A 50-State Survey of Auditor Liability

Declining Vitality of

By Brian J. Hunt

Any objective observer must conclude that the audit interference rule is on the wane.

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the Audit Interference Rule

Professional negligence cases—by their very nature—require an analysis of the interaction between the client and the professional. Negligence cases against certified public accountants (CPAs) are no exception. However, in those cases, the potential scope of damages is extraordinary. As Judge Cardozo stated in the *Ultramares* decision:

> If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences. *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931).

In the face of that potentially large damage exposure, those who defend CPAs may also be confronted with the audit interference rule. Put simply, the audit interference rule represents a limitation on the scope of client conduct to which a defendant CPA can point in a defense. The question is whether a client's alleged misconduct must relate directly to an interference with the audit itself, or instead, whether the defendant can point, for example, to instances of negligent operation of the client's business.

The Audit Interference Rule

In its most famous form, the audit interference rule states that "[n]egligence of the employer is a defense only when it has contributed to the accountant's failure to perform his contract and to report the truth." *National Surety v. Lybrand*, 256 A.D. 226, 236 (N.Y. 1939). A later New York case explained that "contributory negligence must be accepted as a theoretical defense, but it applies only if the plaintiff's conduct goes beyond passive reliance and actually affects defendant's ability to do his job with reasonable care." *Shapiro v. Glekel*, 380 F. Supp. 1053, 1058 (S.D.N.Y. 1974) (quoting Carl S. Hawkins, *Professional Negligence Liability of Public Accountants*, 12 Vand. L. Rev. 797, 811 (1959)). Accordingly, states that adopt the audit interference rule do not allow an auditor defendant to assert a defense for contributory or comparative negligence of the plaintiff unless the auditor can show that the plaintiff actually interfered with the performance of the auditor's duties.

However, not all states apply the audit interference rule. Some states explicitly reject it by ruling that an auditor defendant can assert a comparative negligence defense, or that the audit interference rule has no application in that state's law. Other states have implicitly rejected the rule, meaning either that a ripe case has not come before a court yet a court has tangentially discussed it, or the rule's application was discussed *in dicta*.

This article reviews the positions of states that have ruled on the audit interference rule while evaluating a trend since 2004 to reject the rule.

Change Over Time

Ten years ago, it appeared that the audit interference rule was "alive and well," as Judge Schenkier of the U.S. District Court for the Northern District of Illinois observed in *Comercia Bank v. FGMK, LLC*, 2011 WL 91044 (N.D. Ill. 2011). Ten years ago, in 2004, six states had explicitly adopted the rule in a small upsurge of support. At that time, seven states had explicitly rejected the rule, and eight states had implicitly rejected the rule.

However, over the past 10 years, a clear trend has emerged rejecting the rule. Today, the same six states adopting it earlier still continue to follow it, nine have explicitly rejected it, and 14 implicitly have rejected it. Nearly half of the states have rejected the rule. Twenty-one states, and the District of Columbia, have not ruled on this issue. These include the following: Alabama, Alaska, D.C., Delaware, Georgia, Hawaii, Idaho, Kentucky, Maine, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Vermont, Virginia, West Virginia, and Wyoming.

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Early Information

As mentioned, six states have adopted the audit interference rule: New York, Nebraska, Pennsylvania, Utah, Oklahoma, and Illinois.

The rule first appeared in the seminal 1939 case from New York: *National Surety v. Lybrand*, 256 A.D. 226 (N.Y. 1939). In that case, the plaintiff surety company, as subrogee of the audit client, sued the certified public accountant (CPA) firms which performed some audits for negligence in performing their duties. The plaintiff claimed that if the defendant auditors had detected defalcations, then the plaintiff would have terminated the responsible employee and would not have sustained the subsequent monetary losses. The defendants, asserting an affirmative defense of contributory negligence, claimed that the client's poor business practices were the proximate cause of these losses, not the defendants' failure to find the losses.

