ACCOUNTANT'S LIABILITY

CONTRIBUTORY NEGLIGENCE IN ACCOUNTANT MALPRACTICE ACTIONS AFTER LINCOLN GRAIN, INC. V. COOPERS & LYBRAND

INTRODUCTION

An accountant may be held liable for malpractice either in contract for the breach of his contractual duties or in tort for the breach of his general duty to exercise due care.\(^1\) Since an accountant may be liable in tort, an intriguing issue arises concerning the availability of the defense of contributory negligence.\(^2\) In the limited cases in which the defense has been asserted, it has been proffered within either of two types of cases.\(^3\) First, the contributory negligence defense has been asserted when the accountant contends that the client's negligence in conducting its business allowed an employee's fraud or the inability to detect the employee's fraud.\(^4\) Second, the contributory defense has been asserted when the accountant contends that the client was contributorily negligent in conducting its business which resulted in a financial loss.\(^5\) In this type of case, the client contends that the accountant is liable for erroneously reporting its financial condition and that the client, as a result of relying on the accountant's erroneous advice, entered into a course of activity which resulted in a financial loss.\(^6\)

The courts which have addressed the issue of the availability of the contributory negligence defense in an accountant malpractice action have reached different results using a variety of rationales.\(^7\) Commentators on the subject have reached similar results but have

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4. See Craig, 212 A.D. at 57, 208 N.Y.S. at 261.
6. Id.
7. Menzel, supra note 3, at 292.
also utilized a variety of rationales.\(^8\)

In *Lincoln Grain, Inc. v. Coopers & Lybrand*,\(^9\) a case of first impression, the Nebraska Supreme Court was asked to decide whether contributory negligence should be available as a defense in an accountant’s malpractice action in Nebraska.\(^10\) This Note reviews the limited number of cases decided on the issue before it was considered by the Nebraska Supreme Court. Commentators' views on the issue are also discussed. This Note then analyzes: 1) how the decision in *Lincoln Grain* conflicts with the Nebraska contributory/comparative negligence statute; 2) how the decision singles out accountants from all other professionals in Nebraska; and 3) how the decision creates an inconsistency in tort theory.

**FACTS AND HOLDING**

Lincoln Grain, Inc. contracted with Coopers & Lybrand to perform an audit of Lincoln Grain’s financial statements for the fiscal year ending June 30, 1975, and to render an opinion on the audit.\(^11\) The audit included an investigation by Coopers & Lybrand into the accuracy of the valuation placed upon the inventory of Lincoln Grain’s Iowa division.\(^12\) The Iowa division’s inventory consisted solely of contracts to purchase or sell commodities.\(^13\) The inventory was valued at the market price for a particular commodity on the last day of the fiscal year.\(^14\)

On June 30, 1975, Lincoln Grain’s statements valued the Iowa division’s inventory at nearly two million dollars.\(^15\) Coopers & Lybrand, on September 12, 1975, issued an opinion on these financial statements which stated:

> In our opinion, the aforementioned financial statements present fairly the financial position of Lincoln Grain, Inc. at June 30, 1975, and the results of its operations and changes in its financial position for the year then ended, in conformity with generally accepted accounting principles applied on

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\(^8\) Id.


\(^10\) 216 Neb. at 441, 345 N.W.2d at 306-07.

\(^11\) Id. at 435, 345 N.W. 2d at 303.

\(^12\) Id. at 435, 345 N.W.2d at 304.

\(^13\) Id.

\(^14\) Id.

\(^15\) Id. at 435-36, 345 N.W.2d at 304.
a basis consistent with that of the preceding year.\textsuperscript{16}

In November of 1975, due to large cash needs of the Iowa division, the treasurer of Lincoln Grain became suspicious and began to investigate the reasons for the heavy cash demands.\textsuperscript{17} Shortly after the investigation began, the manager of the Iowa division, also a vice president of Lincoln Grain, confessed to falsifying the Iowa division's inventory valuation.\textsuperscript{18} A subsequent investigation revealed that the Iowa division's inventory had only a one hundred and forty-three thousand dollar value and not the nearly two million dollar inventory reported on June 30, 1975.\textsuperscript{19} In February of 1976, the Iowa divi-

\begin{itemize}
  \item \textsuperscript{16} Id. at 436, 345 N.W.2d at 304. The generally accepted professional standards formulated by the American Institute of Accountants are:

    \begin{enumerate}
      \item \textbf{General Standards}
        \begin{enumerate}
          \item The examination is to be performed by a person or persons having adequate technical training and proficiency as an auditor.
          \item In all matters relating to the assignment, an independence in mental attitude is to be maintained by the auditor or auditors.
          \item Due professional care is to be exercised in the performance of the examination and the preparation of the report.
        \end{enumerate}
      \item \textbf{Standards of Field Work}
        \begin{enumerate}
          \item The work is to be adequately planned and assistants, if any, are to be properly supervised.
          \item There is to be proper study and evaluation of the existing internal control as a basis for reliance thereon and for the determination of the resultant extent of the tests to which auditing procedures are to be restricted.
          \item Sufficient competent evidential matter is to be obtained through inspection, observation, inquiries and confirmations to afford a reasonable basis for an opinion regarding the financial statements under examination.
        \end{enumerate}
      \item \textbf{Standards of Reporting}
        \begin{enumerate}
          \item The report shall state whether the financial statements are presented in accordance with generally accepted principles of accounting.
          \item The report shall state whether such principles have been consistently observed in the current period in relation to the preceding period.
          \item Informative disclosures in the financial statements are regarded as reasonably adequate unless otherwise stated in the report.
          \item The report shall either contain an expression of opinion regarding the financial statements, taken as a whole, or an assertion to the effect that an opinion cannot be expressed. When an over-all opinion cannot be expressed, the reasons therefor should be stated. In all cases where an auditor's name is associated with financial statements the report should contain a clear-cut indication of the character of the auditor's examination, if any, and the degree of responsibility he is taking.
        \end{enumerate}
    \end{enumerate}

\textsuperscript{17} 216 Neb. at 436, 345 N.W.2d at 304.

