Civil Liability for Aiding and Abetting

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Civil liability for aiding and abetting provides a cause of action that has been asserted with increasing frequency in cases of commercial fraud, state securities actions, hostile takeovers, and, most recently, in cases of businesses alleged to be supportive of terrorist activities. The U.S. Supreme Court, in its 1994 decision in Central Bank of Denver, N.A. v. First Interstate Bank of Denver, *ended decades of aiding and abetting liability in connection with federal securities actions. However, the doctrine since has flourished in suits arising from prominent commercial fraud cases, such as those concerning Enron Corporation and Parmalat, and even in federal securities cases some courts continue to impose relatively broad liability upon secondary actors. This article reviews* Central Bank *and its limitations, before turning to an analysis of the elements of civil liability for aiding and abetting fraud. The article then similarly identifies and analyzes the elements of liability for aiding and abetting breach of fiduciary duty, which predominantly concerns professionals, such as accountants and attorneys, that are alleged to have assisted wrongdoing by their principal. The analysis then examines aiding and abetting liability in the context of particular, frequently-occurring, factual matrices, including banking transactions, directors and officers, state*

securities actions, and terrorism. The article concludes by summarizing emerging principles evident from judicial decisions applying this very flexible and potent source of civil liability

I. INTRODUCTION

Allegations of corporate fraud and misdealing pervade the commercial marketplace. In a sequence that has become familiar, exposure of the primary fraud perpetrator leads swiftly to bankruptcy for a company later revealed to have been technically insolvent for months or years prior to the disclosure. When the debacle is reported, the bankrupt's former auditor, investment bank and outside counsel know litigation soon may be at their door, even though they were not the primary actors in the alleged fraud. The principal concern? *Secondary liability*—increasingly based on the theory that the secondary actor aided and abetted fraud or other misconduct by the primary actor.

Liability for aiding and abetting is a doctrine with ancient roots that has sprouted new and significant offshoots during the last twenty years. During the 1980s the doctrine increasingly ensnared auditors and other professionals alleged to have facilitated misconduct by their clients. Significant relief for many securities industry participants came in 1994 when the U.S. Supreme Court, in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, held there is no cause of action for aiding and abetting violations of the Securities Exchange Act.[1] But while one important basis for liability was cut off, claims of aiding and abetting, in areas such as breach of fiduciary duty, commercial fraud, and state law securities liability, steadily have increased. And terrorism, with its myriad facilitators and statutes providing compensation for victims, is a development that very soon may transform aiding and abetting law.

This article examines the current state of the law of civil liability for aiding and abetting, prefaced by a discussion of the doctrine's origin in criminal law. Because of the still rippling effect of *Central Bank*, that 1994 opinion is analyzed, and the scope of its effect discussed. The hub of the article

is an explanation of the legal elements of the civil causes of action for aiding and abetting fraud and breach of fiduciary duty, respectively. Whether there are four elements required for the tort, or potentially five or six, depends on the judicial forum, as will be shown. The article then shifts perspective and concludes with a discussion how the outcome may depend on the factual matrix and role of the defendant. We find that attorneys may have less to fear than corporate officers, for example, and, as the law develops, we see that terrorists' associates may be subject to far-reaching liability.

Aiding-abetting law has adapted to emerging business torts and new variations of commercial misconduct though if it is part of a legal trend there is no unifying theme—other than adaptability itself. This article posits no such theme, but synthesizes common elements where they exist and identifies the doctrine's many variations.

II. HISTORICAL ANTECEDENTS

Civil liability for aiding-abetting pre-existed such well-established doctrines as joint and several liability and product liability, as well as the modern concept of a duty of professional loyalty (which is now a frequent context for aiding-abetting claims). The antiquity of aiding-abetting liability has interested the courts in various important decisions, on occasion subtly deployed in support of broadened liability,[2] while on other occasions leading to the conclusion that against the historical background a statute that fails to specify aiding-abetting liability cannot be deemed implicitly to provide for it.[3] Consequently, the doctrine's origins remain relevant even now.

A. ORIGIN IN CRIMINAL LAW

Criminal liability for aiding and abetting was codified in the sixth century by the Roman emperor Justinian,[4] and in Anglo-American law has its origin in the ancient doctrine concerning accessories to crime.[5] At common law, the inquiry concerning the liability of accessories to crime was plagued by "intricate" distinctions.[6] Persons might be charged with a felony as: (i) principals in the first degree

who actually perpetrated the offense; (ii) principals in the second degree who were actually or constructively present at the scene of the crime and aided and abetted its commission; (iii) accessories before the fact who aided and abetted the crime, although not present when it was committed, or; (iv) accessories after the fact who rendered assistance after the crime was complete.[7]

Though there is no federal common law of crimes, Congress in 1909 enacted what is now 18 U.S.C. § 2, a general aiding and abetting statute applicable to all federal criminal offenses.[8] Under the statute, all those who knowingly provide aid to persons committing federal crimes, with the intent of facilitating the crime, are themselves committing a crime.[9]

In the civil liability context, secondary liability arising from concert of action, though probably incorporating some element of conspiracy between the primary and secondary actor, can be traced back at least 400 years.[10] In the United States, liability for lending encouragement or aid to a tortfeasor is reported in cases appearing at least from the mid-nineteenth century.[11] Many of the early reported cases of civil liability purely for aiding and abetting (that is, without any element of conspiracy) are said to have concerned "isolated acts of adolescents in rural society."[12]

B. DISTINGUISHED FROM CONSPIRACY

Aiding-abetting and conspiracy have been regarded as "closely allied forms of liability."[13] However, a conspiracy generally requires an *agreement* as well as an overt act causing damage.[14] Aiding and abetting does not require any agreement, but rather *assistance* given to the principal wrongdoer.[15]

Nevertheless, common to both conspiracy and aiding-abetting is "concerted wrongful action."[16] Because of this commonality, it has (erroneously) been said that evidence that would permit a reasonable finder of fact to conclude that defendants conspired to breach a duty necessarily must support a determination that defendants aided and abetted

it by knowingly and substantially participating in a breach of such duty.[17] However, an agreement with another to perpetrate wrongdoing is not the same thing as actively facilitating the act, and thus proof of mere agreement does not give rise to traditional aiding-abetting liability.[18]

Unlike a conspirator, an aider and abettor does not "'adopt as his or her own'" the tort of the primary violator.[19] Instead, the act of aiding and abetting "is distinct from the primary violation; liability attaches because the aider and abettor behaves in a manner that enables the primary violator to commit the underlying tort."[20] The D.C. Circuit Court of Appeals has distinguished conspiracy from aiding and abetting by observing that a conspiracy consists of "concerted action by agreement" while aiding and abetting is "concerted action by substantial assistance."[21] To illustrate: When in baseball a pitcher strikes out a hitter the putout is the product of a prearranged conspiracy between the pitcher and the pitcher's manager; by contrast, when fans heckle to distract the batter they do so absent any bilateral agreement and thus are aiding and abetting the pitcher, not conspiring with him.

Aiding and abetting is, in some instances, easier to establish than conspiracy. For example, while California law holds that one may not be subject to liability for conspiracy unless one owed a preexisting duty to the plaintiff, no such requirement exists with respect to aiding and abetting liability.[22]

C. NATIONWIDE ACCEPTANCE OF CIVIL LIABILITY FOR AIDING AND ABETTING

Of the jurisdictions that have addressed the doctrine of civil liability for aiding and abetting as set forth in the RESTATEMENT (SECOND) OF TORTS section 876(b), thirty permit a claim for aiding and abetting in some context.[23] The *Central Bank* Court observed that courts in Georgia, Maine, Montana and Virginia had declined to recognize a cause of action for aiding and abetting fraud.[24] Commentators have perceived a trend toward increased recognition,[25] which probably is either (i) the inexorable

progression (or expansion) of tort liability, (ii) the result of an increased perception that fraud actors often rely on accessories to perpetrate large-scale, complicated schemes, or (iii) both.

