

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION**

<b>IN RE:</b>	§	
	§	
<b>ABC UTILITIES SERVICES, INC., et al.,</b>	§	
	§	<b>Administratively Consolidated under</b>
<b>Debtors.</b>	§	<b>Case No. 89-41420-BJH-7</b>
_____	§	
	§	
<b>FRANK A. WOLFE, JR.,</b>	§	
	§	
<b>Plaintiff,</b>	§	
	§	<b>Adversary No. 00-4118</b>
<b>v.</b>	§	
	§	
<b>BRUCE A. BUDNER &amp; ASSOCS., P.C.,</b>	§	
	§	
<b>Defendant.</b>	§	
	§	

**MEMORANDUM OPINION**

In a Memorandum Opinion dated December 20, 2000 (the “Prior Memorandum Opinion”), the Court denied the Rule 12(c) Motion for Judgment on the Pleadings of Defendants Bruce A. Budner, Individually, and Bruce A. Budner & Associates, P.C. (collectively, “Budner”) (the “Rule 12(c) Motion”), finding that a question of material fact existed with respect to Frank A. Wolfe, Jr.’s (“Wolfe’s”) personal relationship with Budner. *See* Prior Memorandum Opinion at 14. However, because a resolution of the issue of whether Wolfe, individually, had an attorney-client relationship with Budner could dispose of this suit in its entirety, the Court concluded that a separate trial of that issue was appropriate. *See* Prior Memorandum Opinion at 15. Thus, this Court ordered separate trials of: (i) the issue of whether Wolfe, individually, had

an attorney-client relationship with Budner in connection with the OCAI Documents<sup>1</sup> and the OCAI Settlement (“Phase I”), and (ii) all remaining issues, including liability, causation, and damages (“Phase II”). *See* Prior Memorandum Opinion at 15-16; Order Directing Separate Trials at 1-2.

The Phase I trial was held on March 6, 2001. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1334 and 157. This is a non-core proceeding in accordance with 28 U.S.C. § 157(c)(1). This Memorandum Opinion constitutes the Court’s Findings of Fact and Conclusions of Law in connection with the Phase I trial. FED. R. CIV. P. 52; FED. R. BANKR. P. 7052.<sup>2</sup>

### **I. Contentions of the Parties**

Wolfe contends that Budner was his lawyer in connection with: (i) the Malpractice Suit, (ii) his efforts to obtain (and keep) the OCAI Documents, and (iii) protecting his “legal position as a creditor and indemnitor [sic] of the Estate.” *See* Proposed Findings of Fact and Conclusions of Law filed by Wolfe on March 1, 2001 (“Wolfe’s Proposed Findings”) ¶ 9.

Budner contends that he had no attorney-client relationship with Wolfe, individually, in connection with any of these matters. Specifically, Budner contends that he represented the Debtors’ estates in connection with: (i) the Malpractice Suit (and the Malpractice Settlement), and (ii) obtaining the OCAI Documents (and the OCAI Settlement). Finally, Budner contends

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<sup>1</sup>Capitalized terms not defined herein shall have the meaning ascribed to those terms in the Prior Memorandum Opinion.

<sup>2</sup>Because this is a non-core proceeding, the Court’s findings of fact and conclusions of law will be submitted to the District Court as proposed findings and conclusions in accordance with Bankruptcy Rule 9033. Parties may object to these proposed findings and conclusions within the time period provided by Bankruptcy Rule 9033(b).

that he had no attorney-client relationship with Wolfe, individually, in connection with Wolfe's creditor status in the underlying bankruptcy cases.

## **II. Factual and Procedural Background**

As noted previously, the history of this adversary proceeding is tied to the somewhat arduous history of these bankruptcy cases. *See* Prior Memorandum Opinion at 2. The Court made detailed findings with respect to the background leading up to this adversary proceeding in the Prior Memorandum Opinion. *See id.* at 2-7. While the record cites supporting those prior findings will not be repeated here, for ease of reference, the Court will repeat those findings in this Memorandum Opinion.

Wolfe was the principal and controlling shareholder of the three Debtors: ABC Utilities Services, Inc.; ABC Asphalt, Inc.; and Utilities Equipment Leasing Company, Inc. (collectively, the "ABC Entities" or the "Debtors"). In April 1989, Wolfe caused the ABC Entities to file for protection under Chapter 11 of the Bankruptcy Code. Subsequently, Joseph Colvin was appointed as the Chapter 11 Trustee for each of the ABC Entities and, after all three cases were converted to Chapter 7, the Chapter 7 Trustee (hereinafter, the "Bankruptcy Trustee").

Prior to their bankruptcy filings, the ABC Entities entered into a series of secured lease and finance transactions with ORIX Credit Alliance, Inc. ("OCAI"). During the bankruptcy cases OCAI was successful in defending itself against all claims asserted by the Debtors, in securing relief from the automatic stay to execute on its liens, and in obtaining allowed claims against the Debtors' estates over the objections of the Debtors and Wolfe.

Wolfe believed that several of the Debtors' former attorneys had committed malpractice in connection with the Debtors' prosecution of claims against OCAI. The Bankruptcy Trustee

refused to bring those malpractice claims. Thus, in 1996, Wolfe sought, and obtained, permission from this Court to bring a lawsuit, on behalf of the Debtors, against several of the Debtors' former attorneys (the "Malpractice Suit"). *See* Order Granting Second Amended Motion for Order Permitting Creditor to Initiate Litigation (the "Litigation Order"); Plaintiff's Exh. 3; Defendant's Exh. 5. The basis for the Malpractice Suit was the contention that the Debtors' former attorneys had impermissible conflicts of interest with OCAI while representing the Debtors in proceedings against OCAI, and that the Debtors suffered damages as a result of these conflicts.

The Litigation Order provided that Wolfe was "entitled to pursue litigation *on behalf of the estates of the Debtors* . . . on the condition that Wolfe pay all of the expenses of such litigation, the attorney that Wolfe employs to pursue such litigation accept such representation on a contingency basis, and that Wolfe indemnify the estates against any sanctions orders and counterclaims." *See* Litigation Order (emphasis added). Budner agreed to represent the Debtors in the Malpractice Suit on the terms set forth in the Litigation Order and a Contingent Fee Agreement was executed by Budner and Wolfe. *See* Plaintiff's Exh. 4. Budner filed the Malpractice Suit in Texas state court. The Debtors were the named plaintiffs in the Malpractice Suit.