\textsuperscript{18} Id. The Iowa division manager "had altered and misrepresented the number of bushels on the list of open contracts . . . and had used the most favorable market price available rather than the true market price applicable to the open contract" in reporting the Iowa division inventory valuation. In doing so, the inventory had been overstated and the value of grain subjected to contract had been enlarged. 215 Neb. at 292, 338 N.W.2d at 596.

\textsuperscript{19} 216 Neb. at 436, 345 N.W.2d at 304.
sion closed for new business.\textsuperscript{20}

Subsequently, Lincoln Grain commenced an action against Coopers & Lybrand,\textsuperscript{21} with Lincoln Grain contending that the fraudulent activities of its employee would have been discovered at an earlier time if the Coopers & Lybrand audit had been conducted in accordance with generally accepted auditing standards.\textsuperscript{22} Lincoln Grain claimed that it was damaged due to the delayed discovery.\textsuperscript{23} Specifically, Lincoln Grain asserted, among other things, that Coopers & Lybrand failed to discover that the actual commodity contract prices, which Coopers & Lybrand reviewed in the performance of the audit, did not correspond with those listed on the Iowa division's inventory; that many of the freight rates listed on the Iowa division's inventory were incorrect; and that the figure used to value the net financial position of the Iowa division was not consistent with available external market information.\textsuperscript{24} Coopers & Lybrand asserted a variety of defenses, including that Lincoln Grain had assumed the risk of employee fraud and that Lincoln Grain was contributorily negligent.\textsuperscript{25} The Lancaster County District Court, pursuant to a jury verdict, dismissed the action.\textsuperscript{26} On appeal, Lincoln Grain contended that the district court erred on four counts, including the submittance of the contributory negligence defense to the jury.\textsuperscript{27}

In its decision, the Nebraska Supreme Court took note of the "dim and uncertain" dividing line between breaches of contracts and torts.\textsuperscript{28} The court stated that the character of the action, tort or contract, is determined by the nature of the grievance, not by the form of the pleadings.\textsuperscript{29} The court subsequently stated that it would dispose of the case on the theory on which it was presented in the dis-

\begin{itemize}
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} Id. at 434, 345 N.W.2d at 303.
  \item \textsuperscript{22} Id. at 436, 345 N.W.2d at 304.
  \item \textsuperscript{23} Id.
  \item \textsuperscript{24} Id. at 436-37, 345 N.W.2d at 304.
  \item \textsuperscript{25} Id. at 435, 345 N.W.2d at 303-04. "In addition, Coopers & Lybrand sued the director and officers of Lincoln Grain as third party defendants, claiming that if Coopers & Lybrand were found liable to Lincoln Grain, the third-party defendants would become liable to Coopers & Lybrand for their failure to properly discharge their duties to Lincoln Grain." No issue as to the propriety of that third-party action was presented in the action. Id. at 435, 345 N.W.2d at 304.
  \item \textsuperscript{26} Id. at 434, 345 N.W.2d at 303.
  \item \textsuperscript{27} Id. at 437, 345 N.W.2d at 304. The three other assignments of error were: 1) refusing to receive into evidence a Lincoln Grain exhibit; 2) submitting the assumption of the risk defense to the jury; and 3) charging the jury in the language of three different instructions. Id.
  \item \textsuperscript{28} Id.
  \item \textsuperscript{29} Id. at 437, 345 N.W.2d at 304-05.
\end{itemize}
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It then reversed and remanded the case for a new trial, ruling that the contributory negligence of a client is a defense available to an accountant in a malpractice action only where contributory negligence "has contributed to the accountant's failure to perform the contract and to report the truth." The court stated that an accountant is not immune from the consequences of his own negligence simply because those who employ him conducted their own business in a negligent fashion. The court reasoned that allowing such a defense "would render illusory the notion that an accountant is liable for the negligent performance of his duties.

BACKGROUND

The Availability of the Contributory Negligence Defense: Case Law and Commentary

The courts which have addressed the issue of the availability of the contributory negligence defense in an accountant malpractice action have reached differing results with varying rationales. Commentators on the subject have generally attained the same results but have used a variety of rationales in reaching their conclusions.

