

**Not My Client, Not My Problem: The Duty of Attorneys to Non-Clients**

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Pursuant to the Professional Code of Responsibility, lawyers owe a certain legal duty to their clients throughout the span of their representation. In certain circumstances this duty can be extended to non-clients. The issue of liability to non-clients was recently addressed following the actions of Mayer Brown, LLP (“Mayer Brown”), and the resulting malpractice suit filed against Mayer Brown which was based upon Mayer Brown’s inadvertent termination of certain liens granted by General Motors (“GM”) in favor of J.P. Morgan Chase (“JPM”). Specifically, the allegations of misconduct arose from actions in connection with a loan and the related “Term Loan Agreement.”<sup>1</sup>

In June 2016, the Northern District of Illinois was cautious of extending an attorney’s liability to an “unlimited and unknown number of potential plaintiffs” when addressing the malpractice suit brought by the non-client members of the Term Loan Agreement.<sup>2</sup> In finding that no duty existed to allow for a malpractice suit to continue, the Northern District focused on the intent of the hiring, specifically the “primary and direct purpose” of Mayer Brown’s hiring, which the court found was not to benefit the members of the Term Loan Agreement (the “Term

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<sup>1</sup> *Oakland Police and Fire Retirement System v. Mayer Brown, LLP*, Case No. 15 C 6742 (N.D. Ill. June 22, 2016); 2016 WL 359714, \*2.

<sup>2</sup> *Id.* at \*6.

Loan Members”).<sup>3</sup> Shortly after the decision from the Northern District of Illinois, the Term Loan Members filed an appeal with the United States Court of Appeals for the Seventh Circuit.<sup>4</sup>

While the Northern District of Illinois’ decision focused on the “primary and direct purpose” of the hiring, this memo will discuss an issue that the two parties are currently arguing on the appeal to the Seventh Circuit.<sup>5</sup> The Term Loan Members are attempting to establish that Mayer Brown had a duty to the Term Loan Members, although they were not Mayer Brown’s clients. Specifically, the Term Loan Members are arguing that the transaction should be considered non-adversarial and therefore a duty would exist to non-clients.<sup>6</sup> Mayer Brown, however, is arguing that the transaction was adversarial in nature, and therefore did not create a duty.<sup>7</sup>

#### **I. Development of an Attorney’s Duty to Non-Clients**

The Northern District of Illinois did not want to unreasonably extend an attorney’s liability.<sup>8</sup> The Court sought to find a rule that would limit liability of attorneys to non-clients when they could reasonably expect to have such liability.<sup>9</sup> The court noted that there can be a duty for attorneys to non-clients in specific circumstances where the attorney is either hired to benefit the non-client, or provides certain services in the scope of his employment to non-clients.<sup>10</sup>

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<sup>3</sup> See generally *Oakland Police*, 2016 WL 359714.

<sup>4</sup> *Oakland Police and Fire Ret., et al v. Mayer Brown, LLP*, Case No. 16-2983 (N.D. Ill July 31, 2016).

<sup>5</sup> *Oakland Police*, WL 359714 at \*3.

<sup>6</sup> See *Brief for Appellant* at 22-30, *Oakland Police Et Al v. Mayer Brown LLP*, WL 359714 (2016) (No. 16-2983).

<sup>7</sup> See *Brief of Appellee* at 10-21, *Oakland Police Et Al v Mayer Brown LLP*, WL 359714 (2016) (No 16-2983).

