

Relationship Between Premium Finance Agency and Insurance Company Is Not Sufficient to Sustain a Cause of Action for Negligent Misrepresentation

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minimum contacts regardless of whether any property of the defendant has been attached. Of course, separate objections would still be appropriate when failure of service or improper attachment is alleged.¹⁷⁴ Nonetheless, it is submitted that the proposed change would lend consistency to jurisdictional pleading under the CPLR.

Richard H. Metsch

Relationship between premium finance agency and insurance company is not sufficient to sustain a cause of action for negligent misrepresentation

The negligent misrepresentation cause of action permits recovery for injuries arising out of justifiable reliance upon careless, though innocent, statements.¹⁷⁵ Although the cause of action read-

¹⁷⁴ An objection to an attachment procedure, on grounds other than a failure of minimum contacts among the forum, defendant and controversy, would seem warranted because actual distinctions between quasi-in-rem and in personam actions still exist. See note 169 *supra*.

¹⁷⁵ New York first recognized a cause of action for negligent misrepresentation in *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922). In *Glanzer*, the plaintiff entered into an agreement to buy beans "in accordance with weight sheets certified by [the defendant] public weighers," employed by the seller. *Id.* at 238, 135 N.E. at 275. The plaintiffs paid for the goods in reliance upon the certified weight measures, which proved to be inaccurate, and sought to recover the overpayment from the public weighers. *Id.* Judge Cardozo, writing for the majority, overcame the restrictions of privity and reasoned that when one acts pursuant to an independent calling to control the conduct of another, the duty to act with care will extend to "all whose conduct was to be governed," even if acting gratuitously. *Id.* at 239, 135 N.E. at 276.

Although the Court upheld the recovery "not merely for careless words . . . but for the careless performance of a service," *id.* at 241, 135 N.E. at 276 (citations omitted), the only evidence of negligence was the inaccurate certificate itself, *id.*; see Green, *The Communicative Torts*, 54 TEX. L. REV. 1, 35 (1975), and, therefore, *Glanzer* is still considered the leading case on negligent misrepresentation. Note, *Negligent Misrepresentation: Can an Attorney Rely on What the Government Tells Him?*, 40 LA. L. REV. 859, 860-63 (1980); see, e.g., *White v. Guarente*, 43 N.Y.2d 356, 362, 372 N.E.2d 315, 319, 401 N.Y.S.2d 474, 478 (1977); *Doyle v. Chatham & Phenix Nat'l Bank*, 253 N.Y. 369, 377-78, 171 N.E. 574, 577-78 (1930); *Courteen Seed Co. v. Hong Kong & Shanghai Banking Corp.*, 245 N.Y. 377, 381, 157 N.E. 272, 273-74 (1927). In addition, *Glanzer* provided the basis for section 552 of the Second Restatement of Torts on negligent misrepresentation. Green, *supra*, at 35. Under the Restatement, a person is liable for negligent misrepresentation if, "in the course of his business . . . [he] supplies false information for the guidance of others in their business transactions . . . [and] he fails to exercise reasonable care." RESTATEMENT (SECOND) OF TORTS § 552(1) (1976). The Restatement differs from *Glanzer* only in that the former will not impose a duty when the person is acting gratuitously. RESTATEMENT (SECOND) OF TORTS § 552(1) comment c (1976); *But see Glanzer v. Shepard*, 233 N.Y. at 239, 135 N.E. at 276 (1922) ("[i]t is ancient learning that one who assumes to act, even though gratuitously, may thereby become

ily has been incorporated into the area of personal injury,¹⁷⁶ courts have been reluctant to extend its application to redress purely economic loss.¹⁷⁷ Accordingly, the imposition of a duty to speak carefully when the damages are limited to economic loss, requires proof of a special relationship between the parties sufficient to justify actionable reliance.¹⁷⁸ Recently, in *Home Mutual Insurance Co. v.*

subject to the duty of acting carefully, if he acts at all"). For a discussion of the English development of negligent misrepresentation, see Goodhart, *Liability for Innocent but Negligent Misrepresentations*, 74 YALE L.J. 286, 287-94 (1964).