III. THE CENTRAL BANK DECISION: NO AIDING AND ABETTING CAUSE OF ACTION UNDER THE SECURITIES EXCHANGE ACT

The current state and likely future development of the body of law of aiding and abetting cannot properly be understood without an analysis of the 1994 decision that performed a dramatic amputation: *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*[26] There, the Supreme Court held that Section 10(b) of the Securities Exchange Act does not create or support a private cause of action for aiding and abetting securities fraud.[27] The reasoning of the decision has since been held applicable to other federal statutes, such as RICO, though it has been less persuasive in connection with state law remedies, including state "Blue Sky" laws.[28] While the *Central Bank* decision provoked some controversy when it was decided, it generated considerably more seven years later when it came to light that secondary actors, such as Arthur Anderson, LLP, had played critical roles in facilitating multi-billion dollar securities frauds.

A. PRE-CENTRAL BANK FEDERAL SECURITIES LAW JURISPRUDENCE

One of the most important elements of Rule 10b-5 pursuant to the Securities Exchange Act is its statement of the proscribed conduct. Rule 10b-5 sets forth separately articulated proscriptions for fraud, deceit, misleading statements and fraudulent "devices," "schemes" and "artifices."[29] Each subsection of the Rule prohibits slightly different conduct in connection with the purchase or sale of a security. The second subsection prohibits the *making* of a material misstatement or omission.[30] The first and third subsections prohibit a person from *employing* a fraudulent device and *engaging* in conduct that "operates or would operate as a fraud."[31]

Prior to *Central Bank*, a significant number of federal courts in nearly every circuit had held that an aider-abettor was subject to civil liability under section 10(b) of the Securities Exchange Act and Rule 10b-5.[32] Such liability was described as having been grounded in tort law, and as a "logical and natural complement" to the private right of action under section 10(b), furthering the "maintenance of a post-issuance securities market that is free from fraudulent practices."[33] Consequently, entities such as financial advisors to corporations,[34] auditors of a brokerage firm,[35] accounting firms providing tax opinions on which investors relied,[36] corporate insiders interested in the sale of securities of a parent company,[37] and corporations themselves[38] had been held subject to potential liability for aiding and abetting federal securities fraud. Perhaps because of the agreement among federal circuits as to aiding and abetting liability for securities fraud, the issue did not reach the Supreme Court until nearly sixty years after enactment of section 10(b) of the Securities Exchange Act.

B. REASONING OF CENTRAL BANK OPINION

Section 10(b) of the Securities Exchange Act of 1934 provides: "It shall be unlawful for any person directly or indirectly . . . (b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest to the protection of investors."[39] Aiding and abetting was not, however, expressly made unlawful in the 1934 Act.

In *Central Bank*, the majority opinion observed that Congress had not enacted a general civil aiding and abetting statute, "either for suits by the Government (when the Government sues for civil penalties or injunctive relief) or for suits by private parties." The Court held that when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, one cannot presume Congress intended to create a cause of action for aiders and abettors.[40] And while Congress had amended the

securities laws more than once during a period when courts were interpreting section 10(b) to cover aiding and abetting, the Court regarded this alleged "acquiescence" as "inconclusive evidence" of what Congress intended.[41]

The Court, did, however, speculate as to policy reasons why Congress may *not* have wished to allow for aiding and abetting liability:

> [T]he rules for determining aiding and abetting liability are unclear, in "an area that demands certainty and predictability." [citation omitted]. That leads to the undesirable result of decisions "made on an ad hoc basis, offering little predictive value" to those who provide services to participants in the securities business . . . . Because of the uncertainty of the governing rules, entities subject to secondary liability as aiders and abettors may find it prudent and necessary, as a business judgment, to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial.[42]

Accordingly, "newer and smaller companies may find it difficult to obtain advice from professionals . . . ." Further, "the increased costs incurred by professionals because of the litigation and settlement costs under 10b-5," the Court commented, might be "passed on to their client companies, and in turn incurred by the company's investors, who were the intended beneficiaries of the statute."[43] Further, Congress had declined to enact a general statute to authorize public or private civil suits against aiders and abettors.[44]

Therefore, in a decision often regarded as unfortunate in public policy terms because of the apparent upsurge in large-scale commercial misconduct subsequently associated with it—though its interpretation of the Securities Exchange Act remains largely unscathed[45]—the Court held there is no cause of action under section 10(b) for aiding and abetting securities fraud.[46]

C. POST-CENTRAL BANK SECURITIES FRAUD LIABILITY

Significantly, the *Central Bank* Court explained that the absence of aiding-abetting liability under Section 10(b) did not mean secondary actors were insulated from liability under the securities laws. Any individual or company who employs a manipulative device or makes a material misstatement on which a purchaser or seller of securities relies may be liable as a primary violator under Rule 10b-5.[47] In *Newby v. Enron Corp. (In re Enron Corp. Securities, Derivative & ERISA Litigation)*,[48] the U.S. District Court for the Southern District of Texas held that corporate advisors can be deemed "participants" in a fraud if they created transactions with the knowledge that those transactions might mislead investors.[49]

Seeking recourse against companies that often are the only solvent entities among those responsible for their losses, plaintiffs increasingly have alleged "primary liability" for conduct which, some have contended, the judicial system previously considered a secondary (that is, aiding and abetting) violation.[50] It has been said in this regard:

> Arguably, many of the recent "scheme" cases are attempts to revive aiding and abetting under a different name. Under the scheme theory, a person who substantially participates in a manipulative or deceptive scheme can incur primary liability, even if the fraudulent statements linking the scheme to the securities markets are made by others. But this sounds like a reformulation of the "substantial assistance" element of an aiding and abetting claim.[51]

It has, however, been observed that during the thirty years in which aiding-abetting liability was recognized, courts generally failed to establish clear distinctions between conduct giving rise to aiding-abetting liability and conduct giving rise to primary liability.[52]

In the decade following *Central Bank*, plaintiffs alleging inadequate disclosure by a securities issuer not uncommonly have included claims that third party professionals knowingly or recklessly assisted or participated in the preparation of an issuer's alleged misrepresentations or omissions. Such conduct, plaintiffs maintain, is sufficient for a violation of Rule 10b-5 even after *Central Bank*, because the violator was a primary offender (even if others were more directly responsible).[53]

The controversy concerns a distinction between claims that professionals "knowingly provided 'substantial assistance' to the issuer in preparing allegedly misleading communications to investors (which constitutes aiding and abetting) and claims that professionals knowingly 'participated' in the making of those communications (which plaintiffs have claimed to be sufficient for an independent violation)."[54] Certainly, primary responsibility for a violation of Rule 10b-5 contemplates more than simple assistance in the dissemination of misstatements and omissions.[55] For example, an outside accountant probably only aids and abets a violation of Rule 10b-5 if the accountant merely physically compiles and delivers placement memoranda to a brokerage firm, even if this is done after an officer of the issuer tells the accountant the memoranda contains material misstatements.

The Second, Third, and Eleventh Circuits apply a relatively strict "attribution" test that requires the "making" of a statement. These courts have held that a secondary actor cannot incur liability under Rule 10b-5 for a statement not attributed to that actor at the time of its dissemination. Mere "review and approval" is not sufficient.[56] The Second Circuit has explained that because "'[r]eliance only on representations made by others cannot itself form the basis of liability' " for securities fraud, "a secondary actor cannot incur primary liability under the Act for a statement not attributed to that actor at the time of its dissemination."[57] The Third Circuit, moreover, has held that a securities fraud plaintiff must allege "a more exacting threshold of scienter —'a mental state embracing intent to deceive, manipulate or defraud . . .'"[58] Failing that, the plaintiff must alternatively

show "'highly unreasonable (conduct) involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care' . . . which presents a danger of misleading buyers and sellers that is either known to the defendant or is so obvious that the actor must have been aware of it."[59]

The Ninth Circuit has followed a less rigorous standard—the "substantial participation test"—under which actors may be primarily liable under section 10(b) for statements attributable to others if the actor "significantly participated" in generation of the statement.[60] In *In re Software Toolworks, Inc. Securities Litigation*, it was alleged, sufficiently to state a claim, that the accountants and underwriters knowingly had "assisted" in defrauding investors in violation of section 10(b) and Rule 10b-5 by issuing a misleading securities prospectus.[61] Notably, in *Newby v. Enron Corp.*, the district court relied substantially on a liability standard urged by the SEC.[62] There, the SEC stated that primary Section 10(b) liability can attach to secondary actors if they created fraudulent documents, irrespective of whether misrepresentations to the public were publicly attributable to the secondary actor. The district court applied this test and denied motions to dismiss brought by Arthur Andersen, the Vinson & Elkins law firm, and others.[63] The "substantial participation" test arguably bears a resemblance to traditional aiding and abetting liability though it requires participation in the actual offense, whereas aiding and abetting liability does not.