The New York Supreme Court, in Craig v. Anyon, was the first court to discuss the defense of contributory negligence in an accountant malpractice action. In Craig, the client-brokers contended that the accountants hired to audit their books were liable for damages. They alleged that the accountants failed to discover falsifications in the clients' books, which were entered by the clients' commodities department manager. The clients asserted that the accountants' failure to discover the falsifications constituted a breach of contract and negligence in the performance of the contract. The accountants asserted the defense of contributory negligence on the part of the clients and, additionally, both contributory negligence and crimi-

30. Id. at 438, 345 N.W.2d at 305.
31. Id. at 442, 345 N.W.2d at 307. The supreme court stated that the evidence in this action was such that whether Lincoln Grain was contributorily negligent in its dealings with the auditors and whether such negligence contributed to Coopers & Lybrand's failure to perform its contract in accordance with generally accepted auditing standards were questions of fact for the jury under an instruction in accordance with the foregoing rule. Id.
32. Id. at 441-42, 345 N.W.2d at 307.
33. Id. at 442, 345 N.W.2d at 307.
34. See note 2 supra.
35. See note 3 supra.
37. See Menzel, supra note 3, at 293.
38. 212 A.D. at 56-57, 208 N.Y.S. at 260.
39. Id.
40. Id. at 57, 208 N.Y.S. at 260.
nal acts on the part of the clients' employee. The jury found that the accountants were negligent in performing the audit and awarded the damages which the clients had actually proven. The accountants moved to set aside the finding of negligence. The supreme court rejected the accountants' motion and entered a judgment for the clients but only for the amount of the fee which the accountants had charged for their services. Both the accountants and the clients appealed, and the New York Appellate Division affirmed.

The New York Appellate Division had little difficulty concluding that the accountants were careless in conducting their audit. However, the court had trouble determining whether the accountants' carelessness had caused the financial loss.

The appellate court found that the accountants could have performed their work without the information received from the clients' commodities department manager. However, the court stated that the accountants "believed they were justified in taking the information given to them by the firm's representative, who exercised without interference, the power to deal with them in reference to their work in the commodities department." The court opined that while a proper accounting would have revealed the commodities department manager's wrongdoing, reasonable supervision by the clients also would have revealed the manager's wrongdoing. The court noted that the clients had never investigated their most actively traded account which the manager used in his fraudulent scheme. Additionally, the clients ignored a written notification from the accountants that a certain ledger should be controlled by an employee other than the manager. In spite of

41. \textit{Id.} at 57, 208 N.Y.S. at 261.
42. \textit{Id.} at 58, 208 N.Y.S. at 261. Two specific questions were submitted to the jury: 1) "Were the defendants negligent in the performance of their agreement with Craig & Co.?” and 2) “If so, what damages to the plaintiff resulted directly and proximately from such negligence?” \textit{Id.} The jury answered the first question affirmatively and found the defendant liable for damages in the amount of $1,177,805.26. \textit{Id.}
43. \textit{Id.}
44. \textit{Id.} The order stated that the court proceeded “on the ground that as a matter of law the only loss which resulted directly and proximately from the negligence of the defendants was the sum of $2,900.” \textit{Id.}
45. \textit{Id.} at 67, 208 N.Y.S. at 269.
46. \textit{Id.} at 59, 208 N.Y.S. at 262.
47. \textit{Id.}
48. \textit{Id.} at 60, 208 N.Y.S. at 263.
49. \textit{Id.}
50. \textit{Id.} at 64, 208 N.Y.S. at 266-67.
51. \textit{Id.} at 65, 208 N.Y.S. at 267. In fact, the account constituted 75 to 85% of the clients' Chicago business. The initial margin of the account was $200. The clients paid to the account $123,689.04 without ever examining the books to see what was due on the account. \textit{Id.}
52. \textit{Id.} at 64, 208 N.Y.S. at 266.
this, one of the clients' partners entrusted the ledger to the manager.\textsuperscript{53} The ledger afforded the manager control over the clients' financial books, which was necessary for him to implement his fraudulent scheme.\textsuperscript{54}

The court stated that while the accountants should not have relied on the records and papers given to them by the manager, the clients relied upon the accountants to "an extent beyond all reason."\textsuperscript{55} The court concluded that the loss was due not only to the accountants' negligence but also to the negligent manner in which the clients conducted their business.\textsuperscript{56} Further, the court found that the clients should not have relied exclusively on the accountants' audit.\textsuperscript{57} Finally, the appellate court stated that the damages could not be directly attributed to the accountants' negligence and that, therefore, the clients "should not be allowed to recover for losses which they could have avoided by the exercise of reasonable care."\textsuperscript{58}

In dissent, Judge Clark\textsuperscript{59} stated that he would have held the accountants liable for the financial loss proven rather than for the price of the contract.\textsuperscript{60} He further stated that the contract for the audit included protection of the clients from their failure to find errors in their own bookkeeping.\textsuperscript{61} Judge Clark opined that the accountants had not complied with this part of the contract.\textsuperscript{62} Regardless of the negligence of the clients in the examinations of their books, Judge Clark believed that the clients' negligence did not excuse the accountants from their failure to perform the contract.\textsuperscript{63}

