

Legal Update – June 2011 NASBA Regional Conferences
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I. Introduction

Since the case law update presented at last year's Regional Conference, there have been several reported decisions dealing directly with accountancy regulation or directly involving state boards of accountancy. Several pertained to constitutional challenges. Others dealt with questions about grounds for discipline. Some involved primarily procedural issues. There are also some cases of note concerning accountancy related issues such as malpractice and negligence that impact regulation though not necessarily directly involving a state board. For your convenience this manuscript has been divided so that Part III is a collection of case squibs organized by topic. Part IV includes a slightly more detailed analysis over each case arranged alphabetically. In addition to the cases included in this document, we will also discuss recent Federal Trade Commission cases of critical interest to all professional licensing boards.

Note: These are limited summaries. Every case involves not only particular facts but also unique statutes and rules. Some of these cases are "unpublished" and under some rules of court may be of limited authority or citation value. Additionally, some of these cases might be subject to further appeal. Finally, these summaries often represent an outsider's view of a case that one of the other attorneys at this conference actually handled. So, when in doubt, please presume that the interpretation offered by the handling attorney is more likely the correct one!

II. Table of Recent Cases and Opinions

Adsumelli v. Steiner, 31 I.E.R Cas. (BNA) 511 (2010).

Appeal of Robert Daniel Mays (New Hampshire Board of Accountancy), No. 2010-101, Supreme Court of New Hampshire, 2011 N.H. LEXIS 12 (February 23, 2011).

Baisden v. California Board of Accountancy, F060100, 2011 Cal. App. LEXIS 105, (January 6, 2011) [unpublished].

Banister v. California Board of Accountancy, No. C062435, 2010, Cal. App. LEXIS 7457 (Sept. 21, 2010) [unpublished], *petition for review denied*, No. S187914, 2010 Cal. LEXIS 12714 (Dec. 15, 2010).

Duncan v. State Bd. of Accountancy, No. 35804, 2010 Ida. LEXIS 69 (Idaho Apr. 23, 2010).

Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. ____ (2010).

In Re Enron Corporation Securities, Derivative & "Erisa" Litigation; Mark Newby, et

al., v. Enron Corporation, et al., American National Insurance Company, et al., v. Arthur Andersen, LLP, et al., MDL-1446, Civil Action No. H-01-3624 Consolidated Cases Civil Action No. G-03-0967, United States District Court for the Southern District of Texas, Houston Division, 2010 U.S. Dist. LEXIS 130386 (December 8, 2010).

In the Matter of Joseph M. Wunderlich, v New York State Education Department, Committee on the Professions, No. 510631, 2011 NY Slip Op 1566; 918 N.Y.S.2d 257; 2011 N.Y. App. Div. LEXIS 1555 (March 3, 2011).

Johnson v. Hall, 2010 U.S. Dist. LEXIS 97331 (Aug. 23, 2010).

Larson v. Missouri Board Of Accountancy, No. 10-CV-06094-NKL 2011 U.S. Dist. LEXIS 3391 (Jan. 13, 2011).

Miguel Guzman-Rivera, Plaintiff, Appellant, v. Kermit Lucena-Zabala Et Al; Defendants, Appellees, No. 09-2175 United States Court Of Appeals For The First Circuit, 2011 U.S. App. LEXIS 8324 (April 22, 2011).

Scott A. Whisenant CPA v. Alabama State Board of Public Accountancy Et Al, 03-CV-2010-900736.00 (December 7, 2010)

South Carolina Department of Labor, Licensing, and Regulation v. Michael A. Paulin, No. 2010-UP-091, 2010 S.C. App. LEXIS 100 (Feb. 3, 2011) [unpublished].

State Board of Accountancy, v. James F. Ferris, Jr., CPA, No. 10-0210 AC 2010 Mo. Admin. Hearings LEXIS 176 (Dec. 8, 2010).

State Board of Accountancy, Petitioner, vs. Charles B. Larson, Respondent, No. 10-0601 AC, No. 10-0601 AC (March 1, 2011).

Steven E. Leber, As Trustee of the Steven E. Leber Charitable Remainder Unitrust, Plaintiff, v. Paul J. Konigsberg and Konigsberg, Wolf & Co., P.C., Defendants, Case No. 09-80593-Civ-Marra/Johnson, United States District Court for the Southern District of Florida, 2010 U.S. Dist. LEXIS 128910 (December 6, 2010).

Texas State Board of Public Accountancy v. Bass, No. 03-09-00251-CV, 2011 Tex. App. LEXIS 294 (Jan. 14, 2011).

Thomas v. State Board of Certified Public Accountants of Louisiana, 34 So. 3d 296, 2010 La. LEXIS 1207 (April 30, 2010)

Western Security Bank and Glacier Bancorp Inc., v. Eide Bailly LLP, DA 09-0404 2010 MT 291; 359 Mont. 34; 2010 Mont. LEXIS 452 (December 30, 2010).

Op. Att'y Gen. Ky. No. 10-ORD-164, 2010 Ky. AG LEXIS 171 (Aug. 20, 2010).

Op. Att’y Gen. Tex. No. GA-0811, 2010 Tex. AG LEXIS 63 (October 22, 2010).

III. Legal Developments Highlights (by subject)

A. Grounds for Discipline

Banister v. California Board of Accountancy, No C062435, 2010, Cal. App. LEXIS 7457 (Sept. 21, 2010) [unpublished], *petition for review denied*, No. S187914, 2010 Cal. LEXIS 12714 (Dec. 15, 2010). Revocation of CPA’s license based on IRS disbarment did not constitute violation of due process rights.

Duncan v. State Bd. of Accountancy, No. 35804, 2010 Ida. LEXIS 69 (Idaho Apr. 23, 2010). An accountant was required to disclose a conflict of interest although all parties were already aware of the conflict, and the Idaho Board was authorized to apply an AICPA rule to a CPA’s behavior when it had adopted the AICPA’s standards by reference in its own rule.

Miguel Guzman-Rivera, Plaintiff, Appellant, v. Kermit Lucena-Zabala Et Al; Defendants, Appellees, No. 09-2175 United States Court Of Appeals For The First Circuit, 2011 U.S. App. LEXIS 8324 (April 22, 2011). The U.S. Court of Appeals, First Circuit, affirmed the district court’s grant of individual defendant Puerto Rico Accountancy Board members’ motion to dismiss, finding that the Board had the jurisdiction to suspend or revoke the CPA’s license and that the Board members were entitled to immunity despite the commission of grave procedural errors.

Scott A. Whisenant, CPA v. Alabama State Board of Public Accountancy Et Al, 03-CV-2010-900736.00 (December 7, 2010). The Circuit Court of Alabama affirmed a Board Order that suspended CPA’s license and fined him \$2,000.00 for failure to complete a Peer Review program.

South Carolina Department of Labor, Licensing, and Regulation v. Michael A. Paulin, No. 2010-UP-091, 2010 S.C. App. LEXIS 100 (Feb. 3, 2011) [unpublished]. The South Carolina Board had subject matter jurisdiction and the authority to revoke a CPA’s license for conviction of a felony offense.