¹⁷⁶ See W. PROSSER, THE LAW OF TORTS § 107, at 704 (4th ed. 1971). Since potential liability is limited to a defined class of injured persons, the courts have had little trouble applying negligent misrepresentation to personal injury cases. *Id.*; see *Washington & Berkeley Bridge Co. v. Pennsylvania Steel Co.*, 226 F. 169, 171-72 (4th Cir. 1915).

¹⁷⁷ W. PROSSER, *supra* note 176, § 107, at 704-05. When recovery is sought for purely economic harm, courts "have become alarmed" that a broad application of negligent misrepresentation potentially would lead to the unlimited liability of an indeterminate class. *Id.*; RESTATEMENT (SECOND) OF TORTS § 552 comment a (1976). This problem was exemplified by the factual situation surrounding the landmark case of *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931). In *Ultramares*, the plaintiff advanced money to the Stern Company in reliance upon an inaccurate balance sheet prepared and certified by the defendant public accountants who had been engaged by the Stern Company. *Id.* at 174-76, 174 N.E. at 442-43. The Court denied the plaintiff's recovery for negligent misrepresentation, observing that although the defendants were aware that the certified balance sheets would be relied upon by potential creditors, they did not know by whom or by how many. *Id.* at 173-74, 174 N.E. at 442. The Court reasoned that to impose a duty of care would subject the defendants to "liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Id.* at 179, 174 N.E. at 444. Writing for a unanimous Court, Chief Judge Cardozo distinguished the case from *Glanzer* by noting that the plaintiff's reliance in *Glanzer* was "certain and immediate and deliberately willed," *id.* at 182, 174 N.E. at 445, whereas in *Ultramares* the plaintiff's reliance was "merely one possibility among many," *id.*

¹⁷⁸ *International Prods. Co. v. Erie R.R.*, 244 N.Y. 331, 338, 155 N.E. 662, 664, *cert. denied*, 275 U.S. 527 (1927). In *International Products* the Court of Appeals, per Judge Andrews, set out the following four criteria for establishing a duty to speak with care:

There must be knowledge or its equivalent that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that if false or erroneous he will because of it be injured in person or property. Finally the relationship of the parties, arising out of the contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care.

244 N.Y. at 338, 155 N.E. at 664 (citing *Jaillet v. Cashman*, 235 N.Y. 511, 511, 139 N.E. 714, 714 (1923)).

In *International Products*, the plaintiff made arrangements with the defendant railroad to have its goods received and stored by the defendant. 244 N.Y. at 333-34, 155 N.E. at 662. In order to insure the goods once they were stored, the plaintiff asked the defendant at which warehouse the goods were to be stored, and purchased his insurance based upon the defendant's answer. *Id.* at 334, 155 N.E. at 662. In fact, only half the goods were stored at that particular location, and the other half were stored at another dock which subsequently caught fire, *id.* at 335, 155 N.E. at 663. Because of the misinformation given to the insurance company, the plaintiff could not recover under the policy and, therefore, sought to recover

Broadway Bank & Trust Co.,¹⁷⁹ the Court of Appeals held that when a defendant is not required to speak,¹⁸⁰ but speaks to further its own interests,¹⁸¹ an existing business relationship does not give rise to a duty to speak with care, and thus no cause of action for negligent misrepresentation arises.¹⁸²

In *Home Mutual*, the defendant bank, acting as a premium finance agency,¹⁸³ sent an ineffective notice of cancellation¹⁸⁴ to the

from the defendant on the theory of negligent misrepresentation. *Id.* Upholding the plaintiff's recovery, the *International Products* Court recognized the need to place limits on the cause of action and, consequently, established the four criteria, *see supra*, to avoid imposing liability for merely "casual response[s]" or "idle word[s]." *Id.* at 337, 155 N.E. at 664. These criteria have since come to be recognized as the necessary elements of a cause of action for negligent misrepresentation. *See Cavallo v. Metropolitan Life Ins. Co.*, 34 App. Div. 2d 682, 683, 312 N.Y.S.2d 438, 440 (2d Dep't 1970) (Hopkins, Acting P.J., dissenting); *Advance Music Corp. v. American Tobacco Co.*, 268 App. Div. 707, 710-11, 53 N.Y.S.2d 337, 340-41 (1st Dep't 1945), *rev'd on other grounds*, 296 N.Y. 79, 70 N.E.2d 401 (1947).