Although OCAI was not a party to the Malpractice Suit, the Debtors sought extensive discovery from OCAI, including certain documents OCAI believed to be confidential (the "OCAI Documents").<sup>3</sup> Eventually, OCAI was ordered by the state court to produce certain documents

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<sup>3</sup>Budner testified that the OCAI Documents were needed for the successful prosecution of the Malpractice Suit because to prove a malpractice claim against the Debtors' former attorneys, the Debtors

under the protection of a confidentiality order (the “Confidentiality Order”). Among other things, the Confidentiality Order provided that the OCAI Documents were to be “used solely for the prosecution or defense of the claims asserted in the [Malpractice Suit] and shall not be used for any other purpose. . . .” The Confidentiality Order further provided that it would “survive the termination of [the Malpractice Suit]” and that upon the termination of the Malpractice Suit, the parties were to “return to OCAI all documents produced by OCAI, including all copies, prints and other reproductions of such information.”

OCAI and the Debtors had continuing discovery disputes in the Malpractice Suit. While these discovery disputes were pending, the parties to the Malpractice Suit successfully mediated their disputes and in July 1998, a Compromise Settlement Agreement was executed by the parties, subject to this Court’s approval (the “Malpractice Settlement”). As a result of the Malpractice Settlement, only one issue remained in the Malpractice Suit – the Debtors’ motion for sanctions for discovery abuses against OCAI and to lift the protections of the Confidentiality Order. By letter agreement dated July 23, 1998, OCAI and the Debtors agreed to settle their discovery disputes, subject again to this Court’s approval (the “OCAI Settlement”).

Budner, as counsel for the Debtors, submitted both of the settlement agreements (*i.e.*, the Malpractice Settlement and the OCAI Settlement) first to the state court, and then to this Court, for approval. The only response filed to the Settlement Motion in this Court came from Wolfe,

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had to prove that their claims against OCAI were meritorious and that the claims were lost because of the conduct of their former attorneys. *See* March 6 Trial Transcript (“Transcript”) at 272 (“A. I told Mr. Wolfe from the beginning, and we discussed from the beginning that our case had no value if we couldn’t prove the underlying case, which meant proving damages in the underlying case. Q. So you did recognize and know and believe that? A. Yes. Q. And Mr. Wolfe told you that, Mr. Budner, the thing we need to do is get these documents from Orix? A. Yes, he -- he didn’t tell me that. I told him that.”)

who objected to the settlements “to the extent approval [of the settlements] would arguably bar him or any party in interest from seeking disclosure of [the OCAI Documents].” The Settlement Motion was set for hearing on October 7, 1998.

At the October 7, 1998 hearing on the Settlement Motion, the Court found that while Wolfe was objecting to the OCAI Settlement, he had no objection to the Malpractice Settlement. *See Order Partially Approving Settlements and Application of Special Counsel for an Award of Professional Fees and Reimbursement for Expenses* (the “Malpractice Settlement Order”). Thus, the Court approved the Malpractice Settlement and “reserved for later determination” the OCAI Settlement. The Malpractice Settlement Order also allowed Budner’s fees for his representation of the Debtors in the Malpractice Suit. Wolfe agreed to the entry of the Malpractice Settlement Order.

On September 28, 1999, this Court considered the OCAI Settlement and Wolfe’s objections to that settlement. On October 22, 1999, this Court entered an order approving the OCAI Settlement, finding that “the settlement agreement between debtors and Orix Credit Alliance, Inc. is fair and equitable and in the best interest of the bankruptcy estate.” *See Order Approving Sanctions Settlement with Orix* (the “OCAI Settlement Order”).

On November 1, 1999, Wolfe filed his Motion for Additional Findings of Fact and asked the Court to “make an explicit finding of fact that the parties agreed that the records could be made available by the Bankruptcy Court, free of the restrictions of the confidentiality order, and

that the Court has done so by its order denying OCAI's motion to quash the deposition." *See* Motion for Additional Findings of Fact at 2. Wolfe's motion for additional findings was denied by Order entered on February 11, 2000. *See* Order Denying Motion of Frank A. Wolfe, Jr. for Additional Findings of Fact (the "Order Denying Additional Findings"). Wolfe did not appeal the Order Denying Additional Findings. Thus, the OCAI Settlement Order became final and binding upon the parties.

On July 11, 2000, Wolfe filed the instant action in Texas state court, which was subsequently removed to this Court. The Court denied Wolfe's motion to remand at a hearing held on November 8, 2000.

### **III. Analysis and Authority**

#### **A. Was Budner Wolfe's attorney in connection with the Malpractice Suit?**

Wolfe repeats his earlier arguments in connection with the Rule 12(c) Motion that Budner was his lawyer because "[t]he Bankruptcy Court's Order of February 5, 1996, (Exhibit \_\_\_) [sic] specifically authorizes Frank Wolfe individually to hire an attorney for the purpose of filing suit on behalf of the Estate. This Order does not confer a representative capacity on Frank Wolfe . . . . Instead, this Order gave Frank Wolfe permission, as an individual, to hire an attorney who, by the Court's Order, would have the authority to file suit for the Estates. Frank Wolfe was acting in the single capacity of an individual in hiring Bruce Budner as an attorney to pursue claims for the Estate." *See* Wolfe's Proposed Findings ¶ 6(a).

For the reasons explained in the Prior Memorandum Opinion, the Court rejects this argument and again concludes that the claims asserted in the Malpractice Suit belonged to the

Debtors' estates, not Wolfe individually. *See* Prior Memorandum Opinion at 8-12. The Litigation Order specifically provided that Wolfe was “entitled to pursue litigation *on behalf of the estates of the Debtors* . . . on the condition that Wolfe pay all of the expenses of such litigation, the attorney that Wolfe employs to pursue such litigation accept such representation on a contingency basis, and that Wolfe indemnify the estates against any sanctions orders and counterclaims.” *See* Litigation Order (emphasis added).<sup>4</sup>

Next, Wolfe repeats his earlier contention that “[t]he Employment Agreement dated February 14, 1996, between Wolfe and Budner (Exhibit “\_\_\_”) [sic] is a written agreement by Budner to provide professional services to Wolfe. The designation of Wolfe as a ‘Court authorized representative’ is inaccurate. Wolfe was not representing the Estates . . . .” *See* Wolfe’s Proposed Findings ¶ 6(b).

The Court disagreed with Wolfe’s interpretation of the Contingent Fee Agreement in the Prior Memorandum Opinion. *See* Prior Memorandum Opinion at 10-11. For at least the following reasons, the Court is satisfied that its prior determination was correct. The Contingent Fee Agreement provides that

[t]his Agreement is between the Estates of ABC Utilities Services, Inc., ABC Asphalt, Inc., and Utilities Equipment Leasing Company, Inc., by and through their court-appointed representative, Frank A. Wolfe, Jr., (“**Client**”) and Johnson & Budner, a Professional Corporation (“**Attorneys**”).” *See* Contingent Fee Agreement (Exh. \_\_\_ at p. 1) (emphasis in original). The Contingent Fee

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<sup>4</sup>As noted in the Prior Memorandum Opinion, in seeking authority to bring the Malpractice Suit, Wolfe recognized that the claims were not his, individually, to bring. Specifically, Wolfe’s motion was entitled “Motion for Order Permitting Creditor to Initiate Litigation *in the Name of the Trustee* and Brief in Support Thereof.” *See* Defendant’s Exh. 4 (emphasis added). Not only did the title of the motion recognize that these claims belonged to the Debtors’ estates, the motion specifically stated that “Wolfe requests that this Court enter an order which permits Wolfe to pursue the litigation on behalf of the Debtors’ estate.” *See id.*; *see also* Prior Memorandum Opinion at 9-10.