In ruling that the defendants could not assert a defense of contributory negligence, the appellate court compared the situation to "a workman injured by a dangerous condition which he has been employed to rectify" to explain that accountants "are commonly employed for the very purpose of detecting defalcations which the employer's negligence has made possible." *Id.* at 236. In doing so, the court protected the interest of the audit client by analogizing an audit to repairing a property. According to the court, a worker hired to fix a problem is similar to an auditor, and because the worker did not have recourse to sue a landowner for a defect on the landowner's property that the worker was hired to fix, the auditor cannot put the auditor's client at fault in a professional negligence action.

The court barred the defendants' claim of contributory negligence: "Negligence of the employer is a defense only when it has contributed to the accountant's failure to perform his contract and to report the truth." *Id.* And so, the audit interference rule was born.

A discussion of the development of the audit interference rule is not complete without discussing *National Surety*'s predecessor, *Craig v. Anyon*, 212 A.D. 55 (N.Y. 1925). In *Craig*, the plaintiffs, security and commodity brokers, sued their auditor for negligence and breach of contract, claiming that by not detecting an employee's fraud, the auditor performed his duty negligently and prevented the company from terminating the fraudulent employee and retaining lost income. The defendants argued that the plaintiffs should have discovered the fraud; the auditor relied on the fraudulent employee for information; and the actions of the fraudulent employee were intervening causes in the plaintiffs' losses. On appeal, the court upheld judgment for the plaintiffs for only the cost of the auditor's services, not for the entire amount of economic loss. The court reasoned that the plaintiffs' "loss was not entirely the result of the negligence of the defendants, but also resulted from the careless and negligent manner in which the plaintiffs conducted their business" and the plaintiffs "should not be allowed to recover for losses which they could have avoided by the exercise of reasonable care." *Id.* at 65–66. While *National Surety* narrows the *Craig* ruling into an explicit doctrine of audit interference, the *Craig* case still fits into the framework because the auditor was unable to perform his duties and report the truth because of interference in the performance of the audit; the individual supplying the financial documents necessary to the audit was simultaneously defrauding the plaintiffs, which allowed the fraudulent activity to continue unchecked.

Earnest Adoption

Almost 50 years after the ruling in *National Surety*, Nebraska adopted the audit interference rule with little discussion in *Lincoln Grain, Inc. v. Coopers & Lybrand*, 345 N.W.2d 300 (Neb. 1984). The plaintiff, a grain dealer, sued the CPA firm that performed its audits for negligence, asserting that the firm's failure to find a vice president's defalcations in inventory valuations damaged the company by delaying discovery of the defalcations and causing additional losses. The defendant CPA firm submitted an affirmative defense of the plaintiff's comparative negligence for failing to monitor an employee. The defendant argued that the employee's actions were the proximate cause of the grain dealer's losses, not the CPA's failure to find the defalcations. Reversing the jury's decision for the defendant, the Supreme Court of Nebraska reasoned that not applying the audit interference rule "would render illusory the notion that an accountant is liable for the negligent performance of his duties" and adopted the rule language from *National Surety*: "the contributory negligence of the client is a defense only where it has contributed to the accountant's failure to perform the contract and to report the truth." *Id.* at 442.

Following Nebraska's lead, Pennsylvania adopted the audit interference rule in 1988. *Jewelcor v. Corr*, 542 A.2d 72 (Pa. Super. Ct. 1988). The plaintiff alleged that the defendant auditors were negligent in performing their audit of a company, which the plaintiff bought after relying on the auditors' evaluation of the company's inventory and financial statements. The Superior Court of Pennsylvania affirmed the trial court's decision for the defendants, which was based on the defendants' allegation of the plaintiff's negligence. The Superior Court approved of the trial court's two-part test to determine if the plaintiff was contributorily negligent. First, using language from *National Surety*, the jury determined that the plaintiff's negligence was a defense because it "contributed to the defendants' failure to perform its contract and report the truth." *Id.* at 80. Second, the jury determined that the plaintiff's actions, not the defendants', were the proximate cause of the plaintiff's losses. *Id.* This case shows that it is possible for a court to apply the audit interference rule while holding for an accountant defendant based on the proximate cause of the alleged losses.