¹⁷⁹ 53 N.Y.2d 568, 428 N.E.2d 842, 444 N.Y.S.2d 436 (1981).

¹⁸⁰ *Id.* at 574, 428 N.E.2d at 844, 444 N.Y.S.2d at 438.

¹⁸¹ *Id.* at 575-76, 428 N.E.2d at 845, 444 N.Y.S.2d at 439.

¹⁸² *Id.* at 571, 574-75, 428 N.E.2d at 843-44, 444 N.Y.S.2d at 437-38.

¹⁸³ The defendant bank was authorized to act as a premium finance agency under Article XII-B of the New York Banking Law. *Id.* at 571-72, 428 N.E.2d at 843, 444 N.Y.S.2d at 437. In June of 1972, Shelva Ludwig entered into a premium finance agreement with the Broadway Bank whereby the bank agreed to advance the full amount of Mrs. Ludwig's insurance premium to the plaintiff, Home Mutual Insurance Company, and Mrs. Ludwig agreed to pay the premium and interest to the bank in monthly installments. *Id.* at 572, 428 N.E.2d at 843, 444 N.Y.S.2d at 437.

¹⁸⁴ *Id.* at 572-73, 428 N.E.2d at 843, 444 N.Y.S.2d at 437. Under section 576(1) of the New York Banking Law, and the insurance contract, the defendant was given the exclusive authority to cancel the policy if Mrs. Ludwig defaulted in her payments. *Home Mut. Ins. Co. v. Broadway Bank & Trust Co.*, 76 App. Div. 2d 24, 25, 429 N.Y.S.2d 948, 949 (4th Dep't 1980). Section 576(1) provides in part:

When a premium finance agreement contains a power of attorney or other authority enabling the premium finance agency to cancel any insurance contract or contracts listed in the agreement, the insurance contract or contracts shall not be cancelled unless such cancellation is effectuated in accordance with the following provisions:

(a) Not less than ten days written notice shall be mailed to the insured . . . and that at least three days for mailing such notice is added to the ten day notice.

N.Y. BANKING LAW § 576(1) (McKinney Supp. 1981-1982). Mrs. Ludwig defaulted on her July installment, and the bank, on July 21, 1972, sent her notice that her policy would be cancelled on August 24, 1972. 53 N.Y.2d at 572, 428 N.E.2d at 843, 444 N.Y.S.2d at 437. The bank, however, failed to check the box on the statement which signified that it was a cancellation notice. *Id.* This was later determined, in *Balboa Ins. Co. v. Widener*, 47 App. Div. 2d 815, 815, 367 N.Y.S.2d 1020, 1020 (4th Dep't 1975), to be an ineffective notice of cancellation. 53 N.Y.2d at 573, 428 N.E.2d at 843, 444 N.Y.S.2d at 437. On August 21, 1972, the bank sent another notice of cancellation, with the appropriate box checked, but this too was ineffective because it failed to give 10 days notice as required by section 576(1) of the New York Banking Law. 76 App. Div. 2d at 25-27, 429 N.Y.S.2d at 949-50.

holder of an automobile insurance policy issued by the plaintiff insurance company.¹⁸⁵ Upon receiving a copy of the notice, the insurance company returned the unused portion of the premium to the bank.¹⁸⁶ The insured vehicle was subsequently involved in an accident,¹⁸⁷ and after a determination that the insurance policy was still in effect,¹⁸⁸ the plaintiff settled the damage claim for \$25,000.¹⁸⁹ The insurance company brought an action against the bank to recoup the settlement plus expenses, claiming that the bank negligently misrepresented that the policy had been cancelled.¹⁹⁰ Finding the defendant liable, the trial court held that the only damage proximately caused by this negligence was \$243, the amount of the refunded premium.¹⁹¹ The Appellate Division, Fourth Department, unanimously upheld the trial court's determination¹⁹² but reversed the lower court's finding that the bank owed

¹⁸⁵ 53 N.Y.2d at 572, 428 N.E.2d at 843, 444 N.Y.S.2d at 437. The plaintiff insurance company issued the compulsory automobile insurance policy pursuant to the assigned risk plan. *Id.*; see N.Y. Ins. Law § 63 (McKinney Supp. 1980-1981).