After Global Crossing, Worldcom and Enron followed one another in alarming fashion (having been foreshadowed by less celebrated but hardly less fraudulent schemes involving Sunbeam Corporation, Bennett Funding, Inc., and others), some predicted Congress soon would act to "restore" aider-abettor liability to section 10(b).[64] Congress has not done so, however, notwithstanding the arguably indispensable role played by bond underwriters, accountants and law firms in the perpetuation of certain securities frauds. Imposition of liability on those actors for securities fraud is left, therefore, to state securities acts, and common law principles of aiding

and abetting, the requisites of which are discussed below, both in the context of securities violations and other misconduct.

IV. SUBSTANTIVE ELEMENTS OF CIVIL LIABILITY FOR AIDING AND ABETTING

Aiding and abetting liability concerns, to a significant extent, a particular state of mind. The plaintiff must show whether the defendant intended to facilitate wrongdoing. However, the analysis may, in a departure from general tort principles, consider not merely intent, but motive. Did the alleged aider-abettor have a noteworthy, perhaps undue, pecuniary interest in the consummation of the fraud or misdealing?

More broadly, the judicial decisions explore what the defendant knew *regarding the misconduct*, for none would argue that one who has unwittingly held the door for the bank robber intended to aid and abet through such assistance. And assistance (when knowledge of the misconduct is shown) also receives a careful inquiry, which differs from the usual tort analysis in that such "assistance" need not proximately cause any injury, in the traditional sense; rather, it must meet standards unique to aiding and abetting liability principles, as discussed below.

A. AIDING AND ABETTING FRAUD

Under the law of most states, a party may be regarded as an "aider and abettor of fraud if the following requirements are satisfied:[65]

- (1) the existence of an *underlying fraud*;
- (2) *knowledge* of this fraud on the part of the aider and abettor, and;
- (3) *substantial assistance* by the aider and abettor in perpetration of the fraud.[66]

It also has been held that one may be subject to aiding-abetting liability if one “gives substantial assistance to the other in accomplishing a tortious result and the person’s own conduct, separately considered, constitutes a breach of duty to the third person.”[67]

An aider and abettor of a fraud is regarded as equally responsible, in terms of civil liability, with the perpetrators of the scheme. However, because aiders and abettors, unlike conspirators, do not agree to commit, and are not subject to liability as joint tortfeasors for committing, the underlying tort, they may be subject to liability irrespective of whether they owed to the plaintiff the same duty as the primary violator.[68]

1. EXISTENCE OF UNDERLYING FRAUD

The plaintiff must allege and prove that it has been defrauded or otherwise victimized by tortious conduct by one other than the aiding-abetting defendant. If the claim is for aiding and abetting fraud, then the elements of fraud must be alleged with the requisite specificity,[69] though the other elements of aiding and abetting ordinarily are subject to a liberal notice pleading standard, pursuant to Rule 8(a) of the Federal Rules of Civil Procedure.[70]

Because the primary actor may not be party to the case, establishing the primary wrong may be a particular challenge.[71] The plaintiff may need independently to build the case against the perpetrator for fraud while at the same time establishing its liability claim against the defendant. The plaintiff ’s task is of course simplified where the defendant, as sometimes it must, is compelled to admit the underlying misconduct was fraudulent.[72]

2. AIDER-ABETTOR’S KNOWLEDGE OF THE FRAUD

In order adequately to plead “knowledge” (or scienter) in an aiding and abetting fraud claim, it has been held the plaintiff must allege sufficient facts to support a “strong inference of fraudulent intent.”[73] Plaintiffs may support such an

inference (i) by alleging facts showing a motive for participating in a fraudulent scheme and a clear opportunity to do so, or (ii) by identifying circumstances indicative of conscious behavior.[74]

In one case, for example, a bankrupt company alleged that an ex-director of another company (Bioshield) had aided and abetted the acts of a current officer (Moses) in subverting a planned merger.[75] Moses and the ex-director, Elfersy, originally were officers of Bioshield, the prospective partner to the merger. Moses allegedly had fraudulently represented to plaintiff that Bioshield's board (including Elfersy) had approved the merger.[76] Prior to the consummation of the merger, however, Elfersy quit Bioshield, and ultimately voted his shares against the merger. Plaintiff sued Elfersy individually for having aided and abetted alleged fraud by Bioshield in the merger negotiations.

However, the only evidence cited by plaintiff in its opposition to the defendant's motion for summary judgment was the fact that Elfersy had continued to do some work for Bioshield after his resignations from the Board of Directors and as an officer. (Elfersy had continued to advise Bioshield concerning patent, technological and scientific matters). The court concluded that no reasonable juror could draw from that fact an inference that Elfersy was *aware* of Moses's alleged misstatements concerning the prospects of the merger, or that Elfersy and Moses even discussed the proposed merger. Furthermore, though Elfersy may have had his own economic interests in mind that was not alone sufficient to satisfy the *scienter* requirement.[77]

More expansive holdings, however, abound. Courts have found direct proof of *scienter*, or facts sufficient to permit the requisite inference, to have been evidenced by (a) knowledge of wrongdoing, (b) motive on the part of the alleged aiderabettor, or, occasionally, by (c) reckless disregard by the aider-abettor of information that it was facilitating wrongful acts, as discussed more fully below.

(a) Knowledge of Wrongdoing

Commentators have stated that the knowledge of wrongdoing requirement means the aider-abettor must do more than merely provide assistance: he or she must have known the nature of the act being assisted. "The defendant's knowledge that he is providing assistance or encouragement to another's action by no means establishes the defendant must also possess knowledge that the other's act is *wrongful* (the 'factual knowledge' requirement)."[78] Thus, for example, one who happened to promote a fraudulent investment scheme without knowledge the scheme is fraudulent, hoping to secure commissions, ordinarily is not subject to liability. The Fifth Circuit has stated that "[a] remote party must not only be aware of his role, but he should also know when and to what degree he is furthering the fraud."[79]

Knowledge of the fraud must be pled by stating *how* the defendant knew of the wrongdoing. It has been held that a complaint must contain factual allegations either stating directly or implying that those dealing with the tortfeasor knew or should have known the tortfeasor was breaching a duty to the victim.[80] Allegations that defendants "have aided and abetted and are aiding and abetting" the defendants, accompanied only be a broad characterization of the transaction as a "plan or scheme," have been deemed insufficient.[81] Rather, courts look for defendant's usage of "atypical" business procedures, as well as prolonged involvement with the fraud actor, and motive.

In bank fraud cases, defendant's use of *atypical banking procedures* is a judicially recognized basis for an inference of "knowledge" the bank is aiding another's misconduct. In a leading case, *Neilson v. Union Bank of California, N.A.*,[82] the complaint adequately pled knowledge by alleging the banks utilized atypical banking procedures to service the perpetrator's accounts, raising an inference they knew of the Ponzi scheme and sought to accommodate it by altering their normal ways of doing business. "This supports the general allegations of knowledge."[83] The court rejected the bank's argument that the complaint did not allege that the bank knew particular victims were being defrauded, given that the complaint alleged the banks must be deemed to

have known that the perpetrator was defrauding *all* his clients.[84] This conclusion is consistent with the Second Circuit's view, that "[p]roof of a defendant's knowledge or intent will often be inferential."[85]

For insight into the "knowledge" prong, the facts in *Aetna Casualty & Surety Co. v. Leahey Construction Co.*[86] are instructive. There, Keybank was found liable for aiding and abetting its borrower's defrauding of a surety, Aetna. The borrower had fraudulently induced Aetna to act as its surety by obtaining a four-day loan from Keybank in order to mislead Aetna into believing that the capitalization requirements for issuance of Aetna's bond had been met. The court found that the requisite knowledge on the part of the bank was shown by the following circumstances:

- 1. The bank had known the principal for five years and on several occasions had assisted the principal in obtaining loans for bonding purposes;
- 2. The bank understood that the principal's entrance into commercial construction would "require[ ] special bonding" and that as a result the principal had been "putting funds into the business";
- 3. The bank's own documents revealed that prior to issuance of the subject loan it was informed by the principal that the purpose of the loan was "to obtain approval from a new bonding company";
- 4. A bank memo revealed that even though the loan was classified as a thirty-day agreement, the principal intended to repay it just two days after the month-end that the surety was examining for credit purposes.[87]

