224, 227 (1984) (admitting such evidence). But see Harrigfeld v. Hancock, 140 Idaho 134, 138-39, 90 P.3d 884, 888-89 (2004) (the attorney's duty does not extend to those persons not named or identified in the testamentary documents). This is most critical when a plaintiff claims to have been omitted from the document as a devisee of a will or a trust beneficiary. Quaere whether the "four corners" approach would effectively prevent a lawsuit by trust beneficiaries asserting that the attorney should have included provisions requiring the monitoring of life insurance held in the ILIT. The argument in support of remaining within the "four corners" is that after the death of the settlor the evidence is simply too unreliable to go beyond the instrument. Indeed, this is the basis for strict rules of interpretation of dispositive instruments. On the other hand, with respect at least to inter vivos trusts, many courts have departed from the "four corners" principle.

74 467 So. 2d 315, 317 (Fla. Dist. Ct. App. 1985).

75 See, e.g., Ickes v. Waters, 879 N.E.2d 1105, 1109 (Ind. Ct. App. 2008) (two-year statute began to run when inter vivos trust was funded and plaintiff lost control of her assets); Howard v. Adams, 332 S.W.3d 24, 31 (Ark. Ct. App. 2009) ("a malpractice cause of action against an attorney [in connection with a revocable trust] accrues when the negligent conduct occurs, not when the client sustains injury"); Anderson v. Glenn, 139 Idaho 799, 87 P.3d 286 (2003) (statute began to run when property was placed in trust and settlor lost control under the rule that the statute begins to run when "some damage" has accrued).

76 See, e.g., Blair v. Ing, 95 Haw. 247, 21 P.3d 452 (2001).

77 See, e.g., Saad v. Rodriguez, 30 Ohio App. 3d 156, 506 N.E.2d 1230 (1986) (legal malpractice statute of limitations of one year did not apply with respect to attorney's involvement in real estate sales transaction as escrow agent; rather, fifteen-year statute of limitations applied). On the other hand, the ordinary negligence statute of limitations may begin to run from the moment of the occurrence, whereas the legal malpractice statute of limitations may begin to run from the time of discovery. See, e.g., Knight v. Furlow, 553 A.2d 1232, 1233-34 (D.C. 1989). For a collection of the cases, see George L. Blum, Annotation, When Statute of Limitations Begins to Run on Action Against Attorney for Malpractice Based upon Negligence—View that Statute Begins to Run from Time of Occurrence of Sustaining Damage or Injury and Other Theories, 12 A.L.R.6th 1 (2006 & Supp.); 3 Mallen & Smith, supra note 53, § 23.1.

78 Ickes v. Waters, 879 N.E.2d 1105, 1110 (Ind. Ct. App. 2008). In Ickes, the court actually held that there was no continuing representation, based on an analysis of the relevant facts. It held that this would be the outcome, even if the Ohio rule was adopted in Indiana.

79 The same problem may arise with respect to the settlor of the trust bringing suit while still alive. See id. at 1109 (holding that with respect to the settlor, the statute of limitations began to run at the time of the funding of the trust when the settlor lost control of the assets). See also Guest v. McLaverty, 332 Mont. 421, 138 P.3d 812 (2006).

80 See, e.g., Johnson v. Clarke, 2009 WL 3756332, at *7-8 (Ariz. App. Div. 1 Nov. 10, 2009).

81 Id.