In \textit{National Surety Corp. v. Lybrand},\textsuperscript{64} a New York Appellate Court found it necessary to distinguish the facts\textsuperscript{65} and qualify the holding in \textit{Craig}.\textsuperscript{66} In \textit{National Surety}, the plaintiff, a surety on a fidelity bond, paid the loss to a company whose employee had embezzled from petty cash and had concealed the shortages by "kiting" checks.\textsuperscript{67} The surety sought to hold the accountants liable for their financial loss.\textsuperscript{68}

\begin{itemize}
\item \textsuperscript{53} \textit{Id.}
\item \textsuperscript{54} \textit{Id.} at 64, 208 N.Y.S. at 266-67.
\item \textsuperscript{55} \textit{Id.} at 63-64, 208 N.Y.S. at 266.
\item \textsuperscript{56} \textit{Id.} at 65, 208 N.Y.S. at 267.
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} \textit{Id.} at 66, 208 N.Y.S. at 268.
\item \textsuperscript{59} \textit{Id.} at 67-68, 208 N.Y.S. at 269-70 (Clark, P.J., dissenting).
\item \textsuperscript{60} \textit{Id.}
\item \textsuperscript{61} \textit{Id.}
\item \textsuperscript{62} \textit{Id.} at 68, 208 N.Y.S. at 269.
\item \textsuperscript{63} \textit{Id.} at 67-68, 208 N.Y.S. at 269-70.
\item \textsuperscript{64} 256 A.D. 226, 9 N.Y.S.2d 554 (1939).
\item \textsuperscript{65} \textit{See note} 68 and accompanying text \textit{infra}.
\item \textsuperscript{66} \textit{See note} 77 and accompanying text \textit{infra}.
\item \textsuperscript{67} 256 A.D. at 70, 9 N.Y.S.2d at 557. Kiting has been defined as:
\item \textsuperscript{68} \textit{[i]n the wrongful practice of taking advantage of the float, the time that elapses between the deposit of a check in one bank and its collection at another.}
failure to discover the cash shortages.\textsuperscript{68} The accountants were charged with improper performance of the contract, breach of warranty, negligence, and fraudulent misrepresentation.\textsuperscript{69} The accountants asserted that the proximate cause of the loss was the client's negligence in failing to discover the discrepancies in certain bookkeeping records, in preparing certain memoranda in pencil, and in carelessly conducting the bookkeeping department.\textsuperscript{70}

The New York Supreme Court concluded that the surety had failed to establish a \textit{prima facie} case.\textsuperscript{71} The appellate court reversed, finding that the surety did establish a \textit{prima facie} case and that the complaint should have been submitted to a jury.\textsuperscript{72} The court stated that it was "not prepared to admit that accountants are immune from the consequences of their negligence because those who employ them have conducted their own business negligently."\textsuperscript{73} The appellate court's decision was based upon the observation that accountants "are commonly employed for the very purpose of detecting defalcations which the employer's negligence has made possible."\textsuperscript{74} In its holding, the appellate court strictly limited the defense of contributory negligence to situations in which the client's negligence has "contributed to the accountant's failure to perform his contract and to report the truth."\textsuperscript{75}

The \textit{National Surety} court accepted the \textit{Craig} rationale.\textsuperscript{76} However, by distinguishing the facts of the case, it arrived at a holding which, in effect, limited the \textit{Craig} decision.\textsuperscript{77} The \textit{National Surety} court stated that in \textit{Craig}, the embezzling employee had been negligently represented to the accountants as trustworthy; this fact resulted in losses to the company.\textsuperscript{78} In \textit{National Surety}, no such
representation was made about the embezzler.\textsuperscript{79} On this basis the National Surety court avoided following the contributory negligence defense without explicitly overruling Craig.\textsuperscript{80}

Among the limited number of other decisions which discuss the availability of the defense of contributory negligence in an accountant malpractice action is Cereal Byproducts Co. \textit{v.} Hall.\textsuperscript{81} In \textit{Cereal Byproducts}, the accountants were charged with breach of contract, negligence, and carelessness in performing an audit.\textsuperscript{82} The accountants' audit failed to reveal the embezzlement and the defalcations of the client's bookkeeper.\textsuperscript{83} The accountants denied any negligence or carelessness in performing the audit and charged the client with contributory negligence.\textsuperscript{84} The Superior Court of Cook County, Illinois, while rejecting the accountants' defense of contributory negligence, held that the client had not proven negligence on the part of the accountants in performance of the audit.\textsuperscript{85} Subsequently, the Appellate Court of Illinois reversed, with a direction to find the accountants negligent in the performance of the audit.\textsuperscript{86} Citing National Surety, the appellate court held that the trial court was correct in rejecting the defense of contributory negligence.\textsuperscript{87} In rejecting the contributory negligence defense, the court stated that "no fact or circumstance is cited contributing in the slightest degree to the negligence of [the accountants] in making the audit."\textsuperscript{88}

The United States District Court for the District of Maryland in Social Security Administration Baltimore Federal Credit Union \textit{v.} United States\textsuperscript{89} also addressed the availability of the contributory negligence defense to an accountant in a malpractice action.\textsuperscript{90} In \textit{Social Security Administration}, a federal credit union sought to recover damages incurred from an embezzlement by the credit union's manager.\textsuperscript{91} The credit union asserted that the accountants employed by the United States were negligent in examining the credit union's records.\textsuperscript{92} The government contended that the contributory negli-