Agreement goes on to provide that “Client retains and employs Attorneys . . . Client agrees to pay to Attorneys a contingent fee . . . Client hereby sells, conveys, and assigns to Attorneys an interest to the extent herein indicated . . . Client understands that this agreement does not cover defense of claims asserted against Client . . . Client understands the uncertainty of contested legal matters, and acknowledges that Attorneys made no representations or guarantees regarding the outcome . . . .

*See* Plaintiff’s Exh. 4 at 1-2. In light of this language, the Court concluded in the Prior Memorandum Opinion that

[p]ursuant to the terms of the Contingent Fee Agreement, Budner agreed to represent the Debtors’ estates, not Wolfe individually. Wolfe signed the Contingent Fee Agreement individually because the Court required him, in his individual capacity, to pay the expenses of the litigation and to indemnify the estates from sanctions and counterclaims. *See* Litigation Order (Def. App. at p. 47). Where Wolfe undertakes individual obligations under the Contingent Fee Agreement, the agreement refers to him by name, not as the “Client.” *See, e.g.* Contingent Fee Agreement (Pl. Res. Exh. B at ¶ 3)(“Expenses shall be paid by Frank A. Wolfe, Jr., as incurred.”). Wolfe signed the Contingent Fee Agreement in his individual capacity to reflect his agreement to the personal obligations he was undertaking in connection with the Malpractice Suit. *See id.*

*See* Prior Memorandum Opinion at 10-11.

Moreover, as the Court noted in the Prior Memorandum Opinion, when the Malpractice Suit was filed, the Debtors were the named plaintiffs. Wolfe was not a named plaintiff in the Malpractice Suit. In fact, Wolfe hired separate counsel and sought leave to intervene in the Malpractice Suit in connection with the state court’s consideration of the OCAI Settlement. *See* Prior Memorandum Opinion at 11.

After considering, again, Wolfe’s arguments with respect to who Budner was representing in connection with the Malpractice Suit, the Court comes to the same conclusions that it did in the Prior Memorandum Opinion. Specifically, the Court again concludes that: (i) the claims asserted in the Malpractice Suit belonged to the Debtors’ estates; (ii) the only

plaintiffs named in the Malpractice Suit were the Debtors' estates; (iii) when Wolfe sought to appear personally in the Malpractice Suit, he did so through his own counsel (and not through Budner); (iv) Wolfe had no objection to the Malpractice Settlement or to the payment of fees to Budner for his representation of the Debtors in connection with the Malpractice Suit; and (v) Wolfe does not have standing to pursue any malpractice claims against Budner in connection with Budner's representation of the Debtors' estates in the prosecution of their claims against their former attorneys. *See* Prior Memorandum Opinion at 11-12.

However, as the Court noted previously, these conclusions do not resolve the suit. *See* Prior Memorandum Opinion at 12.

**B. Was Budner Wolfe's Attorney in Connection with Obtaining and Keeping the OCAI Documents or in Providing Advice about Wolfe's Claims?**

Wolfe also sues Budner for malpractice in connection with his negotiation of a settlement of the motions that were pending against OCAI in the Malpractice Suit for sanctions and to lift the confidentiality protections surrounding the OCAI Documents. *See generally* Plaintiff's Original Petition at 4-11. Recall that these disputes with OCAI arose in connection with non-party discovery of documents thought to be material to the Debtors' successful prosecution of the Malpractice Suit. On behalf of the Debtors, Budner sought discovery from OCAI and to compel the production of the OCAI Documents. As noted previously, OCAI was ordered by the state court to produce the OCAI Documents under the protection of the Confidentiality Order. OCAI and the Debtors had continuing discovery disputes. While these discovery disputes were pending, the Malpractice Settlement was agreed to by the Debtors and their former attorneys.

Wolfe contends that once the Malpractice Settlement was agreed to, Budner "agreed to

file motion to lift confidentiality agreement pertaining to certain documents obtained from third party Defendants Orix Credit Alliance.” *See* Plaintiff’s Original Petition ¶ 11. Wolfe further alleges that Budner “filed motion to lift confidentiality and to recover sanctions June, 1998 in the 141<sup>st</sup> State Court;” *see id.* ¶ 12; that “[o]n July 23, 1998, [Budner] entered into a settlement agreement with . . . Orix, against [Wolfe’s] directions and wishes and did not furnish [him] a copy of the agreement”; *id.* ¶ 13; and that “[o]n July 24, 1998, [Budner] testified in 141<sup>st</sup> District Court of Texas that [Wolfe] was not in agreement with settlement but that he had obtained Bankruptcy Trustee, Joseph Colvin’s permission to do so. [Wolfe] testified that he was against because it would do irreparable harm to the estate and himself.” *Id.* ¶ 14.

As relevant to the Phase I trial, Wolfe contends that he had an attorney-client relationship with Budner in connection with these matters. The Contingent Fee Agreement does not specifically address this issue. No other written agreement between the parties specifically addresses this issue.

Wolfe contends that “there are several documents which state directly or implicitly that Bruce Budner was Frank Wolfe’s attorney.” *See* Wolfe’s Proposed Findings ¶ 6. Wolfe further contends that an attorney-client relationship results from an agreement between the parties that can be express or implied; that to determine if there was an agreement, one must use objective standards of what the parties said and did and not look to their subjective state of mind; and that when those objective standards are applied here, the Court must conclude that Budner was Wolfe’s attorney in connection with the OCAI Documents and in connection with “giving Frank Wolfe advice about his own claims and potential liabilities in connection with the Estate’s claims.” *See* Wolfe’s Proposed Findings ¶ 10, and Proposed Conclusions ¶¶ 1, 2, and 3.

In *Vinson & Elkins v. Moran*, 946 S.W. 2d 381, 405-06 (Tex. App. – Houston [14<sup>th</sup> Dist.]

1997, writ dismissed by agreement), the court stated:

The attorney-client relationship is a contractual relationship in which an attorney “agrees” to render professional services for a client. To establish the relationship, the parties must explicitly or by their conduct manifest an intention to create it. In other words, an attorney-client relationship may be established either expressly or impliedly from the conduct of the parties. To determine if there was an agreement or meeting of the minds one must use objective standards of what the parties said and did and not look to their subjective states of mind.

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Because the attorney-client relationship is contractual, the determination of the existence of a contract must be, as in any other contract case, based on an objective standard, and not on what the parties subjectively thought.