Soon after Pennsylvania, Utah adopted the audit interference rule in a Tenth Circuit case, *Fullmer v. Wohlfeiler & Beck*, 905 F.2d 1394 (10th Cir. 1990). While adopting the audit interference rule, the Tenth Circuit judge explicitly reasoned for the first time that the rule was equally applicable to comparative and contributory negligence states. In the case, shareholders and creditors of a company sued the auditors of that company for negligence and fraud, claiming that their reliance on the defendants' negligent audit resulted in large losses for the plaintiffs. The defendants asserted a defense of comparative negligence, claiming that the plaintiffs were negligent in their transactions with the now-defunct company and that if the plaintiffs conducted their business as reasonable business persons, they "would have discovered the precarious financial situation."

The trial judge rejected the comparative negligence defense while adopting the audit interference rule: "There is no evidence that plaintiffs' negligence contributed to defendants' failure to properly prepare the audited financial reports or in any way prevented them from reporting the true financial condition of [the company]." *Id.* at 1396 (internal quotation marks omitted). In other words, the plaintiffs' negligence, if unrelated to the defendants' failure to perform an audit and to report the truth, was deemed irrelevant to the determination of comparative fault. In reasoning that the audit interference rule applied in any kind of negligence scheme, the Tenth Circuit justice concluded "that the more fundamental principle is that the accountant should not be absolved of the duty undertaken by him to one reasonably relying on his audit unless the plaintiff's negligence contributed to the auditor's misstatement in his reports." *Id.* at 1399.

In 2001, Oklahoma explicitly adopted the audit interference rule in *Stroud v. Arthur Andersen*, 37 P.3d 783 (Okla. 2001). The plaintiff brought charges of negligence against the defendant accounting firm that audited the company. The plaintiff alleged that its reliance on the defendant's audited financial statements caused the plaintiff's company to become economically unviable. The defendant attempted to assert a defense of comparative negligence based on the plaintiff's own negligent management decisions and lack of internal accounting controls in its business; however, the trial judge rejected this defense and instructed the jury to determine liability according to the audit interference rule. The Supreme Court of Oklahoma, reviewing the case, analogized the defendant's attempt to assert a comparative negligence defense to a doctor attributing "the negligent provision of medical services in the emergency room to the accident victim by asserting that it was the plaintiff's own negligence that caused the accident in the first place." *Id.* at 789. Along with this analogy, the supreme court emphasized that it was "mindful of the enhanced obligations and responsibilities owed to the public by a person who dons the mantel of a professional." *Id.* Clarifying its opinion, the supreme court stated that the ruling does not prevent the defendant from asserting that the plaintiff's damages did not result from the defendant's conduct. However, "[i]t does prevent the defendant from excusing its liability for professional negligence by interjecting facts into the trial which are unrelated to the issue of its responsibility for negligently-provided professional services." *Id.* at 790. Although the defendant could not assert a comparative negligence claim, it still had the opportunity to argue that the plaintiff's conduct, not the defendant's, was the proximate cause of the plaintiff's injury. However, the defendant did not introduce evidence of any intervening or superseding cause at trial.

Illinois became the most recent state to adopt the audit interference rule in 2003. *Bd. Tr. Cmty. Coll., Dist. No. 508 v. Coopers & Lybrand*, 803 N.E.2d 460 (Ill. 2003). In this case, the plaintiff, a board of trustees, sued the defendant auditors for failing to discover inappropriate investments made by high level officials within the college. The defendant auditors were barred from admitting evidence regarding the board's oversight of the individuals making the inappropriate investments and its potential knowledge of policy violations because the court applied the audit interference rule. The Supreme Court of Illinois upheld application of the rule on appeal, holding that its application conforms to recognized principles of comparative fault." *Id.* at 468. Furthermore, the supreme court set the standard of care for accountants and auditors at the "same standard as surgeons or any other professional service providers." *Id.* The court compared the audit interference rule to a dental malpractice action: "Just as a patient's poor dental hygiene could not be asserted as a defense to the negligent infliction of a surgical injury, a client's poor business practices cannot be asserted as a defense to the auditor's negligent failure to discover and report the client's noncompliance with investment policy and legal requirements." *Id.* at 467.

While adopting the audit interference rule, the Tenth Circuit judge explicitly reasoned for the first time that the rule was equally applicable to comparative and contributory negligence states.