State Board of Accountancy v. James F. Ferris, Jr., CPA, No. 10-0210 AC 2010 Mo. Admin. Hearings LEXIS 176 (Dec. 8, 2010). CPA’s license and firm permit were subject to discipline, based on the CPA’s failure to enroll in a peer review program or respond to Board correspondence.

State Board of Accountancy, Petitioner, vs. Charles B. Larson, Respondent, No. 10-0601 AC, No. 10-0601 AC (March 1, 2011). The Missouri Administrative Hearing Commission held that Respondent is subject to discipline for practicing

public accounting without a license, in that he held out as a CPA on business cards and represented himself as such in a book he wrote.

Texas State Board of Public Accountancy v. Bass, No. 03-09-00251-CV, 2011 Tex. App. LEXIS 294 (Jan. 14, 2011). CPAs' suit against the Texas Board related to a disciplinary matter was dismissed for lack of jurisdiction because it was barred by sovereign immunity and because they had also sought relief through a pending administrative appeal.

Thomas v. State Board of Certified Public Accountants of Louisiana, 34 So. 3d 296, 2010 La. LEXIS 1207 (April 30, 2010). Louisiana CPA sought review of a decision of the Civil District Court that dismissed his petition for judicial review of an order of the State Board of Certified Public Accountants of Louisiana, that revoked his license and imposed an administrative fine of \$ 16,000.

B. Constitutional Challenges

Banister v. California Board of Accountancy, No. C062435, 2010, Cal. App. LEXIS 7457 (Sept. 21, 2010) [unpublished], *petition for review denied*, No. S187914, 2010 Cal. LEXIS 12714 (Dec. 15, 2010). Revocation of CPA's license based on IRS disbarment did not constitute violation of due process rights.

Johnson v. Hall, No. 2010 U.S. Dist. LEXIS 97331 (Aug. 23, 2010). The South Carolina Board's prohibition of use of the CPA title by a CPA who was not licensed in South Carolina, but in another state, did not violate his constitutional rights under the First and Fourteenth Amendments.

Larson v. Missouri Board of Accountancy, No. 10-CV-06094-NKL 2011 U.S. Dist. LEXIS 3391 (Jan. 13, 2011). Plaintiff's suit against the Missouri Board was dismissed, in light of the fact that a case based on the same facts was pending before the Missouri Hearing Commission.

Miguel Guzman-Rivera, Plaintiff, Appellant, v. Kermit Lucena-Zabala Et Al; Defendants, Appellees, No. 09-2175 United States Court Of Appeals For The First Circuit, 2011 U.S. App. LEXIS 8324 (April 22, 2011). The U.S. Court of Appeals, First Circuit, affirmed the district court's grant of individual defendant Puerto Rico Accountancy Board members' motion to dismiss, finding that the Board had the jurisdiction to suspend or revoke the CPA's license and that the Board members were entitled to immunity despite the commission of grave procedural errors.

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C. Procedural Issues

Larson v. Missouri Board of Accountancy, No. 10-CV-06094-NKL 2011 U.S. Dist. LEXIS 3391 (Jan. 13, 2011). Plaintiff's suit against the Missouri Board was dismissed, in light of the fact that a case based on the same facts was pending before the Missouri Hearing Commission.

Texas State Board of Public Accountancy v. Bass, No. 03-09-00251-CV, 2011 Tex. App. LEXIS 294 (Jan. 14, 2011). CPAs' suit against the Texas Board related to a disciplinary matter was dismissed for lack of jurisdiction because it was barred by sovereign immunity and because they had also sought relief through a pending administrative appeal.

D. Board's Statutory Authority

Larson v. Missouri Board of Accountancy, No. 10-CV-06094-NKL 2011 U.S. Dist. LEXIS 3391 (Jan. 13, 2011). Plaintiff's suit against the Missouri Board was dismissed, in light of the fact that a case based on the same facts was pending before the Missouri Hearing Commission.

Texas State Board of Public Accountancy v. Bass, No. 03-09-00251-CV, 2011 Tex. App. LEXIS 294 (Jan. 14, 2011). CPAs' suit against the Texas Board related to a disciplinary matter was dismissed for lack of jurisdiction because it was barred by sovereign immunity and because they had also sought relief through a pending administrative appeal.

Appeal of Robert Daniel Mays (New Hampshire Board of Accountancy), No. 2010-101, Supreme Court of New Hampshire, 2011 N.H. LEXIS 12 (February 23, 2011). The New Hampshire Supreme Court reversed a Board decision to deny an applicant licensure on the grounds that he did not have acceptable public accounting experience because the rule was invalid in that it imposed an additional requirement not set out in its statutes. The case was remanded to the Board.

In the Matter of Joseph M. Wunderlich, v. New York State Education Department, Committee on the Professions, No. 510631, 2011 NY Slip Op 1566; 918 N.Y.S.2d 257; 2011 N.Y. App. Div. LEXIS 1555 (March 3, 2011). The New York Supreme Court, Appellate Division, affirmed a decision to deny an applicant a CPA license on the basis of a lack of good moral character, finding that the decision was supported by the evidence in the record.

E. Other Accountancy Cases Not Directly Involving a Board

Malpractice/Negligence

Western Security Bank and Glacier Bancorp Inc. v. Eide Bailly LLP, DA, 09-0404 2010 MT 291; 359 Mont. 34; 2010 Mont. LEXIS 452 (December 30, 2010). Prior jury verdict finding only causal negligence against CPA firm for failing to detect fraud while performing annual audits was remanded by the Montana Supreme Court for a new trial, based on incomplete jury instructions as to the claims to be considered by the jury.

Steven E. Leber, As Trustee of the Steven E. Leber Charitable Remainder Unitrust, Plaintiff, v. Paul J. Konigsberg and Konigsberg, Wolf & Co., P.C., Defendants, Case No. 09-80593-Civ-Marra/Johnson, United States District Court for the Southern District of Florida, 2010 U.S. Dist. LEXIS 128910 (December 6, 2010). The U.S. District Court denied the Defendant CPA's motion for summary judgment, finding that there was a genuine issue of material fact as to whether, under New York law, there was a fiduciary relationship between the parties, based on Defendant's alleged solicitation and facilitation of the Trust's assets with Bernard Madoff, or whether merely an accountant-client relationship existed.

F. Other Significant Cases & AG Opinions

Adsumelli v. Steiner, 31 I.E.R Cas. (BNA) 511 (2010). The U.S. District Court for the Southern District of New York found unconstitutional a state law limiting the practice of pharmacy to persons with U.S. citizenship or legal permanent residence.

Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. ____ (2010). The Supreme Court held that the Sarbanes-Oxley Act provisions making Public Company Accounting Oversight Board members removable by the SEC only for good cause unconstitutionally restricted the President's power. Because the Court severed these provisions from the Act, however, no legislation is necessary to bring the Board's structure within constitutional requirements.