Notably, the four-day loan in *Leahy* was an unusual transaction and thus easily gave rise to an inference the bank knew what was going on. Courts have held that: "A party who engages in atypical business transactions . . . may be found liable as an aider and abettor with a minimal showing of knowledge."[88]

A contrasting result is found in *Ryan v. Hunton & Williams*,[89] where plaintiffs failed adequately to plead "actual knowledge" by Chase Manhattan Bank of its depositor's

Ponzi scheme notwithstanding allegations that (1) Chase suspected the perpetrator was running an "advance fee scheme"; (2) Chase knew the perpetrator had defrauded it on another matter, and; (3) Chase had shut down the account of a cohort of the perpetrator because of a bounced check. "Allegations that [Chase] suspected fraudulent activity," the court held, "do not raise an inference of actual knowledge" of the fraud.[90] Similarly, knowledge on one's part of past misconduct by the fraud actor, without more, ordinarily will not give rise to liability for rendering assistance.[91]

Substantial familiarity over an extended period with the course of conduct relating to the scheme at issue also may support a reasonable inference of "knowledge." In *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*,[92] the alleged aider-abettor's son directed the fraudulent scheme, but it was the father's "experience and active participation in the . . . dealership, combined with the extent of the fraud," that presented a sufficient basis for imposition of aiding-abetting liability.[93] The evidence of the father's control over the dealership, included his having (1) spent significant time there, (2) reviewed the financial statements, and (3) discussed the dealership's operations on a daily basis with his son, "the architect" of the fraudulent scheme "combined with evidence of the pervasive nature of the fraudulent scheme."[94] These facts allowed the jury to find the father liable for aiding and abetting the predicate acts of mail fraud.

In *Leahey*, the court observed that there is "no conflict between the position that an aider and abettor must have actual knowledge of the primary party's wrongdoing and the statement that it is enough for the aider and abettor to have a general awareness of its role in the other's tortious conduct for liability to attach."[95] However, allegations that a bank (which had financed a fraud actor) merely "suspected" fraudulent activity would not satisfy the actual knowledge requirement.[96] And "actual knowledge" is not established by the mere allegation of the aider-abettor's knowledge that an audit was not conducted properly.[97]

(b) Relevance of Motive

An inference supporting requisite *scienter* (knowledge of the fraud) on the aider-abettor's part may be established by facts showing a *motive* for participating in the fraudulent scheme and the clear opportunity to do so.[98] Thus, in criminal law, for example, knowledge of wrongdoing may be inferred on the part of one who lends a car to a bank robber if the facts show the individual solicited an inordinate amount of money in exchange for lending the car.[99] Aiding and abetting gross negligence was held actionable, for example, in a case where the defendants were attorneys who had advised an S&L institution that later failed.[100] In that case the court ruled that whereas mere unknowing participation in another's wrongful act does not subject one to liability the requirement of knowledge may be less strict where the alleged aider and abettor derives "benefits" (such as attorney's fees) from the wrongdoing.[101]

California courts have suggested that, in addition to the conventional elements for aiding-abetting, a plaintiff also must allege the defendant participated in the breach for reasons of its own financial gain or advantage.[102] In *Neilson*, however, the court held that statements in prior decisions—to the effect that a true aider-abettor is one "reaping the benefit"—should not be regarded as adding an element to the tort.[103] Rather, the financial gain emphasized in aiding-abetting decisions is *evidence* the aider-abettor knew of and substantially assisted the primary violator's breach of fiduciary duty.[104] A profit motive supports an inference of knowing participation, but is not itself an element of the tort.

(c) "Reckless Disregard" Equating to "Awareness" of Misconduct

A literal "actual knowledge" standard may be overly restrictive given the inherent difficulty of pleading the state of mind of a defendant.[105] So, it occasionally has been held that, unlike a cause of action for conspiracy, the knowledge requirement for aiding and abetting liability may be satisfied by proof that a defendant acted recklessly.[106] Where facts

are known to the defendant from which the conclusion objectively follows that a fraud is being perpetrated (and assisted by defendant), aider-abettor liability may exist even if the defendant lacked "actual knowledge."[107] It is questionable, however, whether reckless disregard satisfies the "knowledge" requirement under New York law, at least outside of cases in which the actor owed the plaintiff a fiduciary duty.[108] Federal cases in New York, home to the financial industry, not infrequently have gravitated toward insulating financial institutions and professionals from charges of having facilitated financial fraud.[109]

"Reckless disregard," in jurisdictions other than New York, has been found where the actor was "deliberately indifferent" to the propagation of the fraud scheme.[110] "Reckless disregard" is not, however, evidenced by "mere suspicion," but rather requires proof the aider-abettor ignored obvious "danger signals."[111] In this regard, it has been held that even if a defendant "should have discovered" the fraud and could have done so by duly exploring financial questions, liability will not attach absent recklessness.[112]

In *Geman v. Securities Exchange Commission*,[113] a brokerage firm began an undisclosed practice of executing trades as principal with its brokerage customers. The firm without notice ceased reporting to its customers trades executed as "principal" and customers later sued on the ground the trades had been concealed from them and disadvantaged them.[114] The Court observed that Geman, the alleged aider-abettor, "clearly was aware of the cessation of reporting under the former system and, with his extensive background and experience, surely knew that an alternative reporting practice [to disclose the trades on which the brokerage acted as purchaser of customers' securities] was necessary (which he does not deny)." Notwithstanding this awareness, Geman "took no steps to ensure that— or inquire whether— [the firm] was making alternative arrangements to satisfy record keeping obligations." Geman's simple "inaction," which the court regarded as "reckless," was sufficient to support the finding that he willfully aided and abetted the firm's record keeping violations.[115]

Similarly, where a bank's cashiers "cashed so many checks for such large amounts without verification" from the owner of a currency exchange, that evidence could support a finding that the cashiers, but not the owner (who had safeguarding procedures in place which his employees disregarded), acted recklessly.[116] Defendants cannot, it is plain, rely on an "ostrich defense," even where plaintiff finds it difficult or impossible to allege facts showing conscious appreciation of a particular wrongdoing against a specific victim.

3. "SUBSTANTIAL ASSISTANCE"

Mere knowledge of the underlying misconduct is insufficient to give rise to aider-abettor liability.[117] The aider-abettor must also knowingly facilitate commission by the principal actor of the primary fraud. Generally speaking, the most common reason for failure on the part of plaintiffs seeking to establish aider-abettor liability for fraud is the absence of sufficient facts to demonstrate that the defendant "substantially assisted" the fraud.

Commentary to the RESTATEMENT (SECOND) OF THE LAW OF TORTS § 876 identifies five relevant factors for evaluating whether encouragement or assistance was "substantial." Traditional factors include: (1) the nature of the act encouraged; (2) the amount and kind of assistance given; (3) the defendant's relation to the tortious actor, and; (4) the defendant's state of mind.[118] In addition to these criteria, some courts have indicated another factor: the "duration of the assistance provided."[119] These factors may establish "affirmative assistance"—the surest basis for liability—or may indicate aiding of fraudulent concealment or "wrongful inaction," which are less certain predicates for liability, as discussed below.