Early Rejection of the Rule

Before 2004, eight states had explicitly rejected the rule: Florida, Michigan, Minnesota, Arkansas, Colorado, Ohio, Arizona, and Texas. An additional eight had implicitly rejected the rule.

Explicit Rejection

Florida was the first state to reject the rule in *Devco Premium Fin. Co. v. North River Ins. Co.*, 450 So.2d 1216 (Fla. Dist. Ct. App. 1984). In this case, the plaintiff insurance premium finance business sued its auditor for negligence, asserting that reliance on the negligent audit caused damage to the company, and ultimately forced it to liquidate. The defendants performed the audit using a reasonable statistical sampling of the plaintiff's accounts receivable, but failed to report on the lack of adequate internal controls in the plaintiff's business. During the trial, the defendant auditors asserted a defense of the comparative negligence because the plaintiff was unreasonable in not reviewing its own internal controls. The trial court held that the plaintiffs were 80 percent at fault, while the defendants were 20 percent at fault, and allocated damages accordingly.

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On appeal, the District Court of Appeal of Florida upheld the lower court's decision while rejecting the audit interference rule. The court declined to adopt the holding in *National Surety* because that case was decided under contributory negligence principles, which Florida had rejected. Instead, the Florida court adopted the reasoning in *Craig* that "[p]laintiffs should not be allowed to recover for losses which they could have avoided by the exercise of reasonable care." *Id.* at 1220. In doing so, the Florida court started reasoning that later courts rejecting the rule would follow: the audit interference rule is not commensurate with comparative negligence.

Michigan rejected the audit interference rule soon after Florida, in the 1985 case *Capital Mortgage v. Coopers & Lybrand*, 369 N.W.2d. 922 (Mich. Ct. App. 1985). The plaintiff alleged that the defendant auditor's failure to detect a $1.5 million embezzlement was negligent and caused the plaintiff additional losses. During the trial, the defendants asserted a defense of comparative negligence, and the court found the plaintiff 68.33 percent at fault.

On appeal, the plaintiff argued that the defendants did not prove the causal link between the plaintiff's negligent actions and the allocation of fault. However, the Court of Appeals of Michigan affirmed the trial court's application of the comparative fault defense, and it further reasoned that the trial court's decision was proper because "neither party is absolved of fault due to the other's negligence." *Id.* at 925. Furthermore, "[w]ith comparative negligence the result is not so harsh and the policy considerations that accountants should not be allowed to avoid all liability due to some negligence on the part of the client are not present." *Id.* In addition, the Michigan court reasoned that "comparative negligence creates an incentive for both parties to use due care." *Id.*

Minnesota followed Florida and Michigan's lead in rejecting the audit interference rule in a comparative negligence state in *Halla Nursery v. Baumann-Furrie*, 454 N.W.2d 905 (Minn. 1990). In that case, the plaintiff client alleged that the defendant auditors were negligent for failing to find a $135,000 embezzlement by the plaintiff's employee. The defendants argued that the plaintiff was comparatively negligent because it failed to establish internal financial controls to protect its company from embezzlement. The trial court allowed the comparative negligence defense and found the plaintiffs 80 percent negligent and the defendants 20 percent negligent; a judgment of no recovery was entered.

The intermediate appeals court reversed the judgment of the trial court and held that the audit interference rule should apply. However, the Supreme Court of Minnesota reversed the intermediate court. The supreme court framed the issue on appeal as whether comparative fault applies broadly to all professional malpractice cases, or whether the audit interference rule can narrow the application of comparative negligence when a case involves auditor malpractice allegations.

In reversing the appellate court, the supreme court reasoned that because Minnesota courts had applied comparative fault broadly in professional malpractice situations, the audit interference rule did not apply in this auditor malpractice case. However, the court reserved the right to find an exception within its ruling later, explaining that an exception may be necessary "where the scope of the employment is such that discovery of defalcations is clearly encompassed." *Id.* at 909.