In Re Enron Corporation Securities, Derivative & "Erisa" Litigation; Mark Newby, et al., v. Enron Corporation, et al., American National Insurance Company, et al., v. Arthur Andersen, LLP, et al., MDL-1446, Civil Action No. H-01-3624 Consolidated Cases Civil Action No. G-03-0967, United States District Court for the Southern District of Texas, Houston Division, 2010 U.S. Dist. LEXIS 130386 (December 8, 2010).

Op. Att'y Gen. Ky. (August 20, 2010), 2010 Ky. AG LEXIS 171. Questionnaires constituting work papers for county government were not subject to public records law.

Op. Att'y Gen. Tex. No. GA-0811, 2010 Tex. AG LEXIS 63 (October 22, 2010). CPAs employed by the Brazos River Authority were, by law, exempt from professional license fees.

IV. Case Analyses in Alphabetical Order

Adsumelli v. Steiner, 31 I.E.R Cas. (BNA) 511 (2010). The U.S. District Court for the Southern District of New York found unconstitutional a state law limiting the practice of pharmacy to persons with U.S. citizenship or legal permanent residence.

The court concluded that there was no legitimate link between denying licensure to a person based on their non-resident status and a state agency's interest in protecting the public. The court rejected the agency's argument that persons with temporary status in the U.S. would be more difficult to hold accountable for their conduct, as some of their assets would be located outside the U.S. and they would have fewer ties to keep them in the country. Part of the rationale for this conclusion was the fact that out of the twenty-six non-citizens who brought the case, over half were in the process of applying for permanent resident status. Excluding these persons from the practice of pharmacy did not fit within the state's argument that non-permanent residents would be transient.

Appeal of Robert Daniel Mays (New Hampshire Board of Accountancy), No. 2010-101, Supreme Court of New Hampshire, 2011 N.H. LEXIS 12 (February 23, 2011). The New Hampshire Supreme Court reversed a Board decision to deny an applicant licensure on the grounds that he did not have acceptable public accounting experience because the rule was invalid in that it imposed an additional requirement not set out in its statutes. The case was remanded to the Board.

Mays, an applicant for a CPA license, challenged a Board decision denying his application, alleging that the Board had exceeded its authority. Mays had been employed from April 2007 through June 2009 by BearingPoint Inc., a consulting firm in Virginia, which was not registered in Virginia as a public accounting firm. The Board ruled that Mays therefore lacked the required public accounting experience.

Mays next requested that the Board stay its denial and reconsider its decision, arguing that his experience complied with the definition of public accounting experience under the applicable rule. The Board agreed to the stay in order to allow Mays to present documentation that BearingPoint Inc. was registered with the Virginia Board as a public accounting firm. Upon review of Mays' documentation, the Board again denied his application, ruling that his experience gained in this employment did not meet the requirements of the experience rule at issue.

Mays appealed to the New Hampshire Supreme Court, which agreed to accept only the issue of whether the experience rule was inconsistent with the statute. Mays argued that the Board exceeded its rulemaking authority because the experience rule modified and expanded the requirements set out in the statute, which Mays contended did not require "employment within a specific type of organization".

The Board argued that it possesses the authority to make rules to implement its statutes. Because the statute only partly identified where an applicant must obtain the type of

experience and the amount of time required, the rule only more explicitly stated a “requirement that is implicit in the statute.”

The court stated that the authority to adopt rules was designed only to “fill in the details” necessary to implement the statutes. It reasoned that the plain language of the relevant statute does not set any limitation that an applicant must obtain experience in a licensed public accounting firm and the rule, which does set out such requirement, therefore imposes an additional requirement upon applicants. The court ruled that whether the rule was viewed as an attempt to “fill in the details” or as imposing new substantive requirements, it was invalid. The court reversed the Board’s decision and remanded the case to the Board.

Baisden v. California Board of Accountancy, F060100, 2011 Cal. App. LEXIS 105, (January 6, 2011) [unpublished]. CPA’s appeal to the California Court of Appeals regarding the revocation of his CPA license by the California Accountancy Board and upheld by superior court, was denied and the Board’s decision was affirmed.

A California CPA (Baisden) was engaged to set up a corporation and prepare tax returns for an independent contractor nurse anesthetist. His spouse also had a small business that was to be included in the corporation. Baisden filed articles of incorporation for the business in Nevada in 2002 but failed to complete the process; no assets were assigned to the corporation and no by-laws, corporate seal or minutes book were established. The clients provided him with bank statements, which he used to prepare books of original entry and then into other financial records, including a compilation report and corporate and individual tax returns. Baisden advised his clients, without corroborating authority, that their personal expenses could be funneled through the corporation as deductible business expenses, in lieu of salaries or benefits, for the 2002 tax return.

Baisden told his clients that because of IRS issues with the client’s employer, he was waiting for resolution to file the 2003 tax return. In 2004, after no action by Baisden, the clients stopped paying the monthly retainer; he performed no other work for the client and terminated his services without notice.

In 2005, the IRS notified the clients that they were being audited; they contacted Baisden and signed a Power of Attorney for him to handle this matter; he never contacted the IRS. Subsequently, the IRS served a summons on the client and assessed thousands of dollars in penalties and fines for the 2002 return and the unfiled 2003 and 2004 returns. Baisden was unwilling to address the situation and the client hired another CPA to amend and file the returns, as well as an attorney.

The clients then filed a complaint with the California Board of Accountancy; upon review, the Board filed an Accusation against Baisden. Following a hearing conducted by an Administrative Law Judge, the Board accepted the proposed decision and revoked Baisden’s CPA license. He then appealed to superior court, which independently determined the Board’s action was supported by the evidence. Baisden then filed a

petition for writ of mandate with the Court of Appeals. That Court denied his petition and affirmed the lower court's decision, noting that Baisden had failed to ensure that the corporation was properly formed and capitalized and that because he was performing management functions, he failed to disclose his lack of independence on the 2002 compilation

Banister v. California Board of Accountancy, No. C062435, 2010, Cal. App. Unpub. LEXIS 7457 (Sept. 21, 2010), *petition for review denied*, No. S187914, 2010 Cal. LEXIS 12714 (Dec. 15, 2010). Revocation of CPA's license based on IRS disbarment did not constitute violation of due process rights.

The California Accountancy Board revoked Banister's CPA license because he was barred from practice before the IRS. Banister claimed that the IRS denied him the due process he would have been entitled to in California during revocation proceedings of his vested property right to practice accounting.

The IRS filed a Complaint against Banister, alleging misconduct based on advice he gave to clients that had no basis in law or fact. An Administrative Law Judge granted Summary Judgment for the IRS, based on Banister's admissions in his Answer to the Complaint. A hearing to decide the discipline by the IRS followed; Banister was disbarred from practice before the IRS. Banister appealed to the Secretary of the Treasury; upon review, his appeal was denied.

The California Board then filed a Complaint against Banister; at the hearing, Banister challenged the IRS proceeding, claiming denial of due process rights. He failed to introduce any evidence to support his claims. The Board revoked his CPA license; Banister then filed a petition for a writ of mandate, claiming that the Board had improperly relied on the IRS proceedings, which he alleged had violated his due process rights. The trial court denied his petition.