¹⁸⁶ 53 N.Y.2d at 572-73, 428 N.E.2d at 843, 444 N.Y.S.2d at 437. Instead of sending a copy of the original cancellation notice, which did not properly state that it was a cancellation notice, the bank sent the plaintiff a copy of the second cancellation notice. *Id.* at 572, 428 N.E.2d at 843, 444 N.Y.S.2d at 437. That notice stated that it was a cancellation notice and listed July 21, 1972, as its 'Original Date of Notice,' thereby purporting to have cancelled the policy. *Id.* Accepting the defendant's cancellation notice as valid, the insurance company sent a check for the unearned portion of the premium, \$243, to the defendant and Mrs. Ludwig's insurance broker. *Home Mut. Ins. Co. v. Broadway Bank & Trust Co.*, 100 Misc. 2d 228, 230, 417 N.Y.S.2d 856, 858 (Sup. Ct. Monroe County 1979).

¹⁸⁷ The insured car was involved in an accident on September 21, 1972, approximately 1 month after the plaintiff had received a copy of the cancellation notice. 53 N.Y.2d at 573, 428 N.E.2d at 843, 444 N.Y.S.2d at 437. The accident resulted in personal injuries to a third person. *Id.*

¹⁸⁸ *Balboa Ins. Co. v. Widener*, 47 App. Div. 2d 815, 815, 367 N.Y.S.2d 1020, 1020 (4th Dep't 1975); see note 185 *supra*.

¹⁸⁹ The plaintiff insurance company, which was required to defend the claim brought against Mrs. Ludwig, settled for \$25,000 after 1 day of trial. 100 Misc. 2d at 230, 417 N.Y.S.2d at 858.

¹⁹⁰ 53 N.Y.2d at 573, 428 N.E.2d at 843-44, 444 N.Y.S.2d at 837-38.

¹⁹¹ 100 Misc. 2d at 234-36, 417 N.Y.S.2d at 860-62. After a nonjury trial, the Supreme Court, Monroe County, first dismissed the plaintiff's claim against the defendant for negligently attempting to cancel the policy, holding that since the defendant was not an agent of the insurance company, it owed no duty to the insurer with respect to its performance under the finance agreement. *Id.* at 230-32, 417 N.Y.S.2d at 858-59. Respecting the issue of negligent misrepresentation, the court found that the relationship between the parties and the facts of the case met the four criteria established in *International Products*, see note 178 *supra*. 100 Misc. 2d at 233-34, 417 N.Y.S.2d at 860. The court, however, reasoned that the plaintiff's issuance of the insurance policy, and not the defendant's misrepresentation, was the proximate cause of its settlement, and that the only consequence of the misrepresentation was the return of the unearned premium. *Id.* at 236, 417 N.Y.S.2d at 861-62.

¹⁹² 76 App. Div. 2d at 27, 429 N.Y.S.2d at 950. The court stated that the defendant was

a duty to carefully represent that it had cancelled the policy.¹⁹³

In affirming the appellate division, the Court of Appeals held that the defendant owed no duty to the plaintiff with respect to its settlement, and noted that the only act in reliance upon the defendant's misrepresentation was the return of the premium.¹⁹⁴ Writing for a unanimous Court, Judge Jones stated that more than foreseeability is required to create a duty to speak with care.¹⁹⁵ Finding that the defendant was under no contractual or legal obligation to exercise its exclusive power to cancel the policy upon default, the Court reasoned that there was no "special relationship" between the parties sufficient to create a duty to speak carefully.¹⁹⁶ Additionally, the Court concluded that the defendant did not assume a duty by its voluntary action because it was acting on its own behalf, rather than in the insurance company's interest.¹⁹⁷ Emphasizing the legislative intent in promoting premium finance agreements, the Court further observed that the disparity between the benefit to the defendant bank and the potential liability it would be subjected to militated against finding a duty to speak with care.¹⁹⁸ Finally, Judge Jones stated that the insurance company's

not entitled to the return of the "unearned" premium because the policy had remained in effect. *Id.*