Deciding under Arkansas law, the Federal District Court for the Eastern District of Arkansas followed the Minnesota decision closely in *FDIC v. Deloitte & Touche*, 834 F. Supp. 1129 (E.D. Ark. 1992). The defendant auditors, potentially liable for performing a negligent bank audit, argued the negligence of their client as the proximate cause of the alleged damages. The court, reviewing motions to dismiss, ruled that Arkansas courts would not apply the audit interference rule because of their past broad application of comparative negligence principles. Following the reasoning in *Halla Nursery*, the court did "not believe that a failure to follow *National Surety* would 'absolve' accountants of their duties or provide them with immunity from liability for their negligence—at least not under a comparative fault scheme such as Arkansas'." *Id.* at 1145. Furthermore, the court explained that application of a doctrine to ameliorate the harsh effects of contributory negligence in a state in which contributory negligence does not exist is "not necessary or desirable." *Id.* at 1146. In addition, the court did not find the comparison between auditor and medical malpractice "particularly useful" to comparing the relation between audit clients and doctors' patients. *Id.* at 1147 n.31.

Colorado rejected the audit interference rule in *RTC v. Deloitte & Touche*, a case in which an allegedly negligent auditor attempted to argue the plaintiff's comparative negligence as the cause of its damages. 818 F. Supp. 1406 (D. Colo. 1993). The Federal District Court for the District of Colorado, deciding under Colorado law, decided that adopting the audit interference rule would "effectively abrogate" the Colorado comparative negligence statute by creating an unnecessary exception. Therefore, similar to its predecessors, Colorado rejected the audit interference rule in favor of its comparative negligence scheme.

Ohio follows the pattern of comparative negligence states rejecting the rule. *Scioto Memorial Hosp. Ass'n v. PriceWaterhouse*, 659 N.E.2d 1268 (Ohio 1996). In this case, the plaintiffs alleged the defendant auditor's negligence in failing to assess all risks with the plaintiff's building project and for failing to provide a true financial forecast for the plaintiff. The defendants asserted a defense of comparative negligence of the plaintiff, but the trial court, following the audit interference rule espoused by *National Surety*, did not allow this defense.

On appeal, the Ohio Supreme Court rejected the audit interference rule while upholding the trial court's judgment because exclusion of the defendant's affirmative defense was not prejudicial error. Noting that the rule was "made to soften what was then the 'harsh rule' of negligence law which barred recovery of damages if there was any contributory negligence on the part of the plaintiff," the court held that no special need for such a rule existed in a state with a comparative negligence statute. *Id.* at 1272. Explaining further, the court wrote, "Hence, any negligence by a client, whether or not it directly interferes with the accountant's performance of its duties, can reduce the client's recovery." *Id.* The Supreme Court of Ohio held that excluding the comparative negligence defense in this case was not prejudicial error because the defendant had substantial evidence to show that the plaintiff was the proximate cause of its injuries, and the jury could have found for the defendant.

Arizona rejected the audit interference rule by finding it incompatible with Arizona law in *Standard Chartered v. PriceWaterhouse*, 945 P.2d 317 (Ariz. 1997). In this case, the plaintiff bank relied on a negligent audit by the defendant and purchased a bank that it would not have otherwise purchased had the plaintiff known its true financial situation. At trial, the jury was not instructed on the plaintiff's comparative negligence and found for the plaintiff for over $383 million. In affirming a judgment notwithstanding the verdict for the defendant auditors, the Court of Appeals of Arizona determined that the audit interference rule from *National Surety* was incompatible with Arizona's current comparative fault scheme, and in fact that Arizona had never recognized contributory negligence as a complete defense. *Id.* at 352.

Texas adopted the audit interference rule in *Greenstein, Logan & Co. v. Burgess Mktg., Inc.* before the Texas legislature replaced contributory negligence with a modified comparative negligence scheme. 744 S.W.2d 170, 190 (Tex. App. 1987), *superseded by statute*, Tex. Civ. Prac. & Rem. Code Ann. §33.001 *et seq.* (West 1987). Later cases in Texas support this switch to comparative negligence. In *University National Bank v. Ernst & Whinney*, the jury was able to assess the proportionate faults of the parties. 773 S.W.2d 707, 708 (Tex. App. 1999). Furthermore, *Richardson v. Cheshier & Fuller, LLP* explicitly states that the "Texas Civil Practice and Remedies Code, not the audit interference rule, applies in this case." 2008 WL 5122122 (E.D. Tex. 2008).