Banister next appealed to the California Court of Appeals, claiming that before the Board could rely on the IRS decision, the Board was required to determine that the IRS proceedings had comported with the due process rights he would have received in a California hearing. The Court affirmed the lower court decision, finding that Banister had not submitted evidence or law sufficient to support his claims.

Banister then appealed to the California Supreme Court; his petition for review was denied. Finally, Banister filed a petition for writ of certiorari to the Court of Appeals of California, Third Appellate District, in the United States Supreme Court. The Supreme Court denied the petition on April 18, 2011.

Duncan v. State Bd. of Accountancy, No. 35804, 2010 Ida. LEXIS 69 (Idaho Apr. 23, 2010). An accountant was required to disclose a conflict of interest although all parties were already aware of the conflict, and the Idaho Board was authorized to apply an AICPA rule to a CPA's behavior when it had adopted the AICPA's standards by reference in its own rule.

Duncan prepared the 2003 tax return for a married couple whose divorce became final in August 2004. He obtained an extension on the return, which was not filed until September 2004. Duncan began a personal relationship with the wife in May 2004. The husband filed a complaint with the Idaho Board, alleging a conflict of interest in violation of AICPA Rule 102.3 and an Idaho rule. The Board concluded that Duncan did have a conflict of interest and ordered the CPA to pay a \$1000 penalty, \$2000 in costs, and take four hours of ethics training. The matter was ultimately heard by the Idaho Supreme Court.

The Court first noted that the actions of an entity such as the Board were to be “afforded a strong presumption of validity.” Indeed, the court could not substitute its judgment for that of the Board. There was a four-part test that the court was to follow in determining the “appropriate level of deference to the agency interpretation.” The court was to decide whether “(1) the agency is responsible for administration of the rule in issue; (2) the agency's construction is reasonable; (3) the language of the rule does not expressly treat the matter at issue; and (4) any of the rationales underlying the rule of agency deference are present.”

Duncan’s chief argument was that AICPA Rule 102.3 did not require an accountant to disclose a conflict of interest when all parties were already aware of the conflict. He also maintained that the Board erroneously relied on one of the comments to Rule 102.3 because he was not giving tax or financial planning advice to the divorcing couple and he performed no substantive work on the tax return after the time when the conflict arose.

The court noted that the Board was charged with the adoption and enforcement of standards of professional conduct to govern accountants. Pursuant to this authority, the Board adopted AICPA Rule 102.3 by reference to the AICPA Standards in its own rule. Thus, the Board was entitled to apply the AICPA rule to the CPA's behavior. Although the Board recognized Duncan's arguments in its findings, it held that Duncan was required to either terminate services or disclose the conflict to both parties and obtain their consent for the continued provision of tax services. There was no exception in Rule 102.3 for a situation where the clients were already aware of the conflict. The Board also concluded that the actions taken by Duncan after April 28, 2004, constituted tax services within the meaning of the Rule.

In addition, the court held that the Board's reading of the rule was consistent with sound public policy. “If the accountant were allowed to make the determination that the parties knew or may have known of his conflict, the client is at the accountant's mercy, dependent on the accountant's subjective understanding of the client's thoughts and concerns. Professional standards should not be dependent on the accountant's subjective understanding of what he may think the client understands.”

Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. ____ (2010). The Supreme Court held that the Sarbanes-Oxley Act (SOX) provisions making Public Company Accounting Oversight Board members removable by the SEC only for good cause unconstitutionally restricted the President’s power.

Because the Court severed these provisions from the Act, however, no legislation is necessary to bring the Board's structure within constitutional requirements.

The plaintiff public interest group and one of its members (an accounting firm subject to an investigation) challenged the constitutionality of the creation and existence of the Public Company Accounting Oversight Board (PCAOB). They claimed that Title I of the Sarbanes-Oxley Act (SOX), 15 U.S.C. §§ 7211-19, violated the Appointments Clause of the U.S. Constitution because PCAOB board members, as “officers of the United States,” must be appointed by the President with the advice and consent of the U.S. Senate, or, in the alternative, by the head of a department. (Members are currently appointed by a majority of the Securities and Exchange Commission.) The plaintiffs also maintained that the PCAOB violated the Constitution’s separation of powers principles by enabling the SEC Commissioners, rather than the President, to remove PCAOB board members and then only for cause. In other words, in order to exercise influence and control over the PCAOB, the President would have to act through the SEC Commissioners. The U.S. District Court for the District of Columbia granted summary judgment in favor of the PCAOB, and the plaintiffs appealed.

In a split decision, the U.S. Court of Appeals for the District of Columbia affirmed the district court’s grant of summary judgment. The appellate court found that the SOX did not impinge the Appointments Clause for the following reasons: The Securities and Exchange Commission had comprehensive control of the PCAOB, and the Board's members were inferior officers who were not required to be appointed by the President. Due to the nature of the Board's work, it was necessarily directed and supervised by the SEC. It was appropriate, then, to delegate the appointment of PCAOB board members, as inferior officers, to the department head rather than the President. Further, the SEC “is a Department whose Head” consisted of “the several Commissioners,” and thus there was no violation of the Appointments Clause for the PCAOB board members to be appointed by the collective department “Head.”

As to the separation of powers argument, the court noted that the President’s power of control over administrative officers was not absolute. The for-cause limitations found at 15 U.S.C. §§ 7211(e)(6) and 7217(d)(3) on the Commission's power to remove Board members and the President's power to remove Commissioners did not strip the President of sufficient power to influence the PCAOB. Therefore, the separation of powers was not contravened since that principle embraced independent agencies like the Commission and their exercise of broad authority over their subordinates. The PCAOB was subject to statutorily-defined jurisdictional boundaries, and the Commission was empowered to further limit the Board's functions pursuant to 15 U.S.C. § 7217(d)(2). Due to the constitutionality of independent agencies and the comprehensive control exercised by the Commission over the Board, the plaintiffs could not show that the statutory scheme restricted the President's control over the Board.

The Plaintiffs next appealed to the Supreme Court. The Supreme Court denied the petitioners’ request for broad injunctive relief and also rejected three other constitutional challenges that the Free Enterprise Fund had offered against the PCAOB. The Court

narrowly ruled, 5 to 4, affirming in part and reversing in part, the judgment of the Court of Appeals in favor of the PCAOB. The Supreme Court held that SOX's provisions making PCAOB Board members removable by the SEC only for good cause unconstitutionally restricted the President's power. The Court noted that the Act not only protected Board members from removal except for good cause, it also effectively removes from the President any decision on whether good cause exists and assigned such decisions to the Commissioners "...none of whom are subject to the President's direct control." However, because the Court instead removed these provisions, the Act remained "fully operative as a law" and no further legislation was necessary. Consequently, Board members may be removed at will, but all of the PCAOB programs will continue to function as they have. The case was remanded for further proceedings, consistent with the Court's opinion.

In Re Enron Corporation Securities, Derivative & "Erisa" Litigation; Mark Newby, et al., v. Enron Corporation, et al., American National Insurance Company, et al., v. Arthur Andersen, LLP, et al., MDL-1446, Civil Action No. H-01-3624 Consolidated Cases Civil Action No. G-03-0967, United States District Court for the Southern District of Texas, Houston Division, 2010 U.S. Dist. LEXIS 130386 (December 8, 2010).