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\textsuperscript{79} Id.
\textsuperscript{80} Id. at \textemdash, 9 N.Y.S.2d at 563.
\textsuperscript{81} 8 Ill. App. 2d 331, 132 N.E.2d 27 (1956).
\textsuperscript{82} Id. at \textemdash, 132 N.E.2d at 28.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at \textemdash, 132 N.E.2d at 30.
\textsuperscript{87} Id. at \textemdash, 132 N.E.2d at 29-30.
\textsuperscript{88} Id. at \textemdash, 132 N.E.2d at 29.
\textsuperscript{89} 138 F. Supp. 639 (D. Md. 1956).
\textsuperscript{90} Id. at 642.
\textsuperscript{91} Id. The action was brought under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674 (1976). Id. at 644.
\textsuperscript{92} Id. at 642.
gence of the credit union barred the credit union's claim.\textsuperscript{93}

The district court ruled that the credit union had not proven a breach of the duty owed by the government to the credit union.\textsuperscript{94} The district court found that the negligence of the officers, directors, and supervisory committee had made it difficult for the accountants to perform their job properly.\textsuperscript{95} Therefore, the court denied the credit union's claim.\textsuperscript{96} The district court suggested that, notwithstanding other grounds for denial, the client would be barred from recovery due to the credit union's contributory negligence.\textsuperscript{97} Yet, the federal court, relying on \textit{Craig} and \textit{National Surety}, neither recognized the conflicting results nor harmonized the decisions.\textsuperscript{98}

A case which has been cited as embracing the \textit{Craig} rationale is \textit{Delmar Vineyard v. Timmons}.\textsuperscript{99} In \textit{Delmar}, the clients alleged that they had suffered a loss because of the accountants' negligent performance of several audits.\textsuperscript{100} The clients asserted that "as a direct result of defendants' . . . negligence [and the clients'] reliance thereon," the clients continued to employ "the same management . . . under the mistaken belief that the [business] had made a reasonable profit and was financially sound."\textsuperscript{101} The accountants asserted that the clients' financial loss did not occur because of a contractual breach but because of negligence on the part of the client in managing and supervising its business.\textsuperscript{102} The chancery court awarded the clients a judgment against the accountants.\textsuperscript{103} The Tennessee Court of Appeals, Eastern Division, stated that the case "closest in point and applicable" was \textit{Craig}.\textsuperscript{104} However, the appeals court reversed the lower court's award of damages on the grounds that the client's loss was not proximately caused by the accountants' negligence or

\textsuperscript{93} Id.
\textsuperscript{94} Id. at 661.
\textsuperscript{95} Id. at 660.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} The defendant-accountants in Shapiro v. Glekel, 380 F. Supp. 1053 (S.D.N.Y. 1974), relied on Social Security Admin. as a case which embraced the Craig rationale, and the Shapiro court agreed. See Shapiro, 380 F. Supp. at 1054-55. But at least one commentator notes that the court's finding that "the credit union made it difficult for the examiners to do their job properly . . . [put] the case within the National Surety exception and, thus, the defendant-accountants' reliance on Social Security Admin. was probably misplaced." Menzel, supra note 3, at 304 n.90.
\textsuperscript{100} 486 S.W.2d 914 (Tenn. Ct. App. 1972).
\textsuperscript{101} Id. at 915.
\textsuperscript{102} Id. The audit "allegedly contained an understatement of accounts payable and an overstatement of inventory." Id.
\textsuperscript{103} Id. at 916.
\textsuperscript{104} Id. at 920.
The conflicting authorities of Craig and National Surety were discussed in Shapiro v. Glekel. In Shapiro, the client's trustee in bankruptcy brought an action against the client's accountants in district court. The trustee alleged that the accountants' failure to accurately reflect the financial status of the client led to the client's embarking on a series of acquisitions which eventually caused the client's financial downfall. The accountants asserted that the client was contributorily negligent. The accountants argued that the president and executive committee of the client corporation "were aware or should have been aware . . . that [the company's] financial condition was materially worse than that reported in the financial statements."

Applying New York law as interpreted in National Surety, the district court denied the accountants' motion for summary judgment. The court, finding significant policy considerations in support of the National Surety approach, stated: "Accountants should not be allowed to avoid liability resulting from their own negligence except upon a showing of substantial negligence or fault by their employer—the [National Surety] showing, at least." The court concluded that the National Surety approach was "particularly appropriate when . . . public investors are involved and the accountants have been retained because of their professional standing and expertise."

The Shapiro court noted that the cases after Craig and National Surety had not clarified or reconciled the two holdings. The Shapiro court found guidance for its decision, as did the Nebraska Supreme Court in Lincoln Grain, in a law review article by Professor Carl S. Hawkins of the University of Michigan Law School.
Professor Hawkins correctly noted that Craig has never been overruled. However, Hawkins questioned the significance of the Craig decision because of "its curious confusion of tort and contract principles" and the subsequent limitation of its contributory negligence defense as set out in National Surety. He rejected the argument that contributory negligence should never be applied in professional malpractice cases because, he argued, the existence of the contract does not alter the elements of a tort cause of action. For consistency, Hawkins contended that the defense of contributory negligence must be available if the action is in tort. However, Hawkins reasoned that since "contributory negligence is a failure to use reasonable care in looking after one's own interests in the circumstances" and the client engaging the accountant to protect the client's interest is one of the circumstances, there is nothing unreasonable in the client conducting his business with the assumption that the accountant is properly performing his duties. Professor Hawkins concluded that the National Surety court "probably had the right idea," that is, "contributory negligence must be accepted as a theoretical defense, but it applies only if the [client's] conduct goes beyond passive reliance and actually affects the [accountant's] ability to do his job with reasonable care."