Implicit Rejection

Before 2004, eight states had not directly addressed the audit interference rule, but seemed to implicitly reject it: Tennessee (*Delmar Vineyard v. Timmons*, 486 S.W.2d 914 (Tenn. Ct. App. 1972)); New Jersey (*H. Rosenblum v. Adler*, 461 A.2d 138 (N.J. 1983)); Iowa (*American Trust v. United States Fidelity & Guaranty Co.*, 439 N.W.2d 188 (Iowa 1989)); Oregon (*Maduff Mortgage Corp. v. Deloitte, Haskins & Sells*, 779 P.2d 1083 (Or. Ct. App. 1989)); Wisconsin (*Imark Industries v. Arthur Young*, 436 N.W.2d 311 (Wis. 1989)); Louisiana (*National Credit Union v. Aho, Henshue & Hall*, 1991 WL 174671 (E.D. La. 1991)); Maryland (*Wegad v. Howard Street Jewelers, Inc.*, 605 A.2d 123 (Md. Ct. App. 1991)); Kansas (*Comeau v. Rupp*, 810 F. Supp 1172, 1182 n.6 (D. Kan. 1992)); Washington (*ESCA v. KPMG*, 959 P.2d 651 (Wash. 1998)); and Mississippi (*In re River Oaks Furniture, Inc.*, 276 B.R. 507 (N.D. Miss. 2001)).

Recent Developments: Decline in Popularity

In the last 10 years, five states that have addressed the audit interference rule and all five have either implicitly or explicitly rejected it: California, Indiana, Connecticut, Missouri, and Massachusetts.

California implicitly rejected the rule in an unpublished case by stating *in dicta* that the audit interference rule is not applicable in California's negligence scheme. *Karapetian v. Garibian & Associates*, 2006 WL 44428 (Cal. Ct. App. 2006). In this case, the plaintiff sued the defendant CPA for professional negligence because he suffered economic damages after switching insurance plans based on the defendant's advice. Although it was not her area of expertise, the plaintiff unreasonably relied on the defendant to make decisions concerning his insurance coverage, going even so far as to neglect to read the policy illustration. *Id.* ¶ 5. At trial, the defendant asserted a defense of the plaintiff's contributory negligence, and the jury found that the plaintiff was 70 percent at fault, while the defendant was 30 percent at fault. Because this is not a typical auditor negligence case, the California court was not able to address the audit interference rule directly. Instead, while explaining that the plaintiff—as a businessperson—unreasonably relied on the services of a CPA not in her area of expertise, the California court rejected the plaintiff's argument "that a defendant in a professional negligence action may not raise the client's general negligence as a defense unless that negligence proximately caused the defendant's professional negligence." *Id.* ¶ 29 n.4. Without invoking the doctrine itself, the California court rejected the rule.

The U.S. District Court for the Southern District of Indiana ruled, in an unreported case, that the audit interference rule is not consistent with the Indiana Comparative Fault Act. *Paul Harris Stores, Inc. v. PricewaterhouseCoopers, LLP*, 2006 WL 2859425 (S.D. Ind. 2006). The plaintiff retailer sued the defendant auditor for negligent accounting services. On a motion for summary judgment, the court ruled that the defendant could assert a defense of comparative negligence because Indiana follows its comparative fault statute, and fault should be assessed by the fact finder. Furthermore, the court reasoned that the rationale for applying the rule does not exist in Indiana because there is no need to avoid the harsh consequences of a contributory negligence bar to recovery. *Id.* at 7. In addition, to reject the rule the court relied on a Seventh Circuit case holding that Indiana would not apply a common law exception in light of its contributory negligence statute. *Roggow v. Mineral Processing Corp.*, 698 F. Supp 1441, 1445 (S.D. Ind. 1988), *aff'd* 894 F.2d 246 (7th Cir. 1990).