(a) Affirmative Assistance

Some courts have set the standard for "affirmative assistance" relatively high. For example, a federal court in New York has held that even "affirmative actions of opening [bank accounts for the perpetrators], approving various

transfers, and then closing the accounts on the basis of suspected fraud, without more, do not constitute substantial assistance."[120] In *Leahey*, by contrast, the court found that Keybank's making of a questionable loan enabled the fraud principal to "verify" to the surety that he had complied with its first funding request, thereby establishing an indispensable level of credibility the primary actor required to obtain a bond from plaintiff.[121] Thus, for some courts even the mere act of lending money or otherwise transacting business with the fraud actor may give rise to aider-abettor status if the institution knows the loan or other transaction will assist the fraudulent scheme.[122]

Affirmative assistance also has been deemed adequately pled where a weather derivatives trading company knowingly agreed to pay any proceeds obtained under dummy policies in order to conceal from an insurer the existence of reinsurance policies.[123] There, aiding and abetting was adequately alleged with respect to a broker who, apart from being the perpetrator of the scheme, also was a principal owner and chairman of the alleged aider and abettor. Similarly, in *Unicredito*, aider-abettor liability adequately was premised on allegations that financial institutions helped form the various special purpose entities and financing structures that were used to hide Enron's debt.[124] By contrast, relatively few decisions have found affirmative assistance to exist where the affirmative acts of the defendant consist solely of providing financing.[125] Usually, courts require evidence that the alleged aider-abettor wished to bring about the fraud and sought by its actions to make it succeed: "Mere negative acquiescence in the fraud is insufficient."[126]

Recently the Second Circuit decided *Sharp International Corp. v. State Street Bank and Trust Co.*,[127] a case that concerned efforts by a lender to extricate itself from bad loans extended to the alleged fraud actors, former officers of Sharp International. There, the complaint pled five acts by State Street Bank and Trust Company that were alleged to satisfy the standard of either inducement or rendering aid to the breach of duty, which consisted of a scheme to cause

new and unwitting lenders to lend sums to Sharp, thus concealing debt and perpetuating a fraud on Sharp's noteholders.[128]

State Street Bank allegedly had demanded that Sharp, its borrower, obtain new sources of financing to retire the State Street debt. However, the court held that the demand for repayment of a bona fide debt was not, alone, a "corrupt inducement that would create aider and abettor liability."[129] But Sharp's trustee in bankruptcy further alleged the bank had concealed its knowledge of the fraud of Sharp, elected not to foreclose on the loan, and avoided the noteholders' repeated attempts to contact the bank in order to discuss the Sharp credit. Nevertheless, the court held that all of these allegations were merely omissions or failures to act. "Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur."[130]

Sharp's trustee in bankruptcy did allege one affirmative act; namely, that State Street Bank participated in the fraud by providing contractually required consent: the bank gave Sharp its express written consent to the noteholders' purchase of an additional $25 million of subordinated notes. When it gave this consent, it allegedly knew the noteholders were purchasing these notes in reliance on Sharp's fraudulent representations concerning the accuracy of its financial statements. The bank also allegedly knew that absent its consent, the transaction would not be consummated. The court held, however, that the bank's consent was mere "forbearance"; it did no more than remove a contractual impediment the bank had the right to invoke or not in its own interest.[131] In language that manages to be enigmatic yet revealing, the court explained:

> The nub of the complaint is that State Street knew that there would likely be victims of the [Sharp officer's] fraud, and arranged not to be among them. On the one hand, this seems repugnant; on the other hand, [the] discovery that Sharp was rife with fraud was an asset of State Street, and State Street had a fiduciary duty to use that asset to protect its own shareholders [from the

> consequences of its own bad loan], if it legally could. One could say that State Street failed to tell someone that his coat was on fire or one could say that it simply grabbed a seat when it heard the music stop. The moral analysis contributes little.[132]

The allegations amounted to nothing more, the Court concluded, than that State Street Bank was "in a position to blow the whistle on the [Sharp officers'] fraud, but did not; instead, State Street arranged to extricate itself from the risk."[133]

Why the Sharp noteholders' allegations do not describe aiding and abetting of fraud was not fully explained by the court. "Moral analysis" aside, the allegations described some degree of knowing facilitation by State Street of the Sharp officers' fraud, though perhaps in circumstances the court regarded as protected by State Street's obligation to protect its shareholders' interests. It may also have been important to the Second Circuit that there was no allegation of "atypical barking procedures," nor special services, provided in order to assist the fraud.

"Substantial assistance" also may take the form of *inducement.*[134] "Inducement" is "[t]he act or process of enticing or persuading another person to take a certain course of action."[135] Thus, if one persuades the perpetrator to engage in misconduct one may be subject to liability even if that is the only act done in furtherance of the fraud.[136] Few defendants will slip up and reveal evidence of inducement, so inducement cases are rare, though highly effective when they can be supported.

The *duration* of the defendant's involvement with the primary actor may weigh in favor of liability. Where the fraud has involved a course of conduct occurring over an extended period of time or a series of transactions, it may not be necessary to include detailed allegations of the facts of each transaction of the fraudulent scheme.[137] "The length of time an alleged aider-abettor has been involved with a tortfeasor almost certainly affects the quality and extent of their relationships and probably influences the amount of

aid provided as well; additionally, it may afford evidence of the defendant's state of mind."[138] Of course, an extended period of contact without assistance of wrongdoing weighs against liability.[139]

(b) Aiding Concealment

Most successful fraud claims involve active misrepresentations, as opposed to concealment, because many jurisdictions do not recognize fraudulent concealment absent a duty to disclose or other special circumstances.[140] Where, however, a defendant has encouraged another to rely on the defendant (or on the perpetrator), concealment legally may be equivalent to misrepresentation, and in such cases aider and abettor liability may follow, though under a different analysis.

For example, in 2003, in connection with the Enron scandal, a United States district court sitting in New York issued the first decision holding financial institutions potentially culpable with respect to the Enron Ponzi scheme. In *Unicredito*, the court held "substantial assistance" was adequately pled where the plaintiffs alleged that financial institutions knowingly participated in and helped structure the transactions "that enabled Enron to distort its public financial statements, specifically with respect to Enron's revenues and its ratio of balance sheet debt to balance sheet capital."[141] These actions aided Enron's efforts to conceal from its fraud victims debts that should have been reflected on Enron's balance sheet. The Unicredito decision cogently recognizes that some types of structured financing arrangements may play an indispensable role in facilitating corporate fraud.[142]

(c) Enabling Fraud to Proceed by Failing to Speak When Obligated

Mere inaction, even with knowledge of another's wrongdoing, usually is insufficient to give rise to aider-abettor liability. However, an important exception exists when the circumstances gave rise to a duty to warn, advise, counsel, or instruct the plaintiff.

Courts have stated that in certain cases of fraud aiding-abetting status may not depend on whether the party assisted the primary tortfeasor by direct advice or support, but on whether the actor was obligated to disclose or halt another's wrongdoing discovered in the performance of customary business activities. For example, where the defendant breached a governmentally imposed (and public) obligation to disclose information to the Internal Revenue Service, which was alleged to have caused plaintiff to be misled, the defendant was subject to liability as aider and abettor.[143] However, a law firm's failure to disclose its client's insolvency and inability to fulfill future obligations did not create liability for aiding and abetting fraud. Given that the law firm had no duty to disclose the information, its silence was not "substantial assistance" under Massachusetts law.[144]

In most jurisdictions, aider-abettor status based solely on non-disclosure by the defendant probably can be established only when the defendant had a confidential or fiduciary relationship with the victim. "Absent a confidential or fiduciary relationship between the plaintiff and the aider and abettor, the inaction of the latter does not constitute substantial assistance warranting aider and abettor liability."[145] Thus, a lending institution, at least one court has said, ordinarily has no duty to disclose merely based on its status as a lender.[146]

One group of investors alleged, in the context of federal securities law, that a surety for an investment trust owed the investors a duty of disclosure (the breach of which gave rise to aider-abettor status).[147] However, the court declined to hold such a duty existed where (1) the parties had relatively the same access to the information to be disclosed; (2) the financial benefit and risk was roughly equivalent, and (3) the defendant was not aware plaintiff was relying on it to provide the information.[148]

(d) Sliding Scale Approach

In civil aiding-abetting cases, the Second Circuit employs a "sliding scale approach," effectively requiring a higher degree of intent when the level of assistance is slight.[149] "The sliding scale, or in-tandem, analysis has been proposed as a way of dealing with the difficulty of proving the knowledge and substantial assistance elements."[150] Where all that is alleged is "mere inaction," the intent requirement "scales upward," and plaintiffs have the additional burden of showing that the assistance rendered by such inaction is "'both substantial and knowing,' in other words, 'there must be something close to an actual intent to aid in fraud' . . ."[151]

This analysis has been said to require that "the second and third elements of the test for civil aiding and abetting liability be analyzed in tandem."[152] "In tandem" signifies that where there is relatively good proof of the defendant's general awareness of the alleged wrongful activity, then relatively less evidence of substantial assistance may be required, and vice-versa.[153] A number of courts, in addition to those in the Second Circuit, have employed the "sliding scale" analysis.[154]

4. CAUSATION

Causation is an essential element of an aiding and abetting claim. "Substantial assistance" requires the plaintiff to plead that the actions of the aider-abettor "proximately caused" the harm on which the primary liability is predicated.[155] However, such causation has been interpreted to mean the injury was "a directly reasonably foreseeable result of the conduct."[156] Some courts have held the plaintiff must demonstrate the aider and abettor provided assistance that was a substantial factor in causing the harm suffered.[157] But courts have not generally held that there must be an indisputable "but for" relationship between (i) the assistance rendered, and (ii) the harm to plaintiff.