The Plaintiffs sued all Defendants, alleging a Ponzi scheme, in violation of the Texas laws, including fraud, civil conspiracy, to commit fraud, and negligence and professional malpractice. Defendants Arthur Andersen, LLP and D. Stephen Goddard, Jr. (collectively, "Andersen"), David B. Duncan, and Richard B. Buy, who, alternatively requested a more definite statement under Fed. R. Civ. P. 12(e), filed motions to dismiss the Second Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b). In their response to Richard B. Buy's motion, Plaintiffs included a request for acknowledgment that unanswered admissions served on Richard B. Buy on October 26, 2005 are deemed admitted. The Plaintiffs also filed a motion for status conference.

The Court ruled that because Buy did not file an answer to the Requests for Admission, they were deemed admitted. However, the Court held that the deemed admissions did not "provide the kind of detail necessary to plead, no less prove, a fraud claim." With regard to the Motions to Dismiss, the court found that the complaint was filled with generalities and lacked the specificity necessary to support the fraud claims. However, it recognized the substantial harm that the Enron victims had sustained and allowed the Plaintiffs another opportunity to more fully support their claims with sufficient detail.

With regard to the negligent misrepresentation claim, the court ruled that the Plaintiffs failed to allege and did not appear to have the facts to support a claim that they were members of a limited group known to and for whose benefit Arthur Andersen supplied information that they knew Plaintiffs relied upon.

The court ordered that Defendants Motions to Dismiss were granted with respect to the fraud and negligent misrepresentation claims, but otherwise denied. The Plaintiffs were granted leave to replead within thirty days those claims the court identified as viable.

Because some of the Defendants were imprisoned or otherwise unavailable, the court denied the request for a status conference.

In the Matter of Joseph M. Wunderlich, v. New York State Education Department, Committee on the Professions, No. 510631, 2011 NY Slip Op 1566; 918 N.Y.S.2d 257; 2011 N.Y. App. Div. LEXIS 1555 (March 3, 2011). The New York Supreme Court, Appellate Division, affirmed a decision to deny an applicant a CPA license on the basis of a lack of good moral character, finding that the decision was supported by the evidence in the record.

In 2006, Wunderlich applied for a CPA license in New York. On his application, he disclosed a 2005 arrest, charging him with promoting gambling. He pled guilty and was sentenced to three years probation and a fine. Due to his conviction, his application was referred to the Office of Professional Discipline (OPD) for investigation in light of the requirement to show good moral character.

Subsequently, a panel of the State Board of Accountancy scheduled a hearing. After the hearing, the panel concluded that Wunderlich had met the requirement for a show of good moral character. The OPD appealed this finding and the Committee on the Professions reversed, finding that Wunderlich lacked good moral character. Wunderlich next appealed to the New York Supreme Court. In the interim, he was discharged from probation and received a certificate of relief from disabilities.

Petitioner contended that that the Committee on the Professions lacked jurisdiction to consider OPD's appeal because it had not timely filed an appeal of the hearing panel's decision. The court dismissed this claim, ruling that the time limitation was regulatory, not statutory and the Committee's consideration was discretionary.

On the merits, the court found that the Committee's determination that Wunderlich lacked good moral character was supported by substantial evidence in the record. Moreover, the court held that Wunderlich failed to demonstrate rehabilitation merely by the certificate of relief from disabilities; the conduct in which he engaged was "directly connected to the duties of a CPA" and had taken place only a short time before. The court affirmed the Committee's decision and dismissed the petition.

Johnson v. Hall, No. 2010 U.S. Dist. LEXIS 97331 (August 23, 2010). The South Carolina Board's prohibition of use of the CPA title by a CPA who was not licensed in South Carolina, but in another state, did not violate his constitutional rights under the First and Fourteenth Amendments.

Plaintiff was a CPA in Oregon and Illinois before he took a job as an accounting professor in South Carolina in 2003. Plaintiff signed his name followed by "CPA" on a pleading in an unrelated matter and consequently received a notice from the South Carolina Department of Labor, Licensing and Regulation Office of the Board of Accountancy, informed him that he may be in violation because he signed "CPA" without a valid South Carolina CPA license (he did have a valid Oregon CPA license).

The Board issued a Cease and Desist.

Plaintiff then filed two actions questioning the constitutionality of both the statute defining the practice of accounting and the statute governing the licensing of and use of the title “CPA.” Plaintiff alleged violations of his rights under the Equal Protection and Privileges and Immunities clauses of the Fourteenth Amendment, his First Amendment right to freedom of commercial speech and his rights under the dormant commerce clause.

The Defendants moved to dismiss these actions, citing Plaintiff’s failure to respond to some discovery requests and his failure to attend his properly noticed deposition. The Court ruled that the Plaintiff did not fail to respond to the interrogatories out of bad faith, but rather he objected to the amount of interrogatories and some of the interrogatories were duplicative. Also, the court ruled that his failure to attend the deposition was for good cause and he gave good notice by sending a letter informing the Defendants that he would not be able to attend two weeks in advance. Additionally, the court ruled that the prejudice the Defendants suffered from the Plaintiff’s actions was minimal and the court denied the defendant’s Motion to Dismiss.

Both the Plaintiff and the Defendants filed Motions for Summary Judgment claiming there were no genuine issues of material fact. The Plaintiff argued that “his right to equal protection of the laws is violated where the statutes at issue prevent him, a CPA licensed in another state, from using the CPA designation while allowing CPAs licensed in South Carolina to use the CPA designation. He also argues the classification these statutes draw between CPAs licensed by a state other than South Carolina and CPAs licensed by the state of South Carolina (by restricting the speech of one group but not the other) violates his fundamental right to travel.”

The Court disagreed with the Plaintiff, explaining that the statute does not violate his rights because the requirement that a CPA obtain a South Carolina CPA license is to ensure that the person has demonstrated a sufficient proficiency in the profession of accounting, as defined by the state of South Carolina; it is a requirement for both residents and nonresidents of South Carolina who wish to practice as a CPA in the state. The Court also disagreed with the Plaintiff’s claim that his right to free speech was violated because he was not being treated differently from other out-of-state CPAs and therefore he had no violation of equal protection as he claimed.

The Plaintiff also alleged that Defendants, by enforcing the statutes at issue, violated his right to freedom of speech as guaranteed by the First Amendment of the United States Constitution. Defendants argued that Plaintiff’s use of the CPA designation within South Carolina falls outside the protections of the First Amendment because it is false, deceptive, or misleading. The Court agreed with the Defendants that the Plaintiff’s use of the title “CPA” was misleading and deceptive to the public and therefore not permitted under the protection of free speech.