<sup>8</sup> See generally *Oakland Police*, 2016 WL 359714.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

For instance, the court’s decision referenced *Pelham v. Greishesheimer* and noted that there, the court held that a non-client may establish a duty owed to them by an attorney by proving “that the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party.”<sup>11</sup> This decision was seemingly controlling in *Oakland Police*, as the court followed the primary purpose test strictly in finding that Mayer Brown had not been hired to benefit the Term Loan Members, but rather to assist in the closing of separate loan agreements for GM.<sup>12</sup> Because the court viewed that the hiring of Mayer Brown was not to benefit any of the members of the term loan, no duty existed.<sup>13</sup>

However, prior case law has shown that the existence of a duty can also be established based on the specific type of work done by the attorney.<sup>14</sup> For instance, in *Greycas, Inc. v. Proud*, the Seventh Circuit held that an attorney “who in the course of his business or profession supplies information for the guidance of others in their business transactions is liable for negligent misrepresentations that induce detrimental reliance.”<sup>15</sup> The court also found that the hiring of the attorney was for the express purposes of influencing the financial institution to make the loan to the attorney’s client, and therefore a duty existed for the attorney to the non-client financial institution.<sup>16</sup>

In *Freedom Mortgage Corporation v. Burnham Mortgage Inc.*, the Eastern Division of the United States District Court for the Northern District of Illinois discussed certain exceptions

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<sup>11</sup> 92 Ill. 2d 13, 21 (1982).

<sup>12</sup> See generally *Oakland Police*, 2016 WL 359714.

<sup>13</sup> *Id.*

<sup>14</sup> *Brief of Petitioner-Appellant* at 23-30.

<sup>15</sup> 826 F.2d 1560, 1565 (7<sup>th</sup> Cir. 1987).

<sup>16</sup> *Id.* at 1563

for recovering on misrepresentations.<sup>17</sup> There, the court found that the lender had adequately alleged that the attorney and the attorney's title company owed lender a duty as closing agents hired by the mortgage broker to submit accurate information and to comply with closing instructions.<sup>18</sup> The court found that the plaintiff's damages were proximately caused by a negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in their business transaction and therefore a duty existed.<sup>19</sup>

In *Oakland Police*, the Northern District of Illinois primarily followed *Pelham* and found that other case law did not apply because of the relationship of the parties. *See generally Oakland Police*, 2016 WL 359714. However, a closer look at the type of transaction involved may have an impact on the appeal. The relationship between the parties and the type of transaction, specifically whether an adversarial or a non-adversarial transaction, can create a duty to one who simply supplies advice or counseling to a third party in the transaction. Therefore, an examination of the type of transaction is necessary to determine the existence of a duty in *Oakland Police*.

## **II. Non-Adversarial Versus Adversarial Transactions in Regards to the UCC-3 Termination Statements Filed by Mayer Brown**

In *Freedom Mortgage Corporation v. Burnham Mortgage, Inc*, the court noted that the Illinois Supreme Court has embraced the notion that a duty to non-clients is “easier to establish when the scope of the attorney’s representation involves matters that are non-adversarial...rather than when the scope of the representation involves matters that are adversarial.”<sup>20</sup> In the current

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<sup>17</sup> *See generally* *Freedom Mort. Corp. v. Burnham Mortg., Inc.*, 720 F. Supp. 2d 978 (N.D. Ill. 2010).

<sup>18</sup> *Id.* at 991-92, 998.

<sup>19</sup> *Id.* at 993.

<sup>20</sup> *Freedom Mort. Corp.*, 720 F. Supp. 2d at 990 (quoting *Jewish Hosp. of St Louis Mo. v. Boatmen’s Nat’l Bank of Belleville*, 261 Ill. App 3d 756,761 (1994)).

appeal to the Seventh Circuit, both parties in *Oakland Police* address the issue of the type of transaction involved, specifically attempting to categorize it as adversarial or non-adversarial.<sup>21</sup> The Term Loan Members are attempting to prove that the transaction was non-adversarial in nature because such a transaction would create a duty for an attorney to non-clients.<sup>22</sup> In contrast, Mayer Brown is attempting to categorize the transaction as adversarial in order to prove that no duty was owed to the non-clients and Mayer Brown only owed a duty to their actual client.<sup>23</sup>

