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June 29, 2010

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InvestmentNews.com

## New York's top court says estates can bring malpractice suits

By Darla Mercado

**O**verturning state law, New York's highest court this month ruled that estates and beneficiaries can sue estate-planning attorneys for malpractice.

"The decision is going to change the whole dynamic between estate-planning attorneys and the executor after death," said Henry J. Leibowitz, senior counsel in the personal-planning department at Proskauer Rose LLP. "Courts decide cases based on precedence, and there are years and years of cases that say attorneys are protected this way."

So-called privity laws prohibiting similar suits against attorneys are in effect in Alabama, Arkansas, Maine, Maryland, Nebraska, Ohio and Texas.

The New York case was brought by the estate of Saul Schneider, which accused trust and estate attorney Victor M. Finmann of failing to advise Mr. Schneider properly in the transfer of a \$1 million life insurance policy. Mr. Finmann's actions allegedly led to an additional tax bill of \$500,000, according to the plaintiff's attorney.

Mr. Schneider bought the policy in April 2000 and transferred ownership from himself to two family limited partnerships that he controlled over the next few years. In 2005, he transferred ownership back to himself.

When he died, the life insurance policy's proceeds were counted as part of Mr. Schneider's gross taxable estate, according to court documents. Mr. Finmann was allegedly representing Mr. Schneider from April 2000 until the client's death in October 2006.

The estate pursued a lawsuit against Mr. Finmann in 2007, accusing the attorney of malpractice and claiming that he had either negligently advised Mr. Schneider into moving the policy or failed to advise him against doing so.

"As far as my client is concerned, there is no evidence that he did anything wrong, and ultimately, we expect judgment to be entered in his favor," said Peter J. Mastaglio, an attorney at Cullen & Dykman LLP, who is representing Mr. Finmann.

While the lower court had granted Mr. Finmann dismissal of the complaint due to failure to state a cause of action, the appellate division stated that an estate may not sue for malpractice, because the contractual relationship was between the estate-planning attor-

ney and Mr. Schneider — not his beneficiaries.

The State of New York Court of Appeals reversed the decision of the New York State Supreme Court Appellate Division on June 17 and reinstated the estate's claim. The estate "essentially stands in the shoes of the decedent and therefore has the capacity to maintain the malpractice claim on the estate's behalf," according to the decision.

The case now goes back to Supreme Court, New York's court of original jurisdiction.

"The magnitude of the case isn't whether this is a malpractice case," said Nicholas J. Damadeo, who's representing the estate in the suit. "It's about changing a centuries-old law and giving clients the right to seek redress against attorneys for improper estate-planning advice."

To an extent, the case also highlights the relationship between financial professionals and attorneys. "Here the attorney is held responsible for not sheltering that life insurance from taxation, but any adviser would make sure that the client has their life insurance policy protected in a trust," Mr. Leibowitz said.

In Mr. Schneider's case, an insurance agent — who isn't a party to the lawsuit — first sold the insurance policy, which raises the question of the agent's input as the ownership of the policy changed.

"The initial agent who sold it probably had nothing to do with it," Mr. Damadeo said. The transfers of ownership "sound like part of some estate plan," and the details of that may be flushed out during the discovery process as the Schneider estate prepares to pursue its claim, he said.

For advisers, the case serves as a cautionary tale as they work with estate-planning attorneys. "One of the first questions you ask when you sell someone a policy like that is, 'Who is the owner?'" said Henry Montag, owner of Henry Montag Associates. "This is a wake-up call to advisers in general to ensure they don't become named in a similar suit."

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Investment News Online, June 2010

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