*Id.* (citations omitted). See also *SMWNPF Holdings, Inc. v. Devore*, 165 F.3d 360, 365 (5<sup>th</sup> Cir. 1999) (“Before any duty can arise, however, there must be an attorney-client relationship. The attorney-client relationship is contractual. The parties both must understand and mutually agree to ‘the nature of the work to be undertaken.’ Moreover, this determination – whether a contract exists – must be based on an objective standard, and not on what the parties subjectively believed.”) (citations omitted); *Banc One Capital Partners Corp. v. Kneipper*, 67 F.3d 1187, 1198 (5<sup>th</sup> Cir. 1995) (“The attorney-client relationship is viewed as a contractual relationship in which the attorney agrees to render professional services on behalf of the client. The attorney-client relationship can be formed by explicit agreement of the parties or may arise by implication from the parties' actions.”); *Mellon Service Co. v. Touche Ross & Co.*, 17 S.W.3d 432, 437 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2000, no pet.) (“The attorney-client relationship is a contractual relationship whereby an attorney agrees to render professional services for a client. The relationship may be expressly created by contract, or it may be implied from the actions of the parties.”) (citations omitted); *Roberts v. Healey*, 991 S.W.2d 873, 880 (Tex. App. – Houston

[14<sup>th</sup> Dist.] 1999, pet. denied) (“The attorney-client relationship is a contractual one in which an attorney agrees, expressly and implicitly, to render professional services for a client. In order to establish an attorney-client relationship, the parties must explicitly or by their conduct manifest an intention to create it. To determine whether there was a meeting of the minds, we use an objective standard examining what the parties said and did and do not look at their subjective states of mind.”) (citations omitted).

When these legal principles are applied to the evidence admitted during the Phase I trial, the Court finds that Wolfe failed to establish by a preponderance of the evidence that Budner was his attorney as alleged in the Original Petition. *See Yaklin v. Glusing, Sharpe & Krueger*, 875 S.W.2d 380, 383 (Tex. App. – Corpus Christi 1994, no writ) (“The duties [of an attorney to its client] flow from the relationship, and Yaklin, the plaintiff at trial, has the burden of proving the existence of the attorney-client relationship.”) The evidence in the record establishes the following facts. Wolfe never asked Budner if he was his attorney – “it just wasn’t an issue.”<sup>5</sup> Wolfe “assumed” that Budner was his attorney.<sup>6</sup>

The only time that Budner stated that he was Wolfe’s attorney was in connection with a deposition taken in July, 1997 by Power’s malpractice insurance carrier in coverage litigation

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<sup>5</sup>See Transcript at 153 (“Q. And I asked you whether there were any verbal statements to support that assumption [that Budner represented you] on your part, and whether there had been any specific discussions between you and Mr. Budner about it, and you said there wasn't any discussion because it just wasn't an issue, didn't you? A. Yeah, he was my attorney.”)

<sup>6</sup>See Transcript at 153 (“Q. All right, and then when I asked you whether there was anything specifically said by Mr. Budner to you verbally about the attorney-client relationship, this personal representation of you in a personal capacity, you said that you just assumed that Mr. Budner represented you because you had hired him, according to that contingency fee contract, didn't you? A. I think that's probably what I said. I still feel that way.”).

pending between the carrier and Power's firm (the "Coverage Dispute"). Budner admits that he represented Wolfe in that deposition.<sup>7</sup> Budner testified that he did so to protect the ABC Entities' interests in the Malpractice Suit. If Power's insurance carriers succeeded in denying coverage for the claims asserted in the Malpractice Suit (*i.e.*, by contending that Power's fraudulent conduct in representing the ABC Entities against OCAI vitiated their insurance coverage), any recovery by the Debtors' estates in the Malpractice Suit would have been jeopardized.<sup>8</sup> Budner testified that this was the only time that he represented Wolfe, individually.<sup>9</sup> The Court finds Budner's testimony credible.

Wolfe next points to the language used by Budner in connection with certain letters Budner wrote to support his contention that Budner was his personal attorney. For example, in a letter dated February 19, 1997, Budner told Wolfe that he looked forward "to continuing to represent you." *See* Plaintiff's Exh. 6. The letter goes on to state that "[y]ou can be assured to receive the same high quality and efficient legal representation that you have been receiving from Johnston & Budner." *See id.* Wolfe further contends that Budner asked him to sign the bottom

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<sup>7</sup>*See* Transcript at 217 ("A. I did represent him [Wolfe] in the deposition that we've discussed, where he was subpoenaed in the ancillary CNA vs. White, Huseman case, and I felt it necessary to protect this lawsuit by representing him in that deposition."); *id.* at 305 ("Q. So you were his [Budner's] lawyer? A. For that one deposition, and made it clear in there, as he did, that it was not for all purposes.").

<sup>8</sup>*See* Transcript at 304-05 ("A. I remember being concerned and expressing to Frank that I was concerned that these lawyers in the coverage case who would be taking this deposition in the coverage case would try to use it as a preliminary method of discovery for the malpractice, because basically what we had was a lawyer for the insurance company who was interested in defeating our malpractice claim and a lawyer for White, Huseman who was interested in defeating our malpractice claim. So I felt it was important to protect our malpractice claim, to be there to represent Frank, and so I did.")

<sup>9</sup>*See* Transcript at 305 ("Q. So you were his [Budner's] lawyer? A. For that one deposition, and made it clear in there, as he did, that it was not for all purposes.").

of the letter to evidence his agreement to Budner taking the file, without mention of a representative capacity. *See* Wolfe’s Proposed Findings ¶ 6(d).

This letter was written when Budner was leaving his prior law firm and sought to continue his representation of the Debtors’ estates in the Malpractice Suit.<sup>10</sup> While it would have been more precise for Budner to state that he looked forward “to continuing to represent you [Wolfe] *in your capacity as the representative of the Debtors’ estates,*” or for the signature block at the bottom of this letter to state Wolfe’s representative capacity, because the Court has found that the Malpractice Suit belonged to the Debtors’ estates, and not Wolfe, individually, Wolfe’s signature consenting to Budner taking the Malpractice Suit with him when he left his former firm had to be in his representative capacity.

Wolfe cites to other examples of Budner’s use of imprecise language to support his contention that Budner was his attorney. *See, e.g.,* Wolfe’s Proposed Findings ¶ 6(e). (“During Bruce Budner’s deposition taken in November 1998, (Exhibit “\_\_\_”) [sic] he was asked how he learned about the identity of a particular person and he answered ‘From my client. From Mr. Wolfe.’”). Along these same lines and perhaps most damaging at first blush was a letter from Budner to Joseph Colvin, the Bankruptcy Trustee, dated October 15, 1998 which stated that “I have taken the position that both you and Frank Wolfe have been my clients.” *See* Plaintiff’s

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<sup>10</sup>*See* Transcript at 299 (“Q. Whatever was done, after a year you write him a letter and say, Dear Frank, I am splitting off, I am starting a new firm, here is all my numbers, I very much look forward to continuing to represent you. Now, I guess you probably think it's unreasonable after Frank has a relationship with you for a year and you write him a letter and say, Frank, I enjoyed representing you, and I want to continue to represent you, do you think it's unreasonable for Frank Wolfe to feel like, hey, Bruce is my lawyer, and I've enjoyed his representing me too? A. Yes, sir. When I have represented him for a year in one capacity, for him to think when I sent him a form letter telling him that I was changing firms, that somehow all of a sudden I was now representing him individually, I think that would definitely have been unreasonable.”)