#### **A. Non-Adversarial Transactions**

In *Freedom Mort. Corp.*, the court found that an attorney hired as a closing agent for both parties in a real estate transaction had a duty to his non-clients.<sup>24</sup> The court's decision focused on the fact that the attorney's services were relied upon by all parties in the transaction.<sup>25</sup> On appeal, the Term Loan Members are trying to establish that this case applies because Mayer Brown was hired to influence JPM to close the loan, and during the transaction JPM relied upon the documents provided by Mayer Brown.<sup>26</sup> Since JPM was relying upon the information and documents provided by Mayer Brown to be accurate and because JPM was the representative for the Term Loan Members, the plaintiffs are attempting to prove that a duty was created because the transaction was non-adversarial.<sup>27</sup> Essentially, the plaintiffs argue that Mayer Brown was

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<sup>21</sup> See *Brief of Petitioner-Appellant* at 10-30; *Brief of Appellee* at 10-21.

<sup>22</sup> *Brief of Petitioner-Appellant* at 10-30.

<sup>23</sup> *Brief of Appellee* at 10-21.

<sup>24</sup> *Freedom Mort. Corp.*, 720 F. Supp. 2d 978.

<sup>25</sup> *Id.* at 991.

<sup>26</sup> See *generally Appellants Brief* at 10-30.

<sup>27</sup> *Id.*

influencing JPM to terminate the loan agreement of the separate and distinct loan from the Term Loan.<sup>28</sup>

However, as Mayer Brown notes, in this specific instance the loan that Mayer Brown was hired to terminate had nothing to do with the Term Loan Members.<sup>29</sup> At no point during the transaction was there ever an attempt to influence the Term Loan Members to terminate their own loan, rather the entire hiring of and the services provided by Mayer Brown were directed at terminating the separate and distinct loan from the Term Loan and therefore did not create a duty.<sup>30</sup>

The Term Loan Members address two other cases that have held that a duty is created for non-adversarial relationships based on the type of services provided by the attorney.<sup>31</sup> In *First Midwest Bank, N.A. v. Stewart Title Guaranty Company*, the court found that a duty existed for an attorney when they conveyed false information “if the party is in the business of supplying information for the guidance of others in their business transactions.”<sup>32</sup> Furthermore, in *Tolan & Son v. KLLM Architects*, the court expressly noted that attorneys are included in the definition of those considered to be supplying information, and therefore a duty to provide accurate information arises.<sup>33</sup> These two cases stand for the proposition that in *Oakland Police*, Mayer Brown has a duty to non-clients because of the position they were in within the transaction, specifically their position in supplying information and documentation to JPM. The plaintiffs in

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<sup>28</sup> *Id.*

<sup>29</sup> *Brief of Appellee* at 10-21.

<sup>30</sup> *Id.*

<sup>31</sup> *See Brief of Appellant* at 10-30.

<sup>32</sup> 843 N.E.2d 327, 332 (2006).

<sup>33</sup> 719 N.E.2d 288, 296-97 (1999).

*Oakland Police*, argue that Mayer Brown’s action of supplying incorrect information to JPM gives rise to a duty to the members of the Term Loan.<sup>34</sup>

However, again in the specific transaction at issue in *Oakland Police*, though incorrect documentation was provided to JPM, none of that information was intended to impact the members of the Term Loan. Though information was supplied by Mayer Brown, the information was for a loan that was separate and distinct from the Term Loan. Based on the prior case law, the members of the Term Loan have an uphill battle to establish a non-adversarial transaction that was to specifically benefit or influence the members of the Term Loan. Mayer Brown’s hiring was not done to directly influence the Term Loan Members, but rather to assist in the closing of a completely separate and distinct loan that did not involve the members of the Term Loan.