Another commentator has also expressed views on the subject of contributory negligence as a defense in an accountant malpractice action. Commentator Menzel determined that the earlier cases like Craig were "clearly wrong." Menzel argued that if the accountant had discovered the fraud, future losses would have been pre-

116. See Hawkins, supra note 3, at 810.
117. Id. Professor Hawkins was concerned with the Craig court's viewing the action as one for breach of contract and not allowing recovery beyond the contract price based partially on the finding of contributory negligence of the client.
118. Id.
119. Id. The argument is based on the belief that the essence of the wrong is the breach of contract, and therefore, the consequences of violating the duty, which is imposed only by reason of the contract, should be the same whether the action is in contract or tort. Therefore, since contributory negligence is not a defense in a breach of contract action, it should not be allowed as a defense in a tort action. Id. See Rouse, supra note 2, at 41-42. Professor Hawkins felt that this argument overly stressed the contract as the basis of the duty. See Hawkins, supra note 3, at 811.
120. Hawkins, supra note 3, at 811.
121. Id. Contributory negligence has also been defined as: "Conduct by a plaintiff which is below the standard to which he is legally required to conform for his own protection and which is a contributory cause which cooperates with the negligence of the defendant in causing the plaintiff's harm." BLACK'S LAW DICTIONARY 931 (5th ed. 1979) (citation omitted).
122. See Hawkins, supra note 3, at 811.
123. Id.
124. See Menzel, supra note 3, at 292.
125. Id. at 310.
Menzel contended that this satisfied the element of proximate cause that many earlier cases held was missing. Menzel stated that when a client claims that losses were caused by reliance on faulty audits, proximate cause may be difficult to prove. However, the difficulty is a factual, not a legal, one. Menzel accepted the National Surety rationale but offered refinement. He suggested that if the accountant fails to discover the employee frauds, yet advises the client to make certain adjustments which would prevent future frauds, and if the client does not follow the advice, then "the reasonableness of the client's conduct . . . should be left to the trier of fact."

The issue of the extent and effect of the client's negligence also arises in jurisdictions which have rejected the theory of contributory negligence in favor of comparative negligence. Both the contributory and comparative negligence theories recognize that a plaintiff may "play a part in causing his injuries" and, therefore, that the amount of his recovery should be diminished. However, while the contributory negligence theory completely bars recovery, the comparative negligence theory prevents recovery for only that portion of the damage for which the plaintiff is responsible.

Recently, a court in a comparative negligence jurisdiction addressed the issue of the defense of comparative negligence in an accountant malpractice action. In Devco Premium Finance v. North River Ins. Co., the client alleged that it had suffered a financial loss by relying on audits negligently prepared by the accountants.

126. Id.
127. Id.
128. Id.
129. Id. at 310-11.
130. Id.
131. Id. at 311. Menzel asserted that under the National Surety rule the client's conduct, which strictly speaking has not interfered with the accountant's ability to perform his examination, would not bar a claim against the accountant. He contended that in this situation, it would be bad policy to shift the entire loss to the accountant when the client could have prevented the loss by following the accountant's suggestion. In determining the reasonableness of the client's conduct, Menzel opined that the trier of fact should consider the feasibility of the recommended improvements. Id. Menzel asserted that the rule he suggested could, at least partially, reconcile the results in Craig and Social Security Admin. Id. at 311 n.129.
132. See text at notes 136-44 infra.
133. See Hoffman v. Jones, 280 So. 2d 431, 436 (Fla. 1973). Florida has adopted judicially a comparative negligence standard stating: "We find that none of the justifications for denying any recovery to a plaintiff, who has contributed to his own injuries to any extent, has any validity in this age." Id. at 437.
134. Id. at 436.
135. See text at notes 136-44 infra.
137. Id. at 1218.
The accountants argued that the client was comparatively negligent in its failure to review and to take action on information concerning averages in its accounts receivable. The client asserted that the Florida district court should reject the accountants' comparative negligence defense and adopt the holding of National Surety that "negligence of the employer is a defense only when it has contributed to the accountant's failure to perform his contract and report the truth." The court rejected the National Surety holding, stating that "[National Surety] was decided on principles of contributory negligence, a doctrine which has been repudiated in this state." The Devco court thus rejected the National Surety holding, solely on the ground that the decision was based on inapplicable principles of contributory negligence. The Devco court did not expand further on its reasoning. The court subsequently adopted the holding of Craig that "plaintiffs should not be allowed to recover for losses which they could have avoided by the exercise of reasonable care." The court then affirmed the trial court's acceptance of the accountants' comparative negligence defense.

The courts which have addressed the issue of contributory negligence as a defense in an accountant malpractice action have followed both the Craig and National Surety rationales while commentators have favored the National Surety approach. However, the most recent court decision on the issue, decided in a comparative negligence jurisdiction, rejected National Surety and followed the Craig rationale.