¹⁹³ *Id.* at 28, 429 N.Y.S.2d at 957. Distinguishing this case from *International Products and Glanzer*, the Appellate Division, Fourth Department, held that since the defendant was not the insurance company's agent, it owed no duty and thus could not be liable for its misrepresentations. *Id.*

¹⁹⁴ 53 N.Y.2d at 577-78, 428 N.E.2d at 846, 444 N.Y.S.2d at 440 (1981).

¹⁹⁵ *Id.* at 576-77, 428 N.E.2d at 845-46, 444 N.Y.S.2d at 439-40. Quoting from *Pulka v. Edelman*, 40 N.Y.2d 781, 785, 358 N.E.2d 1019, 1022, 390 N.Y.S.2d 393, 396 (1976), the Court stated that foreseeability only defines the duty once one is found to exist, and that the plaintiff failed to show the presence of such a duty. 53 N.Y.2d at 577, 428 N.E.2d at 846, 444 N.Y.S.2d at 440.

¹⁹⁶ 53 N.Y.2d at 574-75, 428 N.E.2d at 844-45, 444 N.Y.S.2d at 438-39. Since the provision of the New York Banking Law which authorized the defendant to cancel the policy upon default was enacted for the bank's benefit, and the choice to cancel was exclusively the bank's, the Court held that the defendant had no duty to act. *Id.* at 575, 428 N.E.2d at 845, 444 N.Y.S.2d at 439. The Court distinguished the case at bar from *White v. Guarente*, 43 N.Y.2d 356, 372 N.E.2d 315, 401 N.Y.S.2d 474 (1977), noting that *White* involved a contractual duty to perform the service whereas in the present case the defendant was under no duty to act. 53 N.Y.2d at 575, 428 N.E.2d at 845, 444 N.Y.S.2d at 439.

¹⁹⁷ 53 N.Y.2d at 575-76, 428 N.E.2d at 845, 444 N.Y.S.2d at 439. Addressing the plaintiff's claim that even if the defendant had no duty to act it assumed a duty to act carefully when it chose to act, the Court noted that this principle has only been applied to "one whose effort is extended for the purpose of aiding or serving another." *Id.* at 576, 428 N.E.2d at 845, 444 N.Y.S.2d at 439 (citations omitted).

¹⁹⁸ *Id.* at 577, 428 N.E.2d at 846, 444 N.Y.S.2d at 440. The Court reasoned that when the minimal benefit to the premium finance agency is weighed against the potential liability,

only act in reliance upon the defendant's misrepresentation was to return the unearned premium and, therefore, any recovery would be limited to that amount.¹⁹⁹

While the *Home Mutual* decision laudably effects the legislature's desire to promote premium finance agencies²⁰⁰ by limiting their potential liability to the amount of the premiums,²⁰¹ it is submitted that the Court's reasoning erroneously makes a duty to speak with care contingent upon a duty to act.²⁰² The failure to

banks would avoid entering into premium finance agreements. *Id.* Even if there was only a small probability of being held liable, when faced with such a large potential liability, it is doubtful that banks would be willing to take the risk. Indeed, it appears that, under such circumstances, banks would be reluctant to enter into the premium finance agencies which are so important in a compulsory insurance system. *See* note 200 *infra*.

¹⁹⁹ 53 N.Y.2d at 578-79, 428 N.E.2d at 846-47, 444 N.Y.S.2d at 440-41.