## **B. Adversarial Transactions**

In determining whether or not a transaction was adversarial, the court looks to the actual benefit given to a non-client in the transaction. Case law has turned on whether the non-client receives a direct, significant benefit. In *First National Bank v. Califf, Harper, Fox & Dailey*, the court found that, although the plaintiff received some benefit, the defendant attorneys did not owe a duty to the plaintiffs.<sup>35</sup> The fact that a party benefits “somewhat” does not change the primary purpose of a hiring of the attorney.<sup>36</sup> In addition, the court noted that in making a determination nature of a transaction, the history of the parties involved must be considered.<sup>37</sup>

In *Oakland Police*, Mayer Brown had previously represented JPM on unrelated matters. The Northern District of Illinois’ discussion of the prior relationship circled around whether or

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<sup>34</sup> See generally *Brief for Appellant* at 10-30.

<sup>35</sup> 548 N.E.2d 1361 (1989).

<sup>36</sup> *Id.* at 1363.

<sup>37</sup> *Id.* at 1364.

not the prior representation had taken an adversarial transaction out of the equation.<sup>38</sup> However, though Mayer Brown had worked with JPM previously on unrelated matters, there was no prior relationship concerning the members of the Term Loan.<sup>39</sup> Even if JPM had been influenced in terminating the separate and distinct loan because of a prior relationship, it would not impact the termination of the Term Loan.<sup>40</sup>

Moreover, in *Gold v Vasileff*, the court held that an attorney owes no duty to non-clients even if the opposing party places a certain level of trust in them unreasonably.<sup>41</sup> Earlier cases such as *Greycas*, held that detrimental reliance would create a duty to non-clients, but *Gold* stands for the proposition that unreasonable trust in the work of an attorney would not create a duty.<sup>42</sup> In *Oakland Police*, certain documents were exchanged between both Mayer Brown and JPM, these documents were sent to the attorneys for JPM for their own approval.<sup>43</sup> The documents were subsequently approved by JPM without making any real changes to them.<sup>44</sup> This opportunity to review the documents presents an interesting point in this case because with this opportunity and subsequent approval, the duty created should shift from Mayer Brown to the attorneys representing JPM for their improper trust, lack of review of the documents, and their failure to notice that the Term Loan was going to be terminated with the filing of the UCC-3 Statements. *Gold* is a strong case for Mayer Brown because even if JPM placed a certain amount of trust in Mayer Brown because of their prior dealings, such amount of trust would have been

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<sup>38</sup> *Oakland Police*, WL 359714 at \*4.

<sup>39</sup> *Id.* at \*4-6.

<sup>40</sup> *Id.*

<sup>41</sup> 513 N.E.2d 446, 447-48 (1987).

<sup>42</sup> *Greycas*, 826 F.2d 1560, 1565; *see also Gold*, 513 N.E.2d 446, 48.

<sup>43</sup> *Oakland Police*, 2016 WL 359714 at \*2.

<sup>44</sup> *Id.*

unreasonable given the opportunity that JPM had to review all the documents involved in the transaction.<sup>45</sup>

### **III. Conclusion**

*Oakland Police* is a situation that resulted in the termination of a loan agreement due to a lack of review by the attorneys involved. However, the case turns on the relationship between the parties and the primary purpose of the hiring of Mayer Brown for the transaction involved. Prior case law implies that Mayer Brown would not be at fault for the termination of the Term Loan for a number of reasons. First, the hiring of Mayer Brown was solely for the termination of a separate and distinct loan from the Term Loan. Second, the transaction involved would be deemed adversarial between Mayer Brown and the members of the Term Loan because the transaction that Mayer Brown was taking part in did not have the purpose of benefiting the Term Loan Members, but rather had some carry-over effects. Furthermore, the transaction involved the transfer of documents and information for a separate and distinct loan from the Term Loan and was not in direct relation to the Term Loan and therefore would not create a duty for Mayer Brown to the members of the Term Loan. Additionally, the prior history between JPM and Mayer Brown again would not be an issue, because any trust in Mayer Brown placed by JPM would be improper due to the time that JPM had to review the documents and their failure to do so. Therefore, no duty to non-clients was created and Mayer Brown should not be held liable for the erroneous termination of the Term Loan in their transaction for a separate and distinct loan.

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<sup>45</sup> *Gold*, 513 N.E.2d 446, 448.