The Plaintiff’s last argument was that the statutes are unconstitutional because they

violate the Dormant Commerce Clause of the Constitution by discriminating or imposing a burden on interstate commerce. The Court disagreed with the Plaintiff once more, explaining that the Commerce Clause is not applicable to the statute because the statutes are regulating the licensing of professional CPAs and do not deal with goods, materials, or other articles of interstate commerce. The Court further explained that even if the Commerce Clause were applicable, the statutes would not be in violation because the burden is not excessive as compared to the legitimate interests of protecting the citizens of South Carolina.

The Court held that the Defendants' Motion to Dismiss was denied, Plaintiff's Motion for Summary Judgment was denied and Defendant's Motion for Summary Judgment be granted as to Plaintiff's second cause of action for a First Amendment violation and denied without prejudice and with leave to refile as to his first and third causes of action.

Larson v. Missouri Board of Accountancy, No. 10-CV-06094-NKL 2011 U.S. Dist. LEXIS 3391 (Jan. 13, 2011). Plaintiff's suit against the Missouri Board was dismissed, in light of the fact that a case based on the same facts was pending before the Missouri Hearing Commission.

Larson, a Missouri CPA, had not renewed his CPA license after September, 2001. However, he continued to use the CPA title, despite the Board's demands that he either submit to its jurisdiction, or cease using the title. Larson filed an action with the U.S. District Court in Missouri, seeking declaratory and injunctive relief. He contended that the Missouri statute prohibiting holding out violated the First and Fifth Amendments to the U.S. Constitution, because another statute contains an exception that allows a person licensed before 2001 to use the title, so long as that person does not engage in the practice of public accounting, auditing, bookkeeping or a similar occupation.

At the same time, there was also a pending proceeding before the Missouri Administrative Hearing Commission based on the same facts. Larson claimed that the Commission did not have the "authority to consider and litigate constitutional issues." Citing well established case law discouraging the federal courts from the "exercise of such jurisdiction where particular kinds of state proceeding have already been commenced...", the Court dismissed the suit, based on the grounds that Larson would have a full opportunity to litigate his constitutional claims in the hearing before the Commission.

Miguel Guzman-Rivera, Plaintiff, Appellant, v. Kermit Lucena-Zabala Et Al; Defendants, Appellees, No. 09-2175 United States Court Of Appeals For The First Circuit, 2011 U.S. App. LEXIS 8324 (April 22, 2011). The U.S. Court of Appeals, First Circuit, affirmed the district court's grant of individual defendant Puerto Rico Accountancy Board members' motion to dismiss, finding that the Board had the jurisdiction to suspend or revoke the CPA's license and that the Board members were entitled to immunity despite the commission of grave procedural errors.

Guzman was a licensed CPA in Puerto Rico. In 2006, the Puerto Rico Board required him to submit to an involuntary practice review and provide a report to the Board. Guzman requested a postponement; the Board denied the request on a “need and urgency basis”. Guzman then requested a hearing which the Board scheduled. Through his own error, Guzman failed to appear; he subsequently contacted the Board to request a new date, but the Board did not respond. On November 17, 2006, the Board summarily suspended his certificate, based on his failure to submit to a practice review. Guzman then requested the Board to reconsider, since he had begun the practice review. A second hearing was scheduled for December, 2006, but the notice sent to Guzman did not comply with applicable laws, since it failed to state the nature or purpose of the hearing, the laws authorizing the hearing, Guzman’s alleged violations, his right to attend the hearing with counsel, or the consequences of his failure to appear. At the hearing, Guzman was informed that his case was referred to the Board by the Puerto Rico Association of CPAs, based on a 2005 audit. Guzman’s license was to be suspended until he submitted the Practice Review Report, due January 31, 2007. He submitted it to the Association on March 6, 2007; it was accepted on July 3, 2007 and provided to the Board on July 13, 2007. Guzman explained the delay in submitting the report was due to the difficulty of finding a CPA who was willing to work on it during the holiday season.

In August, 2007, the Board informed Guzman that it would not lift the suspension because he bought certification stamps on the day he was suspended and because the report was adverse on the merits. The Board notified Guzman of a second hearing to be held on September 24, 2007; that notice also failed to comply with the law. At the hearing, the Board did not question Guzman on the contents of the report, but on the delay in submitting it and his purchase of the certification stamps while suspended. Guzman explained that he did not know he had been suspended when he purchased the stamps. Guzman was not informed of his due process rights. On October 24, 2007, the Board revoked his certificate, citing his failure to adhere to standards and his intention to violate the Accountancy Act and code of ethics. Guzman was notified of the Board’s decision and immediately asked for reconsideration, which the Board denied on November 26, 2007, without explanation.

On December 26, 2007, Guzman filed for judicial review before the Puerto Rico Court of Appeals, alleging violation of his due process rights. On June 18, 2007, the court issued a judgment revoking the Board’s Order and ordering it to immediately reinstate Guzman’s certificate. The court found that the Board had erred in law in the suspension and revocation, disregarding the necessary procedure. It did, however, note that the Board could make findings consistent with its rulings and could hold an administrative hearing.

On August 18, 2008, Guzman filed a suit in the US District Court for the District of Puerto Rico against the Board members in their official and individual capacities, alleging a violation of his *Fourteenth Amendment* due process rights. The Board members filed a motion to dismiss, claiming absolute immunity in their individual capacities, since they were performing quasi-judicial duties. On July 11, 2009, the court granted the motion to dismiss, concluding that the Board members perform functions similar to a judge and that procedural safeguards protect the individual. Guzman timely

filed a motion for reconsideration which the court denied. Guzman appealed and the case moved to the US Court of Appeals For The First Circuit.

The appeals court considered the issue of whether the Board members' roles are similar to that of a judge and whether the proceedings protect an individual's constitutional rights. The court concluded that the Board members do perform traditional adjudicatory functions. The court also found that sufficient safeguards are in place under the Puerto Rico Accountancy Act to protect the constitutional rights of a CPA and therefore justify absolute immunity for the Board members. The court did note that the summary suspension of Guzman's certificate was "grave and unacceptable procedural error" but that the Board did have jurisdiction to suspend and revoke his certificate and the Board members are entitled to immunity. The court therefore affirmed the District Court grant of the motion for dismissal, based on *Federal Rule of Civil Procedure* 12(b)(6), failure to state a claim for relief.

Scott A. Whisenant CPA v. Alabama State Board of Public Accountancy Et Al, 03-CV-2010-900736.00 (December 7, 2010). The Circuit Court of Alabama affirmed a Board Order that suspended CPA's license and fined him \$2,000.00 for failure to complete a Peer Review program.

Whisenant, prior to May 10, 2010, was licensed as a CPA and provided accounting services through a firm licensed by the Alabama State Board of Public Accountancy (ASPBA). On November 23, 2009, the ASBPA filed a complaint against Whisenant, alleging that he had failed to comply with ASBPA's peer review requirements. Following a hearing on the matter, the ASBPA issued an Order containing Findings of Facts and Conclusions of Law. In pertinent part, ASBPA found that: evidence presented at the hearing established that Whisenant failed to complete the requirements of the Peer Review Program established by the Board as specifically set forth in Board rules and failed to satisfy the Peer Review requirements to notify the Board that a Peer Review was completed not less than each third fiscal year since the last submission. The ASBPA suspended his license to practice public accountancy for one (1) year and fined him two thousand dollars (\$2,000.00).