The Availability of a Contributory Negligence Defense: Nebraska Law

Nebraska has adopted a hybrid statute which incorporates both comparative and contributory negligence theories. Under the Ne-
braska contributory/comparative negligence statute, if the evidence reveals beyond a reasonable doubt that the plaintiff's contributory negligence was more than slight in comparison with the defendant's negligence, the action is to be dismissed or the court must direct a verdict.148 Under the statute, if reasonable doubt exists as to whether the degree of the plaintiff's contributory negligence is more or less than slight, the jury is to determine whether recovery should be allowed.149 When the plaintiff's contributory negligence does not bar recovery, both the plaintiff's and the defendant's negligence are considered, and the plaintiff's recovery is reduced proportionately.150

In interpreting the Nebraska contributory/comparative negligence statute, the Nebraska Supreme Court has defined contributory negligence as "conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause."151

The Nebraska Supreme Court has applied contributory negligence to medical malpractice cases.152 For example, in *Mecham v. McLeary*,153 the defendant doctors were accused of negligence in failing to properly diagnose the illness of the patient.154 The doctors asserted that the patient was contributorily negligent in leaving a hospital without the doctors' permission and in cancelling appointments.155 The Nebraska Supreme Court, affirming the lower court's

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148. See Rogers v. Shepherd, 159 Neb. 292, 298, 66 N.W.2d 815, 819 (1954) (action to recover damages as a result of an automobile collision dismissed when evidence established beyond a reasonable doubt that the plaintiff was guilty of negligence more than slight).

149. See note 130 supra.

150. Id.

151. Kover v. Beckius, 133 Neb. 487, 494, 275 N.W. 670, 674 (1937) (citation omitted) (holding no contributory negligence on part of guest in a car who remained silent while driver drove recklessly).

152. See generally Kaspar v. Shack, 195 Neb. 215, 237 N.W.2d 414 (1976) (case reversed and remanded where conflicting instructions were given to jury regarding burden of proof on contributory negligence); Mecham v. McLeary, 193 Neb. 457, 227 N.W.2d 829 (1975).


154. Id. at 457, 227 N.W.2d at 830.

155. Id. at 464, 227 N.W.2d at 833.
submission of the contributory negligence defense to the jury, did not
place any special limitations on the scope of the defense.\textsuperscript{156}

While the Nebraska Supreme Court had not previously consid-
ered the doctrine of contributory negligence in an accountant mal-
practice case, the United States District Court for the District of
Nebraska addressed the issue in \textit{Seedkem v. Safranek}.\textsuperscript{157} In Seed-
kem, the distributor of agricultural chemicals brought an action
against the accountant.\textsuperscript{158} The distributor alleged that the account-
ant had negligently prepared unaudited financial statements for one
of its customers.\textsuperscript{159} The distributor asserted that, in relying upon the
financial statements, it was later unable to fully collect credit ex-
tended to the customer.\textsuperscript{160}

The accountant raised the defense of contributory negligence,
claiming that the distributor possessed information which would
have disclosed the overstated accounts receivable.\textsuperscript{161} The district
court, interpreting Nebraska law,\textsuperscript{162} cited \textit{Kaspar v. Schack}\textsuperscript{163} as an
indication that Nebraska recognizes contributory negligence as a de-
fense in professional malpractice actions.\textsuperscript{164} The court ruled that the
distributor had failed to prove that the accountant's alleged negli-
gence was the proximate cause of the distributor's inability to collect
the debt.\textsuperscript{165} Subsequently, the court found the distributor guilty of
more than "slight" contributory negligence, thereby denying recov-
ery under Nebraska law.\textsuperscript{166}

The Nebraska contributory negligence statute contains elements
of both comparative and contributory negligence theories.\textsuperscript{167} The Ne-
braska Supreme Court had never faced the issue of contributory neg-
ligence in an accountant malpractice action before \textit{Lincoln Grain},
but it had recognized the defense in other professional malpractice
actions.\textsuperscript{168} While the federal district court had addressed the issue in
\textit{Seedkem}, its decision was only an interpretation of analogous Ne-
Since the role of contributory negligence as a defense in an accountant malpractice action was an issue of first impression, the Nebraska Supreme Court was free to adopt either the Craig or the National Surety position, or some variation thereof, in Lincoln Grain. While the federal district court had addressed the issue of contributory negligence as a defense in an accountant malpractice action in Seedkem, the federal court's decision was only an interpretation of Nebraska law and was not binding on the Nebraska Supreme Court. Further, the Seedkem decision was based primarily on the lack of proximate causation. The federal district court discussed neither Craig nor National Surety; therefore, the Seedkem opinion gave no indication of how the Nebraska Supreme Court might rule in Lincoln Grain.

In Lincoln Grain, the Nebraska Supreme Court adopted the National Surety position which allows the defense of contributory negligence in an accountant malpractice action only when the contributory negligence "has contributed to the accountant's failure to perform the contract and report the truth." In adopting the National Surety position, the court has not eliminated the defense of contributory negligence in malpractice actions involving accountants; instead, it has only limited the scope of the defense. However, the court's adoption of National Surety gives rise to a number of problems, both theoretical and practical.