Loss causation also will need to be established between the primary fraud and the victim's losses.[158] Thus, if plaintiff 's harm was not proximately caused by the primary actor's wrongdoing, no further inquiry is needed.

B. AIDING AND ABETTING BREACH OF FIDUCIARY DUTY

Fiduciary duties exist on the part of such persons as attorneys, trust administrators, and director and officers.[159] Such parties are often claimed to have failed to uphold their duties of loyalty. Consequently, while fraud constitutes the largest source of aiding and abetting claims, breaches of fiduciary duty are close behind. As is not infrequent in the case of fraud, the perpetrator of the breach of fiduciary duty may be an individual or small company with little resources, whereas the aider-abettor may be a large institution with deep pockets.

In order to recover for aiding and abetting a breach of fiduciary duty, a plaintiff must establish: "(1) a fiduciary duty on the part of the primary wrongdoer, (2) a breach of this duty, (3) knowledge of the breach by the alleged aider and abettor, and (4) the aider and abettor's substantial assistance or encouragement of the wrongdoing."[160] Eighteen states have recognized a cause of action for aiding and abetting breach of fiduciary duty.[161]

Below we discuss the "knowledge" and "substantial assistance" elements in the context of breach of fiduciary duty cases.

1. KNOWLEDGE

Knowledge on the part of the aider-abettor that a fiduciary relationship was being breached can adequately be pled by allegations that a fiduciary relationship existed, that the defendant knew of it, and that the defendant knew it was being breached.[162] In the context of aiding and abetting, having "knowledge" of the underlying misconduct has been held to mean "[a]n awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact."[163]

One court rejected a "constructive knowledge" standard in the context of aiding and abetting breach of fiduciary duty, and required instead the following instruction:

> [T]o act knowingly means to act with actual knowledge. This means that [plaintiff] must prove [defendant] knew two things: That [defendant] owed a fiduciary duty to [plaintiff], and that [defendant] was breaching that duty. It is not enough for [plaintiff] to show that [defendant] would have known these things if it had exercised reasonable care."[164]

The court noted, however, that plaintiff is not required to show the defendant acted with an intent to harm the plaintiff.[165]

A notable recent breach of fiduciary duty case, employing a relatively liberal standard, is *Higgins v. New York Stock Exchange, Inc.*[166] This dispute arose out of the merger, announced in April 2005, between the New York Stock Exchange, Inc. and Archipelago Holdings, LLC, through which the New York Stock Exchange would become a publicly traded company. Plaintiffs alleged that the terms of the merger agreement heavily and unfairly favored existing shareholders of Archipelago over the NYSE owners.[167]

The CEO of NYSE, defendant Thain, was allegedly self-interested in the merger, based on his financial involvements with defendant Goldman Sachs, a brokerage house that also was a major shareholder in Archipelago. It was alleged that Thain slanted the proposed merger agreement in favor of Archipelago for the ultimate benefit of Goldman Sachs and himself (as a large Goldman Sachs shareholder).[168]

Plaintiffs noted that Goldman Sachs was retained by both the NYSE and Archipelago to act as a "facilitator" in exploring a potential combination, and to provide various financial services, notwithstanding that Goldman Sachs had substantial relations with Archipelago. The decision to retain Goldman Sachs to advise NYSE in the merger was approved by the NYSE board and by CEO Thain, who refused to recuse himself from the decision despite his close ties to Goldman Sachs and his fiduciary duties to the NYSE, which, according to the complaint, prohibits directors from deliberating in a matter in which they are personally interested.[169] Plaintiffs alleged that in order to structure a

deal that benefited Archipelago, Goldman Sachs provided "substantial assistance" to NYSE defendants in breaching their fiduciary duties by exerting its influence through Thain, its former CEO, as well as through a former NYSE Director and current Goldman Sachs CEO and other Goldman Sachs-affiliated NYSE directors who were "overly accommodating" to Goldman Sachs in order to structure a deal that benefited Archipelago.[170]

Goldman Sachs contended that it was insulated from charges of aiding-abetting breach of fiduciary duty by an "engagement letter," which stipulated that the NYSE "understands and acknowledges that [Goldman Sachs is] rendering services to the [NYSE] and to Archipelago in connection with a Transaction. [NYSE] understands that potential conflicts of interest or a perception thereof, may arise as a result of our rendering services to both the Company and Archipelago."[171]

The court rejected Goldman Sachs' argument, holding that the disclosure of the conflict by no means compels the conclusion that Goldman Sachs did not aid and abet the NYSE defendant's breach of fiduciary duty, as alleged by plaintiffs.[172] Ironically, the letter *established* Goldman Sachs' knowledge of the conflicts; and those conflicts may of course have constituted a breach of fiduciary duty. The court deemed legally sufficient plaintiffs' allegations that Goldman Sachs substantially assisted the NYSE in breaching its fiduciary duties by "exerting its influence through its former CEO, Thain, and other Goldman Sachs-affiliated directors, in order to structure a deal that benefited Archipelago."[173]

"Knowledge" that an insider was breaching his or her fiduciary duty to the company requires a relatively high level off awareness. "Red flags" may not be enough. A recent and illustrative case of "red flags" involved a precious metals trading company that had opened a revolving line of credit with the defendant bank, secured by an inventory of precious metals. The bank knew the trading company was in the business of selling precious metals as a dealer, and had other knowledge of how the trading company's president

disposed of assets (ultimately leading to the company's demise), but, according to the court, lacked knowledge of the president's breach of duty.[174]

The complaint alleged that when the defendant bank decided to end its own metals financing program, it had looked for alternative lenders to assume the loans it had extended to dealers. The plaintiff trading company was urged by brokers, who may or may not have been acting at the bank's behest, to become a successor lender with respect to the bank's existing borrowers. The trading company agreed, and ultimately assumed approximately 200 of the bank's loans so that by 1993 it had a total loan balance of $17.5M and, importantly, should have held $24.4M in collateral posted by those lenders. However, the company's president, Clark, secretly had been misappropriating these assets, selling off the precious metal collateral in the company's daily operations, according to the complaint.[175]

As these "take-out" loans were paid off by the trading company, the bank disposed of the collateral, per directions from Clark, typically returning it to the control of Clark (ostensibly acting for the trading company). Clark sold all or nearly all of the metals the bank transferred to the trading company, frequently to purchase additional loans from the bank, as well as metals futures contracts. However, when the price of silver rose in 1993, the company lost a large sum, was unable to purchase enough metals to replace the collateral it had sold, and filed for bankruptcy.[176]

The trading company's trustee in bankruptcy sued the bank, alleging it had aided and abetted Clark's breach of fiduciary duty to the company. The court held, however, that the trustee needed to come forward with evidence to show the bank "knew" Clark was breaching a duty owed to the company. Though it was undisputed the bank knew the company was in some manner disposing of the metals it was acquiring, the bank's senior officers testified, apparently persuasively, that they were unaware Clark had been misappropriating the collateral metals. They pointed out: (i) the company was a metals dealer which regularly traded metals, and; (ii) the bank had no reason to believe the

company had not otherwise covered its positions (for example through futures contracts). The trustee contended the bank knew the company was selling the metals and was close to insolvent, and that the bank knew the silver metals market was volatile and typically full of unscrupulous lenders.[177]

While the court conceded such evidence could have raised "red flags," that circumstance was not conclusive: the bank "owed no duty" to the company. "In the absence of any duty, proof of actual knowledge is required." And absent knowledge of the scheme or breach, the bank "could have had no intent to further either."[178]

A plaintiff alleging aider-abettor liability should plead the defendant knew the principal's conduct contravened a fiduciary duty at the time it occurred.[179] In an ERISA case, for example, a plaintiff was required to show

not only that when [the ERISA Fund] was paying defendant's invoices, it was tapping the Plaintiff 's reserve account (rather than a general operating or legal defense account), but also that the Defendants were or should have been aware of the particular internal bookkeeping account [the Fund] was drawing on to pay them, and that such payment constituted a breach of [the Fund's] fiduciary duty.[180]

