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AALU Bulletin No: 10-72 July 13, 2010

Subject: **Attorney May Be Liable to Executor for Damages for Negligent Advice With Respect to Decedent's Life Insurance Policy**

References: ***Estate of Schneider v. Finmann, __ N.Y.3d. ___; 2010 NY Slip Op 05281 (NY Court of Appeals, June 17,2010)***

MDRT Information Retrieval Index Nos.: *7400.00*

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The Court of Appeals of the State of New York has ruled, in Estate of Schneider v. Finmann, __N.Y.3d.__; 2010 NY Slip Op. 05281 (NY Court of Appeals, June 17, 2010), that an executor of an estate may maintain a legal malpractice claim for monetary losses to the estate resulting from the inclusion in the estate, for federal estate tax purposes, of the proceeds of an insurance policy on the decedent's (Decedent) life.

This case arose as a result of a motion to dismiss a complaint filed against Decedent's attorneys by the executor of his estate. The attorneys represented Decedent from at least April 2000 to his death in October 2006. In April 2000, Decedent purchased a $1 million life insurance policy. Over several years, he transferred ownership of the policy from himself to an entity of which he was principal owner, then to another entity of which he was principal owner and then, in 2005, back to himself. At his death in October 2006, the proceeds of the insurance policy were included as part of his gross taxable estate. Decedent's estate commenced a malpractice action in 2007, alleging that the defendant attorneys "negligently advised [D]ecedent to transfer, or failed to advise [D]ecedent not to transfer, the policy which resulted in an increased estate tax liability."

The defendants' motion to dismiss was grounded in an alleged lack of "privity" between the plaintiff estate and the defendant attorneys. "Privity," in general, is the relationship that exists between two

parties to an agreement, such as an agreement to provide legal services. While Decedent was in privity with his estate planning attorneys, those attorneys argued that his estate, which had no agreement with them, lacked privity and could not maintain an action for negligent representation. The rule in New York, prior to this case, as described by the Court of Appeals, was one of "strict privity" - *i.e.,* that a third party, without privity, could not maintain a claim against an attorney in professional negligence, "absent fraud, collusion, malicious acts or other special circumstances [citations omitted]."

Although two lower New York courts agreed with the defendant attorneys and granted their motion to dismiss, the Court of Appeals (the highest court in NY State) reversed them and reinstated the estate's claim. It noted that: "Now only a handful of jurisdictions apply strict privity to malpractice actions commenced by beneficiaries against estate planning attorneys . . . Numerous jurisdictions have either relaxed the principle of privity or have granted standing to beneficiaries or estates . . . ".

The New York high court chose to follow the rule in Texas, holding that privity, or a relationship sufficiently approaching privity, exists between the personal representative of an estate and the estate planning attorney:

> "We agree with the Texas Supreme Court that the estate essentially ' 'stands in the shoes' of a decedent' and, therefore, 'has the capacity to maintain the malpractice claim on the estate's behalf' . . .[citation omitted]. The personal representative of an estate should not be prevented from raising a negligent estate planning claim against the attorney who 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 en-trusted to the professional. Moreover, such a result comports with [NY law], which generally permits the personal representative of a decedent to maintain an action for 'injury to person or property' after that person's death."
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> Despite holding for the estate in this case, the NY Court of Appeals nevertheless ruled that:
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> ". . . [I]n this case, strict privity remains a bar against *beneficiaries' and other third-party individuals'* estate planning malpractice claims absent fraud or other circumstances. Relaxing privity to permit third-parties to commence professional negligence actions against estate planning attorneys would produce undesirable results-uncertainty and limitless liability. These concerns, however, are not present in the case of an estate planning malpractice action commenced by the estate's personal representative." [Emphasis supplied.]

While the details of why Decedent's attorneys advised him to transfer the life insurance policy first to controlled entities and then to himself are not apparent from the decision, this case is a cautionary tale for all advisors who do not take the opportunity to review life insurance planning with an eye to minimizing estate taxes as well as providing for family members.

Any AALU member who wishes to obtain a copy of ***Estate of Schneider v. Finmann*** may do so through the following means: (1) use hyperlink above next to "Major References," (2) log onto the AALU website at www.aalu.org, enter the *Member Portal* and select *Current Washington Report* for linkage to source material or (3) email Anthony Raglani at raglani@aalu.org and include a reference to this *Washington Report*.

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