Exh. 18. However, Budner testified at trial regarding this letter and put it into context. Specifically, Budner testified that he wrote that statement in order to protect what he believed to be privileged communications. Budner believed he was entitled to protect as privileged communications his communications with Wolfe, as the representative of the Debtors' estates, and his communications with Colvin, as the Bankruptcy Trustee.<sup>11</sup>

The Court finds Budner's explanations credible. While Budner could have been more precise, no reasonable person would have been misled by these references in light of the record as a whole.

In support of his contention that he had no attorney-client relationship with Wolfe as alleged, Budner points to examples Wolfe's equally imprecise language.<sup>12</sup> Budner also cites to

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<sup>11</sup>See Transcript at 247-48 ("A. This letter was about attorney-client privilege. I had taken the position that for purposes of the attorney-client privilege, Frank as the estate's representative was my – was the client who's – so that my communications with him would be protected, and I also felt that they were with the trustee. And that's what I was referring to. And in the second sentence in the last – the second paragraph, makes it clear that that's what I was talking about, because I said I solicit your input as to whether you would want me to answer questions about my communications with you, Mark Petrocchi, and/or Frank Wolfe. I couldn't ask Mr. Colvin as trustee to waive any attorney-client privilege I had with Frank Wolfe in an individual capacity. It only makes sense that I was talking about the attorney-client privilege that I had with him in the representative capacity that I represented him in exclusively, except for that one deposition, for all these years.").

<sup>12</sup>See, e.g., Transcript 184 ("Q. So your testimony was that when you signed the confidentiality order, you were representing the bankruptcy estate only, and it had nothing to do with you, Mr. Frank Wolfe, human being? A. I never made any -- I really, Mr. Crapster, never made any different -- you know, one lawyer will come in and he'll ask you, you meant this, and the other one will come in and ask if you meant that. My honest testimony is that I never made any difference. Q. Well, when you were asked this question about how you signed the confidentiality agreement, you were specifically asked who were you representing, and what was your answer on Line 20? A. It says I was representing the bankruptcy estate."); *id.* at 192 ("Q. And then the question was asked of you, 'Okay, let's talk about that. Mr. Wolfe, you sought and obtained permission from the bankruptcy court as a creditor to pursue the claims against the lawyers on behalf of the estate. Is that correct?' And you said, 'That's correct.' Right? A. That's correct."); *id.* at 179-80 ("Q. And on Page 15, your [Wolfe's] attorney says, 'We are --' -- excuse me, I'll let you get there. Page 15, Line 6, 'We are simply asking the attorney for the estates to allow us to turn

Wolfe's admission that Budner was not his attorney.<sup>13</sup>

Finally, Budner testified that Wolfe authorized him to enter into the OCAI Settlement the afternoon before the sanctions and confidentiality hearing. Specifically, Budner testified that he called Wolfe to discuss the possible settlement and, during the call, Wolfe authorized him to settle on the terms outlined.<sup>14</sup> Armed with that telephonic authority, Budner entered into a binding Rule 11 letter agreement.<sup>15</sup> In subsequent calls later that evening or early the following

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over to Mr. Wolfe in his individual capacity these documents.' Isn't that what your attorney said? A. You are going to have to direct me to the line . . . That's what it says. Q. And then your attorney on Page 17, a couple of pages over, Line 13, said, 'And in the letter agreement,' referring to the July 23 letter agreement, 'they expressly contemplated that we would be here in a hearing like this today, and that we would either seek an order from the bankruptcy court directing Mr. Budner to turn over the documents or that a subpoena would be issued, in which case Orix would respond by a motion for protection.' Were you there when your attorney made those statements? A. Yes, I am sure I was. Q. And you didn't dispute them, did you? A. No.'").

<sup>13</sup>See Transcript at 194-95 ("Q. And he asked you then [at a previous deposition], 'All right, and at that time Mr. Budner was your attorney, is that correct?' Just using the pronoun 'your attorney.' And what was your answer? A. No, I think Mr. Budner was representing the estate at the time. Q. And then Mr. Budner interjected, 'I wasn't representing anybody yet,' and what was your answer? A. 'Yeah.' . . . Q. At this deposition which has been discussed at previous depositions taken in this case, in which Mr. Budner represented you individually, when you were subpoenaed individually about this insurance issue over the Powers lawsuit, you specifically testified that you understood Mr. Budner was representing the estate and not you personally, isn't that correct? A. I think that's what I read off there a while ago.'").

<sup>14</sup>See Transcript at 227-28 ("A. But we [Budner and counsel for OCAI] were discussing possible structures of a settlement of the two hearings that were set, or the two motions that were set for hearing the next morning, and once those discussions began, I immediately contacted Frank to alert him about those. Frank was – he approved the concept of the discussions, and we exchanged offers back and forth. Each time I made an offer, I had specific approval to make that offer. Q. From whom? A. Frank Wolfe as the representative of ABC. Q. All right, did you talk to the trustee, Mr. Colvin, that day, at all that day? A. I talked to his law partner at the end of the day, after Frank had given me permission. Q. For the final – A. For the – to sign the Rule 11 agreement, which I had read to Frank, read to him the actual document. Q. Over the – A. In one of our last phone calls that afternoon.'").

<sup>15</sup>See Transcript at 230 ("Q. All right, so when did you sign the letter agreement that is the July 23, 1998 Rule 11 agreement? A. On July 23, not July 24th. I signed that Rule 11 agreement when Frank Wolfe gave me authority to do so. Q. That afternoon? A. Not a minute before and certainly not the next day. In fact, I didn't even see Richard Ward between signing that Rule 11 agreement, the afternoon of the 23rd, until we were in court in Fort Worth on the morning of the 24th. I did not sign it on the morning of

morning, Wolfe attempted to withdraw his previously given authority, putting Budner into “a really awkward position.” *See* Transcript at 238. At the July 24 hearing before the state court, Budner discussed Wolfe's change in position regarding the settlement and the resulting discomfort Budner felt as a result of having Wolfe, as the representative of the Debtors' estates, now oppose the OCAI Settlement while Colvin, the Bankruptcy Trustee, supported it.<sup>16</sup> The OCAI Settlement was approved at the conclusion of that hearing by the state court.