Connecticut rejected the audit interference rule using the same reasoning as many of its recent counterparts. *Vigilant Ins. Co. v. Deloitte & Touche, LLP.*, 2009 WL 3839341, 48 Conn. L. Rptr. 707 (Conn. Super. Ct. 2009). The plaintiff insurance company sought to recover economic damages from a defendant auditing company on counts of both professional negligence and breach of contract. The plaintiff claimed that if the defendant had not negligently performed an audit, embezzlement of one the plaintiff's employees would have been discovered, and the plaintiff would have suffered less economic damage. The defendant asserted an affirmative defense of comparative negligence of the plaintiff for failing to follow its own internal controls, arguing that doing so would have prevented or made the embezzlement more difficult. The Superior Court of Connecticut denied both parties' motions for summary judgment because questions of fact remained about the alleged negligence of both parties. Furthermore, the court held that the Connecticut comparative negligence statute applied to the case, and as a result, "the audit interference rule is not afforded any special significance." *Id.* at 6.

Missouri's history with the audit interference rule is unique because comparative fault was established by the judiciary in *Gustafson v. Benda*, without a comparative negligence statute, and the fine details do not become settled until they become the subject of litigation. 661 S.W.2d 11 (Mo. 1983) (en banc). In *Children's Wish Foundation International, Inc. v. Mayer Hoffman McCann PC*, the Missouri Supreme Court held that comparative negligence applies in cases of pure economic harm and, in doing so, implicitly rejected the audit interference rule. 331 S.W.3d 648 (Mo. 2011) (en banc). In this case, the plaintiff sued the defendant auditor for professional negligence for failing to find an overstatement in the value of its inventory. During the trial, the jury was instructed on contributory fault and found for the defendants.

The Missouri Supreme Court reversed the jury's verdict and remanded the case for a new trial because the jury instruction on contributory negligence was a prejudicial error. In reaching this decision, the court reasoned that comparative, not contributory, negligence should apply in all negligence cases. This decision established that the scheme of comparative negligence established in *Gustafson* should apply to cases of both physical and economic harm. The court reasoned, "negligence actions are fault-driven," and apportioning liability according to that fault makes more sense than "impos[ing] total responsibility upon one party for the consequences of the conduct of both parties." *Id.* at 651 (quoting *Earll v. Consolidated Aluminum Corp.*, 714 S.W.2d 932, 936 (Mo. Ct. App. 1986)). Furthermore, in stating its holding, the court referred to two cases in which courts applied comparative fault to negligence actions for pure economic loss, which either explicitly or implicitly reject the audit interference rule: Ohio's *Scioto Memorial* and Arizona's *Standard Chartered*.

The Most Recent Jurisdiction to Speak

Most recently, Massachusetts explicitly rejected the rule in *Bank of America, N.A. v. BDO Seidman, LLP*, and it is the first to do so since 1999. 29 Mass. L. Rptr. 513 (Mass. 2012). In this case, the plaintiff bank sued its auditor for performing negligent audits, while the defendant asserted an affirmative defense of comparative negligence of the plaintiff for unreasonably relying on the defendant's independent audits. Ruling in a jury-waived trial, the court held that the plaintiff relied unreasonably on the defendant auditor's statements, and therefore that the defendant auditor was entitled to judgment. However, the court went further, opining on the issue of comparative fault: "The Court would find, as a matter of fact, that the bank was negligent, that its own negligen[ce] was a proximate cause of its harm, and that its negligence exceeded that of [the defendant]." *Id.* at 523. The court reasoned that comparative negligence superseded the audit interference rule, especially because the rule was created to "ease the harshness of common law contributory negligence." *Id.*

Conclusion

In the face of extraordinary liability for CPAs facing allegations of professional negligence, the audit interference rule does not ease the burden of defending a CPA. However, any objective observer must conclude that the rule is on the wane. It is possible that the six states that exercise the rule will reconsider whether to apply it. For instance, an unpublished case from the U.S. District Court for the Southern District of New York questioned the continued application of the rule in New York because of the adoption of a comparative negligence scheme. *Bank Brussels Lambert v. Chase Manhattan Bank*, 1996 WL 728356 (S.D.N.Y. 1996). ("[C]alls into question the continued vitality of *National Surety* even in those cases where the parties do stand in an employer-employee relationship to each other."). If the state that developed the rule can question its current application, perhaps other states will follow suit.