²⁰⁰ Premium finance agreements have played a very important role in the overall scheme of automobile insurance financing by providing an alternative method of financing insurance premiums. Under the assigned risk plan, insurance companies which operate within the state are required to participate in the pool and are compelled to issue automobile insurance to persons who "are unable to procure insurance through ordinary methods." N.Y. INS. LAW § 63(1) (McKinney 1971 & Supp. 1981-1982). This places a heavy burden on insurance companies which are required to carry policies which they normally would not issue. Premium finance agreements relieve some of this burden by allowing the insurance company to receive the full amount of the premium upon issuing the policy. While premium finance agreements existed prior to the legislature's enactment of Article XII-B of the New York Banking Law, their use was accompanied by many unethical and dishonest practices. *See generally* 110 N.Y.S. SUPERINTENDANT OF BANKS ANN. REP. pt. 1, at 119 (1960). In enacting Article XII-B the legislature hoped to eliminate many of these abuses, thereby preserving premium finance agencies as a viable option in automobile insurance financing. *Id.*

²⁰¹ 53 N.Y.2d at 578-79, 428 N.E.2d at 846-47, 444 N.Y.S.2d at 440-41. The *Home Mutual* Court's decision eliminated the possibility of a premium finance agency being held liable for benefits paid under a policy by holding as a matter of law that the relationship is not sufficient to create a duty to speak with care. *See* note 196 and accompanying text *supra*. At least one other court has summarily dismissed an action for negligent misrepresentation on the grounds that the relationship between a premium finance agency and an insurance company is not sufficient to impose a duty to speak with care. *Travelers Ins. Co. v. Robinson*, 79 App. Div. 2d 1022, 1022, 435 N.Y.S.2d 54, 55 (2d Dep't 1981) (relying on the appellate division's opinion in *Home Mutual*).

²⁰² The distinction between a duty to speak and a duty to speak with care appears, at first, to be one of semantics. Speech used in the context of a representation, however, is considered an "act in the law." *Glanzer v. Shepard*, 233 N.Y. at 241, 135 N.E. at 276-77 (citation omitted). Therefore, when the defendant owes the plaintiff a contractual duty to speak, an action can be brought for negligent performance of the contractual duty. *See Tropwood A.G. v. Hempel's Marine Paints, Inc.*, 435 F. Supp. 1120, 1126-27 (S.D.N.Y. 1977); *Rozner v. Resolute Paper Prods. Corp.*, 37 App. Div. 2d 396, 398, 326 N.Y.S.2d 44, 46 (3d Dep't 1971). In *Rozner*, the court stated that "[a] contract may create a duty, not otherwise existing, from which negligence may arise, but the negligence arises not because of a breach in the contract but because of a failure to perform the contractual duty with care." 37 App. Div. 2d at 398, 326 N.Y.S.2d at 46. In addition to an action for negligent performance of a contractual duty, the plaintiff could bring an action for negligent misrepresenta-

speaking with care, however, alone is sufficient to uphold an action in negligent misrepresentation.²⁰³ A duty to speak carefully arises from the relationship between the parties and not from a prior obligation to act.²⁰⁴ While the defendant in *Home Mutual* was not required to cancel the policy, the banking law should allow the plaintiff insurance company to rely upon the bank's notice of can-

tion and infer the negligence from the misrepresentation itself, escaping the burden of proving specific acts of negligence. See *International Prods. Co. v. Erie R.R.*, 244 N.Y. at 337, 155 N.E. at 664; Green, *supra* note 175, at 35. A duty to speak with care, however, can be found when there is no duty to speak. For example, it can be imposed by law, see note 205 *infra*, or arise from the relationship between the parties, see notes 203 & 204 *infra*, even though the person is speaking voluntarily. Additionally, contrary to the *Home Mutual* decision, it is not fatal to finding a duty to speak carefully that the one who speaks does so for his own benefit. Cases which have required that the person speak for the benefit of another in order to impose a duty to speak with care were not concerned with a pecuniary benefit, but rather that the information be given for the purpose of guiding the conduct of another. See, e.g., *Glanzer v. Shepard*, 233 N.Y. at 241, 135 N.E. at 275.