Budner's testimony is credible. Budner advised Wolfe that he was not Wolfe's personal attorney, and that he represented only the Debtors' estates in connection with the Malpractice Suit, the Malpractice Settlement, and the OCAI Settlement.<sup>17</sup> Notwithstanding the Malpractice

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the 24th. I had signed it when I had the conversation with Frank late that night.”); *id.* at 232-33 (“Let's go back to – you said you signed the letter after Mr. Wolfe told you it was okay to do so. A. Yes. Q. And did you read the letter to him? A. I read to him what I regarded to be the material paragraphs of the letter.”).

<sup>16</sup>*See* Transcript at 241-43 (“Q. Did you also tell the state court judge that you perceived there was an issue where you were a little uncomfortable because the trustee had a different position than Mr. Wolfe? A. I don't know how the flavor of that comes across on the transcript. I can tell you that I was more uncomfortable about the fact that Frank – that I had signed something with Frank's authorization and he had withdrawn his approval for that settlement. I never really was clear, and I think I may even have said this on the record, I think I did say it on the record on July 24th, I was never really clear as to whether Joe Colvin had any final authority to approve or disapprove anything, because Frank had been the one that Judge Tillman had said would be the representative for the estates. But I certainly believed that it was prudent to get Joe Colvin's – get him on board with any major decision that had to be approved by the Court. But that wasn't my primary discomfort. My primary discomfort was that as a lawyer I had signed an agreement, and now my client representative was saying he didn't want to go forward with it.”).

<sup>17</sup>*See* Transcript at 217-18 (“Q. And during that deposition, did it specifically come up about who you represented in the ABC case, and you clarified that? A. Yes, yes, I stated on the record that I only represented the ABC entities, and did not represent Wolfe individually. I said that in front of Mr. Wolfe, sort of in the nature of an objection to one of the questions that was posed to him. Q. Do you recall the question and answer that Mr. Wolfe gave when one of the other lawyers started just asking out of the blue whether he represented him personally that was read to the Court on Page 150? A. I have read that testimony in preparation for these proceedings, and I don't specifically recall it, but I'm sure it happened the way it reads. Q. Is Mr. Wolfe's testimony that he gave that day, was it spontaneous? A. It appears to me from reading it. Q. Had you had any discussion with him about it in advance? A. Mr. Wolfe and I

Settlement, Budner filed a motion in the state court for sanctions against OCAI for discovery abuses and to lift the confidentiality protections surrounding the OCAI Documents, as requested by Wolfe in his capacity as the representative of the Debtors' estates.<sup>18</sup> On the day before the hearing on those motions in state court, Budner and OCAI's counsel had discussions about a possible settlement of those motions.<sup>19</sup> Budner fully informed Wolfe of all material terms of the proposed OCAI Settlement during their telephone call on the afternoon of July 23, 1998.<sup>20</sup> Wolfe authorized Budner to agree to the OCAI Settlement during that call.<sup>21</sup> Because Budner agreed to the OCAI Settlement on July 23, 1998 after being authorized by Wolfe to do so, his conduct on July 24, 1998 at the state court hearing was appropriate. Moreover, Budner's conduct in advising the Bankruptcy Trustee of the terms of the OCAI Settlement was proper. Budner knew that the

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have discussed on many occasions the difference between his personal interests and the interests of the ABC estates, and how my job fell in line with representing ABC and not him.”).

<sup>18</sup>See Transcript at 117-18 (“Q. And so does that bring us to Exhibit No. 8, which is the motion to partially lift the confidentiality? A. Yes, sir. Q. And is this the motion that you asked Mr. Budner to file? A. Yes, and he agreed to it and did so the very next day. Q. And does this motion say and ask to do what you told Mr. Budner you wanted him to do? A. Yes, sir. Q. Did he tell you that he would set it for hearing? A. Yes, sir. Q. And did he eventually set it for hearing? A. Yes, sir.”).

<sup>19</sup>See Transcript at 227 (“A. And at some point that afternoon, we [Budner and counsel for OCAI] had a conversation about the hearing the next morning, and you know, as lawyers sometimes do before a hearing, telling the other side why I'm going to win or you're going to win, and it quickly became a conversation about whether we ought to try to settle it. . . .”).

<sup>20</sup>See Transcript 232-33 (“Let's go back to – you said you signed the letter after Mr. Wolfe told you it was okay to do so. A. Yes. Q. And did you read the letter to him? A. I read to him what I regarded to be the material paragraphs of the letter.”).

<sup>21</sup>See Transcript at 230 (“Q. All right, so when did you sign the letter agreement that is the July 23, 1998 Rule 11 agreement? A. On July 23, not July 24th. I signed that Rule 11 agreement when Frank Wolfe gave me authority to do so. Q. That afternoon? A. Not a minute before and certainly not the next day. In fact, I didn't even see Richard Ward between signing that Rule 11 agreement, the afternoon of the 23rd, until we were in court in Fort Worth on the morning of the 24th. I did not sign it on the morning of the 24th. I had signed it when I had the conversation with Frank late that night.”)

OCAI Settlement would also have to be approved by this Court. Budner prudently consulted with the Bankruptcy Trustee because he knew that the trustee would have standing to support or oppose the OCAI Settlement when it was presented to this Court for approval. Budner simply sought to assure himself of the Bankruptcy Trustee's support of the OCAI Settlement before proceeding further.<sup>22</sup>

Notwithstanding the fact that Budner used imprecise language from time to time, after considering the record as a whole and the relevant Texas authorities, the Court concludes that Budner did not have an attorney-client relationship with Wolfe, individually, as alleged by Wolfe. Wolfe is a relatively sophisticated businessman. He operated the Debtors' businesses for years in corporate structures to protect himself from personal liability. He actually filed personal claims against the Debtors in these cases. He was represented by counsel (not Budner) in that connection. He was personally represented by counsel (again, not Budner) when he sought permission to bring the Malpractice Suit on behalf of the Debtors' estates.<sup>23</sup> He admitted in a

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<sup>22</sup>See Transcript at 234-35 (“Q. After you talked to Mr. Wolfe about the letter and got his approval, did you talk to -- who did you call after that? A. I called Mr. Colvin. Q. And what happened? A. He wasn't there, and I spoke to his partner, Mr. Petrocchi. Q. Was this before, or after you signed the letter? A. Before. Q. And what did he tell you? A. I explained a little bit of the background of what led up to this. He was really more familiar with it than I expected he would be. He said that Mr. Colvin was, you know, on his way someplace, but when I explained the details of the background of this, and of the settlement itself, he said, I don't even have to talk to Mr. Colvin, I know he will be pleased with that settlement. You have -- you have my authority as his law partner to go forward with that.”)