Whisenant brought an action against the Board in the Circuit Court of Alabama, asserting that the May 10, 2010 Board Order "was arbitrary and capricious in nature, and not tied to any ascertainable standard or methodology" and that the requests that formed the basis for the Board's Order were "ambiguous, unrealistic, and arbitrary." After arguments at a bench trial and upon review, the court affirmed the board's decision.

Steven E. Leber, As Trustee of the Steven E. Leber Charitable Remainder Unitrust, Plaintiff, v. Paul J. Konigsberg and Konigsberg, Wolf & Co., P.C., Defendants, Case No. 09-80593-Civ-Marra/Johnson, United States District Court for the Southern District of Florida, 2010 U.S. Dist. LEXIS 128910 (December 6, 2010). The U.S. District Court denied the Defendant CPA's motion for summary judgment, finding that there was a genuine issue of material fact as to whether, under New York law, there was a fiduciary relationship between the parties, based

on Defendant's alleged solicitation and facilitation of the Trust's assets with Bernard Madoff, or whether merely an accountant-client relationship existed.

Leber, the Trustee, filed suit against Konisberg and his firm, alleging negligence and a breach of fiduciary duty. The complaint alleged that Konisberg solicited and facilitated the Trust's investment of all of its assets with Bernard Madoff in 2001 and that Konisberg represented that he would personally supervise, monitor and provide due diligence with regard to Madoff. Leber learned for the first time in 2009 that Madoff had made no investments on behalf of the Trust. Leber demanded \$4,000,000.00 in damages resulting from negligence and breach of fiduciary duty.

Konisberg moved for summary judgment, seeking to have the court find that under the facts of the case, New York, rather than Florida, law applied to the lawsuit and for summary judgment on the fiduciary duty claim. Konisberg argued that under New York law, accountants do not have a fiduciary duty to clients, and therefore summary judgment in his favor was justified. The court agreed that his assertion was generally true, absent special circumstances. Konisberg further asserted that the accountant-client relationship is only imposed when a party alleges and proves that the accountant engaged in affirmative fraud or illegal conduct. Konisberg also claimed that Leber, in his response, claimed for the first time that Konisberg was acting as a financial advisor, as well as an accountant, asserting that it was Konisberg's negligent financial advice, rather than the accounting services, that caused the alleged damages. Konisberg argued that this new liability theory was therefore improper and should not be considered by the court. The court rejected this argument, finding that there were sufficient allegations in the record to support the claim.

Upon review of the cases cited by both parties, the court found that Konisberg was incorrect regarding the assertion of the "only exception" to the general rule regarding fiduciary duty. An analysis of case law showed that the various courts examining this issue had not concluded that the only exception to the rule that accountants are not fiduciaries to their clients is an allegation of affirmative fraud or illegal conduct.

The court opined that whether Leber would succeed in his claim for breach of fiduciary duty against Konisberg required a "fact specific inquiry into the nature of the relationship between Leber and Konisberg." Upon reviewing Leber's affidavit, the court ruled that a genuine issue of material fact existed with regard to the fiduciary nature of the parties' relationship. The court therefore denied Konisberg's motion for summary judgment.

South Carolina Department of Labor, Licensing, and Regulation v. Michael A. Paulin, No. 2010-UP-091, 2010 S.C. App. LEXIS 100 (Feb. 3, 2011) [unpublished]. The South Carolina Board had subject matter jurisdiction and the authority to revoke a CPA's license for conviction of a felony offense.

A licensed CPA pled guilty to, was convicted of and served a sentence for a felony offense of a crime involving moral turpitude. The Board held a hearing on this matter, as well as complaints the CPA had failed to provide tax returns to three clients. At hearing, the Board determined that there was insufficient evidence to prove the latter charges, but revoked the license based on the conviction of a felony offense.

The CPA appealed the revocation of his license, alleging a lack of subject matter jurisdiction. Upon review, the South Carolina Court of Appeals affirmed the Board's Order.

State Board of Accountancy v. James F. Ferris, Jr., CPA, No. 10-0210 AC 2010 Mo. Admin.Hearings LEXIS 176 (Dec. 8, 2010). CPA's individual and firm license were subject to Board discipline for failure to enroll in a peer review program and failure to respond to Board correspondence.

During the relevant licensing periods, Ferris (an out-of-state CPA, performing services in Missouri) performed attest services for clients in Missouri that required his enrollment in a peer review program. Despite notice from the Board, Ferris did not enroll and failed to answer correspondence from the Board. The Board subsequently filed a Complaint with the Missouri Hearing Commission and also served Request for Admissions upon Ferris. He did not file a response to the Requests; therefore, the matters asserted in the Requests were deemed admitted, with "no further proof required". At the hearing before the Commission, Ferris did not appear, nor was he represented by counsel. The Commission held that the individual license and the firm permit held by Ferris were properly subject to discipline by the Board.

State Board of Accountancy, Petitioner, vs. Charles B. Larson, Respondent, No. 10-0601 AC, No. 10-0601 AC (March 1, 2011). The Missouri Administrative Hearing Commission held that Respondent is subject to discipline for practicing public accounting without a license, in that he held out as a CPA on business cards and represented himself as such in a book he wrote.

Larson, formerly licensed as a CPA in Missouri, did not renew his license after 2001. However, he continued to use the CPA title on business cards and in a book he authored. After investigation, the Missouri Board of Accountancy served Larson with a copy of a complaint and a Notice of Hearing. Larson did not respond. The Board then served Request for Admissions on Larson, which he also failed to answer. The Requests were therefore deemed admitted. Thereafter, the Board filed a motion for summary judgment; again, Larson did not respond. The Hearing Commission subsequently found that Larson had held out as a CPA while not licensed and there was cause for discipline.

Texas State Board of Public Accountancy v. Bass, No. 03-09-00251-CV, 2011 Tex. App. LEXIS 294 (Jan. 14, 2011). CPAs' suit against the Texas Board related to a disciplinary matter was dismissed for lack of jurisdiction because it was barred by sovereign immunity and because they had also sought relief through a pending administrative appeal.

Three CPAs licensed in Texas filed a declaratory judgment action against the Texas Board regarding the authority of the Board over actions taken by the Board in its decision to discipline the CPAs. During the relevant period, two of the auditors were licensed as CPAs by the Texas Board and one was a manager, who later became licensed by the

Board. All were employed by Arthur Andersen and participated in the preparation of Enron's audited financial statements. After Enron's collapse, the Board investigated the audits and subsequently began disciplinary proceedings against all three. A hearing was held before two Administrative Law Judges (ALJs), who concluded that the auditors, while competent, had made serious mistakes which violated GAAS and GAAP standards. Also, the supervising CPA (Bass) had final responsibility and was therefore responsible for the other auditors' work.