Plaintiffs failed to adequately allege *scienter* (the requisite state of mind) where, according to the complaint, a management company falsely had represented to investors: that it had reviewed prices charged by the fund company it managed to ensure their consistency with market values; that defendant was vested generally with "management and control" of the fund company; that it had the authority to require the fund company to adhere to applicable laws; that it undertook risk management services for the fund company; that it communicated with the individual defendants, and that it knew about the fund company's fiduciary obligations to investors.[181] Even viewed collectively, the court held, those facts did not "permit an inference that [the management company] had actual knowledge of the alleged fraud."[182]

Nevertheless, unlike an action based on conspiracy, aiding and abetting liability may, according to several decisions, be satisfied by proof that a defendant acted recklessly.[183] And as in fraud cases, aiding and abetting may be shown inferentially, such as by the existence of a conflict of interest and encouragement on the part of the aider-abettor to the actor to negotiate contracts that were prejudicial to plaintiff,[184] though, seemingly incorrectly, it also has been held that "[w]hat is clear from all the cases and the RESTATEMENT is that there is not a lower level of culpability or scienter for aiding and abetting than for the underlying tort."[185]

2. SUBSTANTIAL ASSISTANCE

"Substantial assistance" in aiding-abetting breach of fiduciary duty cases may be easier to establish than in fraud cases. For example, substantial assistance has been evidenced by mere advice by attorneys to a company president on how he might "warehouse premiums" so he could purchase illicit off-shore insurance policies.[186] Similarly, where counsel for a partnership failed to inform a principal of material business dealings, counsel was subject to aider-abettor liability.[187] And where a bank lent sums to the fiduciary (a trust) knowing the loan was made for purposes of misleading a plaintiff creditor, the lender was liable to the plaintiff.[188]

The relative ease of alleging "substantial assistance" in breach of fiduciary duty cases is noteworthy, and likely stems in part from the high level of duty owed by the fiduciary. Because of this elevated duty, when a secondary actor renders assistance the nexus between assistance and harm to the plaintiff frequently is apparent, or should be.

V. FACTUAL MATRICES IN WHICH AIDING-ABETTING CLAIMS ARE COMMON

Aiding and abetting doctrine is reasonably well defined; however, close analysis reveals nuances that may be distinct to a particular fact pattern. Greenmail cases, for example, have a body of law practically their own, as in such cases the

"assistance" is often pronounced, though evidence of "knowledge" frequently is more debatable. Given such distinctions, there is much to be learned from a comparative discussion of aiding and abetting law from the standpoint of some noteworthy fact-patterns. There are no over-arching themes common to the varying relationships and circumstances. Rather, aiding-abetting doctrine has tended more to adjust to the particular relationship in question than to crystallize around immutable principles.

A. ATTORNEYS

Certain courts have adopted the principles of the RESTATEMENT (SECOND) OF TORTS section 876(b) to subject to liability attorneys who have aided a client in the client's breach of duty to a third party.[189] As discussed above,[190] the threshold for substantial assistance appears markedly lower in breach of fiduciary duty cases where a professional, such as an attorney, is the alleged secondary actor.

In *Reynolds v. Schrock*, the court held that a jury could find aiding-abetting liability where plaintiff alleged the attorney, having drafted the settlement agreement between the partners and knowing the partners owed each other fiduciary duties, nonetheless advised one partner to breach her duty to the other, then helped her conceal that breach, and received over $130,000 for his role in the transaction that constituted the breach.[191] By contrast, however, an attorney's advice to the client outlining the range of options and the consequences that might flow from them, does not give rise to secondary liability if, after hearing the advice, the client chooses upon her own to engage in conduct that results in a breach of duty.[192] Substantial assistance or encouragement of the client's breach of fiduciary duty needs to rise to "affirmative conduct that actually furthers the client's breach of fiduciary duty, done by the attorney with knowledge that he or she is furthering the breach."[193]

Recently, the Third Circuit undertook a careful analysis of the "substantial assistance" prong of aider-abettor liability, in a case concerning the aftermath of the financial demise of

automotive entrepreneur John DeLorean.[194] DeLorean owed fees for legal services, and ultimately the creditor law firm sued him, seeking a substantial judgment. As attachable funds seemingly were either non-existent or elusive, the chief asset targeted by the creditor law firm was DeLorean's country estate, the 430-acre "Lamington Farm." However, the alleged aider-abettor, DeLorean's *new* law firm, had prepared a Memorandum of Life Lease in which "Genesis," the purported title holder of Lamington Farm, acknowledged a preexisting life lease created in 1987 between DeLorean, as lessor, and DeLorean, as guardian for his children, as lessee.[195]

At this point, the alleged machinations became somewhat convoluted. The complaint alleged that the defendant law firm created the life lease memorandum after entry of judgment in favor of plaintiff (the creditor law firm). The plaintiff alleged the life lease was a fiction and that the defendant law firm knew it was, having created it in support of a wrongful attempt to obstruct plaintiffs' enforcement of their judgment against DeLorean.[196]

Two weeks before DeLorean was to be deposed in connection with disposition of his assets, the defendant law firm recorded the purported life lease memorandum with the Somerset County Clerk. The firm subsequently misrepresented to the clerk that the order had the effect of dissolving a prior order in favor of plaintiffs that had set aside DeLorean's fraudulent conveyance of Lamington Farm to Genesis. The clerk relied on this deceptive letter and entered on the public record erroneous marginal notations in that regard.[197]

After the creditor law firm obtained a writ of execution from the U.S. District Court that included personal property (and DeLorean's shares in a Nevada corporation (CRISTINA)), DeLorean's counsel contacted counsel for DeLorean Cadillac, which was controlled by DeLorean's brother. (DeLorean Cadillac had obtained a writ of execution against DeLorean.) DeLorean Cadillac's attorney agreed to a request not to contact the creditor law firm concerning furniture described in the writ, which John DeLorean was removing to a

warehouse owned by DeLorean Cadillac. Nor did the defendant law firm disclose to the Court when they moved to vacate plaintiffs' writ that DeLorean had delivered the CRISTINA shares to the marshal to facilitate the execution by DeLorean Cadillac on its writ.[198]

The Third Circuit Court of Appeals, taking all of this in, observed that, unlike in a conspiracy case, plaintiffs did not need to plead "shared intent." Civil liability for aiding and abetting arises when one knows the other's conduct constitutes a breach of duty "and gives substantial assistance or encouragement to the other so to conduct himself . . . ."[199] Because the defendant law firm knew DeLorean was seeking to perpetuate a fraud on his creditor, the firm's extensive involvement and assistance in the scheme subjected it to liability as aider-abettor.

The attorney aider-abettor decisions draw a line between the mere rendering of advice to a wrongdoer, on the one hand, and actively misleading or affirmative conduct directed toward a third party on the other. The attorney, as counselor, almost certainly will receive better protection than the attorney who acts as the public and active agent of a wrongdoer.

B. BANKING TRANSACTIONS

Financial institutions are among those entities most frequently charged with aiding and abetting fraud. Because modern banks provide an array of valuable, and frequently innovative, financing services, banks often are regarded as having been a "partner in crime" with a company the bank may have considered merely a "borrower" or "customer." The factual elements frequently recurring in bank fraud cases include, most notably: (i) financing, through a series of transactions, of a fraudulent enterprise over an extended duration; (ii) the bank's use of actual or alleged "atypical" banking practices, and; (iii) an ultimate bankruptcy (or absconding with funds) by a borrower or client of the bank.