<sup>23</sup>See Transcript at 143 (“Q. All right, and so again, without trying to belabor it, the record will show that you and your attorneys, Mr. Simon, filed a motion for permission to lift the -- not lift, let me restate it. A motion for permission to sue the Powers firm, in the Powers lawsuit on behalf of the ABC estates, and you filed a motion in the name of the trustee – A. No, I don't think we did. Q. Well, again, I think I'm tired here. You filed a motion for permission to allow you to file that lawsuit in the name of the trustee, did you not? A. I think that was the original way Mr. Roberts, Seymour Roberts, with Mr. Simon's firm, filed it. Q. Right.”).

deposition taken in the Coverage Dispute that Budner did not represent him personally in the Malpractice Suit.<sup>24</sup> Finally, he admitted that his intention was to hire his own personal attorney to subpoena the OCAI Documents from Budner once the OCAI Settlement was approved and before the OCAI Documents were returned to OCAI pursuant to the terms of that settlement.<sup>25</sup>

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<sup>24</sup>See Transcript at 194-95 (“Q. And he asked you then [at a previous deposition], ‘All right, and at that time Mr. Budner was your attorney, is that correct?’ Just using the pronoun ‘your attorney.’ And what was your answer? A. No, I think Mr. Budner was representing the estate at the time. Q. And then Mr. Budner interjected, ‘I wasn’t representing anybody yet,’ and what was your answer? A. ‘Yeah.’ . . . Q. At this deposition which has been discussed at previous depositions taken in this case, in which Mr. Budner represented you individually, when you were subpoenaed individually about this insurance issue over the Powers lawsuit, you specifically testified that you understood Mr. Budner was representing the estate and not you personally, isn’t that correct? A. I think that’s what I read off there a while ago.”).

<sup>25</sup>See Transcript at 173-76 (“Q. Before you called Mr. Budner at home that night, it was specifically discussed between you and him that you could either get the FBI to subpoena the documents or you could get your own lawyer to subpoena the documents from Mr. Budner within that ninety day period. Wasn’t that specifically discussed? A. He said they could be subpoenaed from him, but other than Mr. Budner, I didn’t have a lawyer at that point in time . . . Q. I asked you, ‘In the procedure you went through to have Mr. Gordon notice Bruce Budner’s deposition and subpoena the records and get them turned over at that deposition was consistent with the initial discussion of the settlement back in July, was it not?’ And you asked me repeat the question, did you? And on Line 11 on Page 67, I said, ‘Back in July of ’98, I believe the date was July 23, you said that Bruce Budner talked to you about the fact that the documents of Orix could be subpoenaed, right?’ And you said, ‘Right.’ And I said, ‘And the actions that were later taken, within a month you hired Mr. Gordon to file a pleading for you in the bankruptcy court about the Orix settlement, right?’ And you said, ‘Right.’ And I said, ‘And then the actions that this same lawyer Gordon took on your behalf to subpoena the records, to get them from Mr. Budner, were consistent with the idea that they could be subpoenaed, and that’s consistent with your discussion with him,’ and you asked me, ‘With Mr. Gordon?’ And I said, ‘No, your discussion with Bruce Budner on the telephone on July 23.’ And you said, ‘Yes, they were subpoenaed.’ And to clarify, I said, ‘And that was -- that was the fashion in which it was discussed?’ And you said, ‘With?’ I said, ‘Mr. Budner, back when y’all discussed the settlement agreement.’ And you said, ‘Yes. that happened that way,’ and then you mentioned that you were hamstrung by the confidentiality agreement later, it didn’t work out like you wanted, but you clearly explained that when you and Mr. Budner discussed this settlement agreement on July 23rd, it was specifically contemplated that you could have your own attorney, Mr. Gordon or anybody else, subpoena these records within that ninety day time frame, did you not? A. Yes. . . . Q. Now, we know you and Mr. Budner talked about you getting your own attorney to subpoena the documents. Let’s focus on what you did. I believe you said you hired Mr. Gordon very soon after the agreement was made, or very soon after July 24. A. I don’t know the exact date, but yes, I did call him and talk to him. Q. Right. At one point you had indicated – it may have been just almost immediately, right? A. It couldn’t have been fast enough for me, I know that.”); *see id.* at 243-44 (“Q. Did you discuss the idea of him subpoenaing the documents as has already been described? A. Yes . . . Q. After that you

Although the strategy was not successful, Wolfe in fact hired an attorney (again, not Budner) to attempt to get the OCAI Documents turned over to him before they were returned to OCAI pursuant to the OCAI Settlement. In light of the record as a whole, Wolfe's contention that he thought Budner was his personal attorney is not credible.

**C. Was Wolfe a Consumer Under the Texas Deceptive Trade Practices Act?**

Although Wolfe contends that this issue requires that this case proceed to a Phase II trial, the Court disagrees. This issue can be addressed on the record adduced at the Phase I trial. To prevail under the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA"), Wolfe must establish (i) that he was a consumer of legal services that are not excepted from the DTPA, (ii) that the legal services provided by Budner violated § 17.49 of the DTPA, and (iii) that Budner's violations of the DTPA caused Wolfe's damages. All three elements must be established. See TEX. BUS. & COM. CODE § 17.50; *Brown v. Bank of Galveston, Nat. Ass'n*, 963 S.W.2d 511, 513 (Tex. 1998); *Guest v. Cochran*, 993 S.W.2d 397, 407 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1999, no pet.); *Kahlig v. Boyd*, 980 S.W.2d 685, 690 (Tex. App. – San Antonio 1998, pet. denied).

Whether a party is a consumer under the DTPA is a question of law. See *Metropolitan Life Ins. Co. v. Haney*, 987 S.W.2d 236, 242 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1999, pet. denied); *Wright v. Gundersen*, 956 S.W.2d 43, 47 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1996, no writ). Thus, the Court can decide this issue on the basis of the record made in connection with the Phase I trial.

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were subpoenaed to give your deposition by an attorney named Mr. Gordon, right? A. Yes. Q. Did that surprise you? A. No.").

In *Moran*, 946 S.W.2d at 406-07, the court refused to extend consumer status to a cause of action by beneficiaries under a will against the attorneys hired by the executors of the estate, holding that

To recover under the DTPA, the plaintiff must be a consumer. A DTPA consumer is “an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services.” For a person to qualify as a consumer he must meet two requirements. First, he must have sought or acquired the goods or services by purchase or lease, and second, the goods or services purchased must form the basis of the complaint. Consumer status is dependent on the plaintiff’s relationship to the transaction, not on the contractual relationship between the parties. Therefore, a party need not show contractual privity with the opposing party to assert consumer status under the DTPA.

The DTPA is designed to protect consumers from any deceptive trade practice made in connection with the purchase or lease of any goods or services. To this end, the supreme court has stated the DTPA must be given its most comprehensive application without doing any violence to its terms. Although the DTPA is to be interpreted liberally, we are not persuaded that the Texas Legislature intended the Act to apply to causes of action by will beneficiaries against the attorneys hired by the executors of the estate.