Judge Cardozo recognized the difficulty in distinguishing between a duty to speak in the first instance and the duty to speak with care, stating that "[t]he line of separation between these diverse liabilities is difficult to draw." *Glanzer v. Shepard*, 233 N.Y. at 241, 135 N.E. at 276. Nonetheless, he felt that the realities of the circumstances would bear out the distinction. *Id.*

²⁰³ *Ultramares Corp. v. Touche*, 255 N.Y. at 184, 174 N.E. at 446. In *International Prods. Co. v. Erie R.R.*, 244 N.Y. 331, 155 N.E. 662 (1927), for example, the Court allowed the plaintiff to recover solely on the basis of negligent words. *Id.* at 338-39, 155 N.E. at 664. Although the defendant in *International Products* had not yet become the bailee of the plaintiff's property, or even entered into a definite contract with the plaintiff, *id.* at 334-35, 155 N.E. at 662-63, the Court held that the plaintiff owed the defendant a duty to speak with care if it spoke at all, *id.* at 338-39, 155 N.E. at 664. Rather than straining the facts to find a contractual duty to act, the Court based the duty to speak with care upon the general relationship between the parties. *Id.* at 338-39, 155 N.E. at 664; see note 178 *supra*.

²⁰⁴ The crux of an action for negligent misrepresentation is that the defendant carelessly distributed information to those who could reasonably be expected to rely upon such information to their detriment. See *White v. Guarente*, 43 N.Y.2d 356, 362-63, 372 N.E.2d 315, 319, 401 N.Y.S.2d 474, 478 (1977); RESTATEMENT (SECOND) OF TORTS § 552 (1976). Therefore, rather than focusing upon the duty to act, courts have looked to the relationship of the parties to ascertain whether it is sufficient to create a duty to speak with care. See note 178 and accompanying text *supra*. In *Doyle v. Chatham & Phenix Nat'l Bank*, 253 N.Y. 369, 171 N.E. 574 (1930), for example, the Court upheld liability despite the lack of a duty to act. *Id.* at 380, 171 N.E. at 578. In *Doyle*, the plaintiff purchased worthless bonds in reliance upon the defendant's certification, which was both false and unauthorized. *Id.* at 371-75, 171 N.E. at 575-77. Noting that the defendant owed no duty to the plaintiff to act, *id.* at 374, 171 N.E. at 577, the Court upheld the plaintiff's recovery reasoning that "the defendant knew that the certificates were desired for a serious purpose by persons who intended to rely and act thereupon," *id.* at 379, 171 N.E. at 578. An even clearer example of this would be *International Products*, wherein the Court upheld the action solely on the relationship between the parties, expressly rejecting the possibility of setting any specific requirement that the defendant must first have a duty to act. *International Prods. Co. v. Erie R.R.*, 244 N.Y. at 338, 155 N.E. at 664.

cellation, thus giving rise to a duty to speak with care.²⁰⁵

Similarly, *Home Mutual's* holding, that one who acts voluntarily is only subject to a duty to act with care if acting for the benefit of another, appears to be contrary to the letter and logic of established precedent. Generally, one who acts voluntarily may be subject to a duty to act with care, *even* if acting gratuitously.²⁰⁶ This suggests that one who is acting voluntarily for his own benefit would clearly be subject to a duty of care, and concomitantly, that one who is acting for the benefit of another would be subject to a similar duty.²⁰⁷ The equitable arguments against finding a duty are

²⁰⁵ See N.Y. BANKING LAW § 576(1)(d) (McKinney 1971). Under section 576(1)(d) of the Banking Law the defendant bank had a duty to provide accurate information to the insurance company if it chose to cancel the policy. This section reads in part:

A copy of such cancellation notice shall be sent to the insurer or insurers prior to the effective date of cancellation containing a statement that it is a true copy of the notice of cancellation served upon the insured or insureds, whereupon the insurance contract shall be cancelled with the same force and effect as if the aforesaid notice of cancellation had been submitted by the insured himself.