The ALJs recommended that the licensed CPAs be admonished and that the charges against the unlicensed manager should be dismissed for lack of jurisdiction. Upon consideration of these recommendations, the Board instead revoked the certificates of the licensees, assessed administrative costs and civil penalties. The Board further concluded that it did have jurisdiction over the manager (who had since become licensed) and suspended her license for three years, but probated that discipline. The CPAs then sought judicial review, contending that the Board's standards and principles were unconstitutionally vague and failed to identify what actions constituted violations; they also filed a court suit, seeking declarations regarding the Board's authority. The Board filed a plea, asserting that Administrative Procedures Act provided the sole method for challenging actions taken by the Board. The court denied the Board's plea.

The Board then filed an interlocutory appeal with the Court of Appeals of Texas, asserting that the court had erred in its decision because the suit was barred by sovereign immunity and also because the CPAs were already seeking relief through the Administrative Procedures Act. In its consideration of this matter, the Appeals Court concluded that because the declarations sought by the CPA Plaintiffs related to actions which they asserted were outside the scope of the Board's authority, they were, in effect, *ultra vires* claims. As such, the action should have been brought against the individual Board members in their official capacities, and not against the Board. Also, the Court found that the relief sought in the suit sought impermissible redundant remedies, in light of the fact that each of the CPAs had also filed appeals under the Administrative Procedures Act. The Court reversed the district court's decision and dismissed the action for lack of jurisdiction.

Thomas v. State Board of Certified Public Accountants of Louisiana, 34 So. 3d 296, 2010 La. LEXIS 1207 (April 30, 2010). Louisiana CPA sought review of a decision of the Civil District Court that dismissed his petition for judicial review of an order of the State Board of Certified Public Accountants of Louisiana, that revoked his license and imposed an administrative fine of \$16,000.

Thomas was charged with numerous violations of Louisiana accountancy laws and rules, including paying his firm \$40,597 from the bank accounts of an elderly client, without her knowledge and for whom he had Power of Attorney. The client's attorney, on her behalf, filed a complaint with the Board. Before the hearing, the client moved to Germany and was not available to testify, but bank records and other supporting evidence were submitted at the hearing. The Board revoked his license and assessed an administrative fine. The CPA appealed the revocation to district court, complaining that

he had been denied his right to confrontation. The district court dismissed his petition for judicial review and Thomas filed an appeal with the Louisiana Court of Appeals; that court affirmed the judgment of the district court.

Western Security Bank and Glacier Bancorp Inc. v. Eide Bailly LLP, DA 09-0404 2010 MT 291; 359 Mont. 34; 2010 Mont. LEXIS 452, (December 30, 2010). Prior jury verdict finding only causal negligence against CPA firm for failing to detect fraud while performing annual audits was remanded by the Montana Supreme Court for a new trial, based on incomplete jury instructions as to the claims to be considered.

A mortgage lender (IMC) borrowed funds for home loans through a line of credit from First Citizens Bank (FCB); under the agreement, it was required to obtain annual audits for the benefit of FCB, which was owned by Citizens Development Corp. (CDC). The CPA firm (Eide) that conducted the audits failed to discover that the mortgage company was diverting funds and overstating assets, income and profit. Eide did not enter into any contractual agreements with CDC, FCB, or the Plaintiffs.

Several years later, Glacier Bancorp began a due diligence process and conducted a review of the assets of CDC, in deciding whether to acquire the company. The sale closed in September 2006 and Plaintiff Western Security Bank assumed the line of credit to the mortgage lender. In February 2007, IMC disclosed that its CFO had been manipulating its financial records, including diversion of \$7.2 million dollars during the years in which the accounting firm had been preparing the annual audits, issuing unqualified opinions. The Plaintiffs sued Eide, alleging professional negligence.

Plaintiff Glacier then moved for partial summary judgment; Eide filed a cross motion for summary judgment, arguing that it did not owe a duty of care to the third party Glacier because there was no near privity of contract between the parties and Eide had not intended Glacier to use the audit reports. Although Glacier contended that its complaint alleged fraudulent misrepresentation, the court noted that “the word fraud is absolutely absent from the Complaint.” A subsequent ruling ended Glacier’s involvement in the suit.

Western had not been a party to the summary judgment motions and later amended the suit, adding negligent misrepresentation and fraudulent misrepresentation. The trial court subsequently dismissed the latter two claims. At the jury trial, the court only instructed the jury to determine the duty of care owed to Plaintiff under the near privity standards. The jury concluded that Eide owed Western a duty of care, but found that Western had been 70% causally negligent and Eider 30% negligent.

The Plaintiffs then appealed to the Montana Supreme Court. The Court reversed the district court judgment with regard to Western and held that the court should have instructed the jury on the negligent misrepresentation claim; the case was remanded for a new trial. It upheld the verdict with regard to Glacier, finding that it had failed to plead fraud with sufficient particularity.

Op. Att’y Gen. Ky. (August 20, 2010), 2010 Ky. AG LEXIS 171. Questionnaires constituting work papers for county government were not subject to public records law.

The Lexington Herald-Leader newspaper requested an opinion from the Attorney General regarding a decision by the Lexington-Fayette Urban County Government not to release the external auditor’s records, including “...all fraud or risk assessment reports...”. The County informed a newspaper reporter that the questionnaires the newspaper sought were retained by the auditor CPA firm as part of its workpapers and were the property of the CPA firm. The questionnaires were intended to be used to assist in identifying any material misstatement in the county’s financial statement due to fraud.

Upon review, the Attorney General concluded that the 2008 questionnaire was never a public record and even though the 2009 questionnaire was provided to the County Director of Internal Audit by the outside auditor, it was subject to the same statutory and regulatory restrictions on access, since the Department of Internal Audit was an independent body within the County government, subject to ethics and standards adopted by the Internal Audit Board. Further, as the Attorney General noted “...the strongly substantiated public interest supporting disclosure of public records reflecting allegations of governmental fraud and how those allegations are addressed, we find that with respect to the records in dispute, records obtained under an auditing standard that attempts to strike a balance between the importance of exposing frauds and promoting candor among employees capable of exposing fraud, the public’s right to know must yield to the need for confidentiality.”

Op. Att’y Gen. Tex. No. GA-0811, 2010 Tex. AG LEXIS 63 (October 22, 2010). CPAs employed by the Brazos River Authority were, by law, exempt from professional license fees.

The Texas Board of Accountancy sought an opinion from the Attorney General as to whether CPA licensees who were employees of the Brazos River Authority qualified for a fee exemption set out in the Texas Public Accountancy Act (TPAA). The TPAA, in pertinent part, exempts “... an employee of the federal government, the government of another state, or a municipal or county government of this state...”. The Board pointed out that the River Authority was not a municipality in “the traditional sense as other cities in the state.”

The Attorney General reasoned that while the River Authority was not a municipality within the meaning of the Local Government Code, for purposes of the TPAA, the River Authority status turned on the Legislature’s intended meaning. The Attorney General stated that the term “municipality” is defined differently in various contexts and has been broadly interpreted by the courts. The opinion concluded that in the case of the River Authority, the Legislature expressly designated it as a “municipality” in its enabling legislation. Therefore, a CPA who is an employee of the River Authority and who otherwise qualifies for the exemption is exempt from professional license fees.