(Citations omitted). *See also Melody Homes Mfg. Co. v. Barnes*, 741 S.W.2d 349, 351-52 (Tex. 1987). Relying on *Brandon v. American Sterilizer Co.*, 880 S.W.2d 488 (Tex. App. – Austin 1994, no writ), the *Moran* court concluded that

[t]he executors’ purpose in hiring V & E was to obtain legal services for the administration of this large Estate. Any benefit of this “purchase” would obviously extend to the beneficiaries in the form of a more orderly administration. Any benefit derived by the beneficiaries, however, was merely incidental to the main purpose, *i.e.*, legal assistance to the executors. We cannot conclude that the executors hired V & E for the principal purpose of providing a benefit to the beneficiaries. We find nothing to indicate that V & E’s retention was in any respect different from the typical retention of counsel by the executor of a decedent’s estate.

There are innumerable instances in modern practice in which services performed by an attorney will benefit others besides the client. For example, successful labor

litigation on behalf of a union will benefit union members. Responsible representation of a city, county, or other governmental entity may confer an advantage on the citizens. In these and other instances, the fortunes of third parties are affected by the performance of an attorney retained by a client. The mere fact that these third parties are benefitted, or damaged, by the attorney's performance does not make the third parties consumers with rights to an action under the DTPA. These third parties are "incidental beneficiaries," and we do not believe the legislature intended to confer consumer status on them. Beneficiaries of a will or trust are, in this respect, no different; they may incidentally benefit or be damaged by the attorney hired to represent the executor. This does not give them consumer status under the DTPA.

*Moran*, 946 S.W.2d at 408. See *Davis v. Nationsbank of Texas, N.A.*, No. 14-99-00434-CV, 2000 WL 1125587 (Tex. App. – Houston [14<sup>th</sup> Dist.] Aug 10, 2000) ("The mere fact that third parties may benefit or be damaged in a particular transaction does not make them consumers with rights to an action under the DTPA."); *Guest v. Cochran*, 993 S.W.2d 397, 408 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1999, no writ) ("Any benefit derived by the beneficiaries of a will from the estate work provided by an attorney is purely incidental."); *Henderson v. Central Power and Light Co.*, 977 S.W.2d 439, 445 (Tex. App. – Corpus Christi 1998) (observing the *Moran* Court's finding that the "legislature did not intend to confer consumer status on third parties who may only incidentally benefit or be damaged by the provision of goods or services to another"); *Querner v. Rindfuss*, 966 S.W.2d 661, 668 (Tex. App. – San Antonio 1998, pet. denied) ("Any benefit derived by the beneficiaries is incidental to the main purpose. This does not give the beneficiaries consumer status under the DTPA.").

Applying these legal principals here, the Court concludes that Wolfe was not a consumer of legal services from Budner as required by the DTPA. Wolfe, individually, did not seek or acquire legal services from Budner. Those services were sought and acquired by Wolfe in a representative capacity – specifically, as a representative of the Debtors' estates. The Debtors'

estates were the purchaser of legal services from Budner. Budner's successful prosecution of the Malpractice Suit resulted in substantial monetary recoveries to the Debtors' estates pursuant to the terms of the Malpractice Settlement and the OCAI Settlement. While Wolfe may indirectly benefit from the monies received from the Malpractice Settlement and the OCAI Settlement (*i.e.*, as a creditor of the Debtors), that does not make him a consumer with rights to bring an action under the DTPA relating to the estates' purchase of legal services from Budner.

Because Wolfe was not a consumer of legal services, he has no cognizable claim against Budner under the DTPA.

**D. Do Any Other Theories of Liability Remain to be Tried?<sup>26</sup>**

Wolfe contends that Budner was negligent in failing to inform him that Budner was not his attorney. However, the Court has already found that Budner did in fact inform Wolfe that he was not representing Wolfe personally. *See supra* at pp. 18-19. Moreover, the Court has made findings with respect to all other allegedly negligent acts committed by Budner (*see* Proposed Amended Complaint ¶ 14). *Id.* at pp. 18-22. Those findings dispose of Wolfe's claims of negligence.

The Proposed Amended Complaint also asserts claims of breach of fiduciary duty. However, those allegations are predicated upon a finding that Budner was Wolfe's attorney. The Court's findings that Budner was not Wolfe's attorney disposes of these claims.

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<sup>26</sup>After the Phase I trial was concluded, Wolfe filed a Motion for Leave to File an Amended Complaint (the "Motion"). Budner opposes the Motion contending that Wolfe improperly attempts to "get another bite at the apple with allegations that are not only new, but are in fact contradictory to those made in the pleadings pending at trial." *See* Budner's Response to Plaintiff's Post-Trial Brief at 2. While the Motion has not been heard, even if it were granted, findings of fact made in this Memorandum Opinion would foreclose any recovery by Wolfe in connection with those theories of liability.

The Proposed Amended Complaint also asserts claims for fraud and negligent misrepresentation. *See* Proposed Amended Complaint ¶¶ 24-27. Again, the Court’s findings of fact in this Memorandum Opinion foreclose any recovery by Wolfe with respect to these claims.

Because (i) Wolfe had no attorney-client relationship with Budner, (ii) Wolfe was not a consumer of legal services from Budner, (iii) Wolfe was informed by Budner that Budner was not his personal attorney with respect to those matters alleged by Wolfe, and (iv) the findings of fact made in this Memorandum Opinion foreclose any recovery on any remaining theory of liability pled in either the removed state court petition or the Proposed Amended Complaint, the Court concludes that this case should be dismissed. A proposed Judgment consistent with this Memorandum Opinion will be submitted to the District Court for entry.

Signed this 17<sup>th</sup> day of April, 2001.

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**Barbara J. Houser**  
**United States Bankruptcy Judge**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION**

<b>IN RE</b>	§	
	§	
<b>ABC UTILITIES SERVICES, INC., et al.,</b>	§	
	§	
<b>Debtors.</b>	§	
	§	
<hr/>		
<b>FRANK A. WOLFE, JR.,</b>	§	
	§	
<b>Plaintiff,</b>	§	
	§	
<b>v.</b>	§	<b>Civil Action No. _____</b>
	§	
<b>BRUCE A. BUDNER &amp; ASSOCS., P.C.,</b>	§	
	§	
<b>Defendant.</b>	§	

**PROPOSED JUDGMENT**

Before the Court is Plaintiff's Original Petition, filed against Bruce A. Budner & Associates., P.C., by Plaintiff Frank A. Wolfe, Jr. Upon review of the Memorandum Opinion submitted by the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division (the "Memorandum Opinion"), and for the reasons stated therein, the Court is of the opinion that this action should be and hereby is dismissed. It is therefore

**ORDERED** that Plaintiff's Original Petition be dismissed with prejudice; it is further

**ORDERED** that the each party shall be responsible for its own costs incurred in the prosecution and defense of this action.

Signed: \_\_\_\_\_

\_\_\_\_\_

**United States District Judge**