Id. It is suggested that this alone was sufficient to impose the duty to speak with care on the defendant in *Home Mutual*. In discussing the requirements for finding a duty in an action for negligent misrepresentation, courts have always held that this duty must exist by contract, law, or otherwise. See note 178 *supra*.

²⁰⁶ See *Glanzer v. Shepard*, 233 N.Y. at 239, 135 N.E. at 276, wherein Judge Cardozo stated the general principle that "[i]t is an ancient learning that one who assumes to act, *even though* gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." *Id.* (citations omitted) (emphasis added).

²⁰⁷ The courts have apparently had little difficulty in upholding a negligent misrepresentation cause of action when the person was acting for his own benefit. In *Shea v. Teachers' Retirement Sys.*, 51 App. Div. 2d 345, 381 N.Y.S.2d 266 (1st Dep't), *dismissed on other grounds*, 40 N.Y.2d 836, 356 N.E.2d 290, 387 N.Y.S.2d 837 (1976), for example, the court upheld the action upon the basis that once the defendant chose to act it assumed a duty of care. 51 App. Div. 2d at 348, 381 N.Y.S.2d at 269. In *Shea*, the defendant Teachers' Retirement System provided information to the plaintiff's decedent regarding options under a retirement plan. *Id.* at 347, 381 N.Y.S.2d at 268. Those options which were most beneficial to the retiree, and least beneficial to the retirement system, were sufficiently obscured to make the retiree reject her most desirable option. *Id.* at 348, 381 N.Y.S.2d at 269. In permitting recovery, the *Shea* court only looked to the voluntary act and the reliance which could be placed upon it. *Id.* While few courts have stated expressly the seemingly self-evident principle in terms of one acting in his own interests, it is implicit in many of the cases. See, e.g., *Gediman v. Anheuser Busch, Inc.*, 299 F.2d 537, 546 (2d Cir. 1962). Furthermore, it is submitted that when a person is acting purely for his own benefit it stands to reason that just as he gains the benefit of his acts, he should be required to bear the burdens of his unreasonable and damaging acts. See N.Y. EDUC. LAW § 6527(2) (McKinney 1972). For example, under the "good samaritan" law, a doctor rendering assistance is held to a higher degree of care if he is acting for his own benefit. When administering emergency care outside a hospital or office, a doctor will only be subject to liability if the defendant can prove gross negligence. *Id.* Should the doctor exhibit an expectation of compensation, however, he will be subject to liability for ordinary negligence. *Id.*

stronger when the person is acting as a "good samaritan" than when he is acting for his own gain and thus it would seem easier to impose a duty in the latter case.²⁰⁸ Under the *Home Mutual* decision, however, such a duty would be imposed *only* upon the good samaritan.

The *Home Mutual* Court appears to impose a new element in the cause of action for negligent misrepresentation, namely, that a duty to speak carefully depends upon the presence of a contractual or legal obligation to make such a representation. In addition to contradicting established precedent, this misinterpretation effectively moots the negligent misrepresentation cause of action since the plaintiff who can show the existence of a duty to act can, of course, maintain an action for negligent performance of that duty.²⁰⁹ Thus, while it is uncertain whether the Court will apply its overbroad reasoning beyond the specific relationship of a premium finance agency and an insurance company, it is hoped that the courts will view the *Home Mutual* decision as a sign of the Court's commitment to promoting premium finance agencies and not as precedent on the elements of negligent misrepresentation.

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²⁰⁸ See generally W. PROSSER, *supra* note 176, § 56, at 343-48. Dean Prosser noted the inequities of holding one who acts gratuitously to a duty of care stating, "[t]he result of all this is that the good Samaritan who tries to help may find himself mulcted in damages, while the priest and the Levite who pass by on the other side go on their cheerful way rejoicing." *Id.* at 344. While this may appear inequitable, Dean Prosser further notes that the person is only required to act reasonably under the circumstances. *Id.* at 348.

²⁰⁹ Whenever there is a contractual or legal duty to act, the plaintiff can bring an action for the negligent performance of that duty. See note 202 *supra*. In such cases the plaintiff need not resort to an action for negligent misrepresentation, although it may present an easier burden of proof. *Id.*