National Surety and Nebraska's Contributory/Comparative Negligence Statute

In establishing the National Surety limitation in accountant malpractice actions, the Nebraska Supreme Court expressed concern that adoption of the Craig "reasonable care" rationale "would render illusory the notion that an accountant is liable for the negligent performance of his duties." In reaching its decision in Lincoln Grain, the court made no mention of Nebraska's contributory/comparative

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169. See text at notes 161-65 supra.
170. See text at note 10 supra.
171. See text at notes 156-65 supra.
172. See note 161 and accompanying text supra.
173. See text at note 165 supra.
175. See 216 Neb. at 442, 345 N.W.2d at 307.
176. Id.
177. See text at notes 32 and 33 supra.
negligence statute. While Nebraska's contributory/comparative negligence statute does not totally reject the doctrine of contributory negligence, as do other jurisdictions, it places a definite limitation on its application. Under the Nebraska statute, a plaintiff may recover damages if his contributory negligence is "slight" in comparison to the defendant's negligence. The effect of the plaintiff's "slight" contributory negligence is to proportionately reduce the amount of the plaintiff's recovery. Assuming the court did consider the Nebraska contributory/comparative negligence statute in reaching its decision, the court may have reasoned that if it followed the Craig rationale, plaintiff-clients would more often than not find their claims against defendant-accountants barred by a finding of contributory negligence more than "slight." Thus, the plaintiff-client's chances for recovery would be diminished if the statute read with Craig was the standard in accountant liability actions.

Another problem with the court's holding in Lincoln Grain is that the National Surety approach, which allows evidence of an accountant's negligence to be admitted for a jury's consideration when the accountant's negligence "has contributed to the accountant's failure to perform the contract and report the truth," conflicts with the Nebraska contributory/comparative negligence statute. By adopting the National Surety limitation on evidence, the Nebraska Supreme Court has encroached upon the jury's power to make two determinations required by the contributory/comparative negligence statute.

First, the exclusion of evidence from the jury effectively raises the plaintiff-client's chances for a recovery. Under the contributory/comparative negligence statute, in all cases where a reasonable doubt exists, the jury is to make the determination if recovery should be allowed. Second, the exclusion of evidence from the jury effectively raises the amount of the plaintiff-client's potential recovery. The contributory/comparative negligence statute requires that in cases where the plaintiff's contributory negligence does not bar recovery, the jury is to consider the plaintiff's contributory negligence in proportionately reducing the plaintiff's recovery. The Nebraska Supreme Court, through this exclusion of evidence from the jury, has

178. See generally 216 Neb. 433, 345 N.W.2d 300.
179. See note 133 supra.
180. See note 147 supra.
181. Id.
182. Id.
183. See 216 Neb. at 442, 345 N.W.2d at 307.
184. Id.
185. Id.
bypassed the applicable standard for recovery that the legislature has mandated "in all cases" where contributory negligence is considered.

Despite the conflict between National Surety and the Nebraska contributory/comparative negligence statute, the two can be partially reconciled if National Surety is considered concurrently with Craig in a two-pronged analysis. First, the National Surety standard of contributory negligence can be applied to determine if the plaintiff-client's contributory negligence bars recovery. Second, if the claim is not barred, the Craig standard of contributory negligence can be applied to determine how much the plaintiff-client's recovery should be reduced. This approach would at least allow the jury to hear all the evidence concerning the plaintiff-client's contributory negligence to determine the amount of the plaintiff-client's recovery.

**Inconsistency in Nebraska Malpractice Actions**

The adoption of the National Surety position in Lincoln Grain also creates an inconsistency in both tort theory and tort actions. By disregarding traditional tort elements, the National Surety mode of analysis severely restricts contributory negligence as a defense in accountant malpractice actions. Professor Hawkins, relied upon by the court in Lincoln Grain, contended that for the sake of theoretical consistency, contributory negligence must be accepted as a defense in accountant malpractice actions. The National Surety rationale, adopted in Lincoln Grain, does the opposite and in so doing, creates an inconsistency in malpractice tort actions in the state. Nebraska currently allows contributory negligence as a defense in all other professional malpractice actions without a National Surety limitation. Thus, after Lincoln Grain, accountants in Nebraska are singled out from other professionals in the treatment of malpractice suits against them. Perhaps this discriminatory treatment has to do with the contractual nature of the accountant-client relationship and the resulting expectations of the parties. The typical contract for audit includes the protection of clients from their own failure to detect bookkeeping errors or fraud.

Despite this contractual arrangement, accountant malpractice suits are brought in tort. Allowing the contract to affect a subsequent tort action, while theoretically inconsistent, may accurately re-
reflect a contractually imposed standard of care. Thus, by limiting the
defense of contributory negligence in accountant malpractice actions,
courts indeed may be manifesting the parties' reasonable expecta-
tions. Nevertheless, the Nebraska Supreme Court did not explicate
its reasoning in *Lincoln Grain* beyond its adoption of the *National
Surety* standard, thereby creating an unexplained, discriminatory ex-
ception to malpractice actions in Nebraska.

CONCLUSION

The Nebraska Supreme Court's adoption of the *National Surety*
rationale conflicts with the Nebraska contributory/comparative negli-
gence statute. Furthermore, the *National Surety* approach creates
inconsistency in both tort theory and professional malpractice actions
in Nebraska. The court adopted the *National Surety* limitation, per-
haps fearing that adoption of the *Craig* rationale would unfairly pro-
tect accountants from liability for the negligent performance of their
duties.

Such protection could result from the application of the current
Nebraska contributory/comparative negligence statute in accountant
malpractice actions. For whatever reason, be it the parties' reason-
able expectations or a statute incompatible with the contractual rela-
tionship of accountants and their clients, the Nebraska Supreme
Court found in *National Surety* a means to effectively sidestep the
statute and traditional tort principles in the context of accountant
malpractice suits.

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