In *Chance World Trading E.C. v. Heritage Bank of Commerce*,[200] plaintiff Chance World undertook to invest in a related business venture (Construction Navigator) by placing $200,000 in an account at Heritage Bank. The investing agreement limited use of the funds to technical development, and required the signatures of all three of Construction Navigator's principals for withdrawals. However, one of the principals of the venture allegedly misappropriated funds to pay her personal salary, office rent, and other general corporate expenses not related to the Company's chartered purpose.[201]

To effectuate this misappropriation, the alleged primary actor had opened a second account at Heritage Bank. This account did not require signatures of all three of the company's principals. The fraud actor then transferred funds from the original account into the new account. The bank permitted the withdrawal without requiring the authorization of the other principals.[202]

Chance World sought to establish the bank knew the fraud actor was misappropriating the $200,000 investment based on the following facts: (1) the bank had been informed that Chance World provided the financial backing for Construction Navigator, a start-up company; (2) the bank understood that Chance World was the source of the first $200,000 in Construction Navigator's money market account; (3) the bank was in possession of the Chance World/Construction Navigator "term sheet"; (4) the bank had learned Chance World was buying 51% of the total shares of Construction Navigator; (5) the Construction Navigator charter, as well as California law and the conditions of the bank account itself barred withdrawals in excess of $100,000 where the authorization was by but one officer, and (6) the bank permitted Construction Navigator to open a corporate banking account without any advance corporate resolution authorizing such action.[203]

Nevertheless, the court observed that the term sheet only contained in very general terms the substance of the agreement between Chance World and Construction Navigator and, importantly, contained no restrictions on

Construction Navigator's use of funds. As a matter of California law, the court held, the violation by the bank of its own internal policies and procedures, without more, is insufficient to show a bank was aware of fiduciary breaches committed by customers.[204] The court held that Chance World needed to produce evidence that Heritage Bank had actual knowledge of the fraud actor's crimes; it could not rely on inferences drawn from "sloppy work" by the Bank.[205]

In another case, in May 2003 Allied Irish Banks, PLC filed suit in the Southern District of New York against Bank of America and Citibank.[206] Allied sought to recover for losses incurred by its then subsidiary, Allfirst, between 1997 and 2002 by a rogue foreign exchange trader, John Rusnak. Rusnak had hid his losses for several years by booking fictitious trades and manipulating Allfirst's internal controls. He pled guilty to bank fraud and was sentenced to seven and one-half years in prison, according to the Complaint.

Allied has alleged that Citibank and Bank of America: (1) carefully tailored their reporting to Allfirst to omit information concerning Allfirst's profits and losses, mark-to-market positions, and risks; (2) were persuaded not to seek margin from Rusnak, which would have disclosed his trading losses; (3) provided to Rusnak $200 million in funding disguised as the proceeds of Rusnak's foreign exchange trading; (4) executed $170 million in trades that helped Rusnak undermine Allfirst's controls but had no business purpose, and; (5) doctored trade confirmations to cover up Rusnak's fake trades. The unusual procedures allegedly helped to avoid detection by Allfirst's internal controls.[207]

Rusnak allegedly persuaded the banks to utilize unusual trading "recaps," which omitted information concerning the price of Rusnak's positions, the risk, or its current mark-to-market value. The confirmation also excluded transfer activity and profit and loss information. Because of Rusnak's unusual requests concerning documentation, "BofA and Citibank knew or should have known that Rusnak wanted to hide material information from Allfirst," according to the complaint.[208]

Further, Bank of America allegedly executed currency trades with Rusnak that were disguised loans. For payment of a small premium on a call option that could never be exercised, Rusnak received $120 million in funds (a premium on a put option) coupled with future liability well in excess of that amount on the put option to Bank of America. In March 2001, Bank of America allegedly paid Allfirst $74.9 million for a "put option" on $230 million worth of yen with an exercise date of March 7, 2002.[209] Though it created a short-term gain, the transaction created an unbalanced long-term liability, according to the complaint.[210]

The Court held the complaint properly stated a claim for aiding and abetting fraud.[211] Bank of America's actual knowledge of the fraud was adequately pled based on the allegations Rusnak told the bank he wanted information omitted from daily trade confirmations, monthly reports, and communications between the bank and Allfirst "because he sought to conceal such information from his employer."[212] "Substantial assistance," in the form of "deliberate concealment" properly was pled by alleging the bank concealed information by withholding it, and by "actively and deliberately altering documents."[213]

Bank of America was also the subject of aiding-abetting charges in *In Re Parmalat*,[214] where it contended that the breach of fiduciary duty at issue merely concerned a supposed duty owed to Parmalat's stakeholders. Because, according to Bank of America, Parmalat owed no such duty to its stakeholders, there could have been no breach of fiduciary duty (and thus no liability for aiding and abetting). The court disagreed, holding that the complaint adequately had alleged that the bank aided insiders in breaching duties the insiders owed to Parmalat.[215]

Bank of America was alleged to have assisted Parmalat affiliates' managers in "structuring and executing a series of complex, mostly off-balance sheet, financial transactions that were deliberately designed to conceal Parmalat's insolvency."[216] According to plaintiffs, Bank of America's

knowing assistance ensured that Parmalat's financial statements were false and misleading, which resulted in Parmalat's bankruptcy.[217]

Specifically, plaintiffs alleged that in 1997, Bank of America had entered into an $80 million five-year credit agreement with one of Parmalat's Venezuelan subsidiaries. The parties did not disclose a side letter that gave Bank of America additional guarantees, a $120,000 "arrangement fee" and interest beyond the publicly disclosed rate. According to plaintiffs, that transaction made Parmalat appear healthier and more creditworthy than, as Bank of America allegedly knew, Parmalat really was.[218]

In addition, in 1998, Bank of America allegedly entered into an $80 million eight-year credit agreement with two of Parmalat's Venezuelan subsidiaries and a $100 million credit agreement with a Brazilian subsidiary. These loans were secured by cash deposits made by an Irish Parmalat subsidiary in the entire amounts of their respective loans. The Irish subsidiary obtained the funds through issuance of eight-year notes to institutional investors in the U.S. in private placements arranged by Bank of America. Consequently, the funds from investors flowed to South American subsidiaries; Bank of America took no risk and, when Parmalat's troubles surfaced in December 2003, Bank of America foreclosed on the collateral. The fact that the loans were secured by cash put up by Parmalat was not disclosed publicly. Thus, the purchasers of the eight-year notes did not know they were contributing collateral for Bank of America loans. Nor, importantly, did the purchasers of Parmalat's stock know that Parmalat had approximately $180 million less available cash than its financial statements indicated. Again, side letters increased the fees and interest payable to Bank of America and were not disclosed, further distorting Parmalat's financial picture. Also, the actual purpose of the Venezuelan loans was to extinguish debt under the December 1997 agreement with Bank of America, rather than as the public disclosure indicated, "to fund import/ export activities by the Venezuelan companies," according to the complaint.[219]

Bank of America also allegedly structured a set of transactions pursuant to which a Brazilian Parmalat subsidiary issued $300 million of privately placed debt that was "disguised as an equity investment." To accomplish this, Bank of America formed two special purpose entities that bought $300 million of stock in the Brazilian entity, whereupon the SPEs issued four-year notes purchased by (i) Bank of America, (ii) U.S. institutional investors, and (iii) another Parmalat subsidiary. The Brazilian entity accounted for $130 million of the $300 million as "equity." In December 1999, a Bank of America employee educated Parmalat "how to describe the transaction in a press release so that it would appear to be equity rather than debt," according to the complaint.[220]

Furthermore, Bank of America allegedly made a succession of loans to Parmalat subsidiaries while simultaneously executing a supposed interest rate swap agreement with Parmalat's African subsidiary. The "swap" required Bank of America, in effect, to pay $5.2 million each year to a Swiss bank account "ostensibly owned by Parmalat Africa." The ostensible purpose of the swap was cancelled out by side letters, which required Parmalat Chile and Parmalat South Africa to pay Bank of America additional interest on their loans roughly equating to Bank of America's yearly $5.2 million installments to Parmalat Africa's "ostensible bank account." And, the account was not Parmalat Africa's; rather, allegedly, it "has been linked to Bank of America officials."[221]

In addition, the swap agreements were not actually swaps, according to the complaint: they specified no currency or interest rate exchanges and offered the counter-parties no ability to hedge. The complaint alleged the agreements were nothing more than a device for Parmalat to make illicit payments to Bank of America officials.[222]

Bank of America did not deny that the complaint sufficiently alleged that it aided and abetted actual breaches of fiduciary duty. Rather, Bank of America characterized the claim as one of aiding and abetting a breach of duty owed to Parmalat's shareholders—to whom the Bank argued Parmalat owed no duty. The court held that this argument was

entirely beside the point: the complaint alleged the banks aided insiders in breaching duties the insiders owed *to Parmalat.*[223] Thus, the complaint properly alleged aiding-abetting liability as a matter of law.

Aiding and abetting charges have been brought by one bank against another. In *Rabobank Nederland v. National Westminster Bank*,[224] the plaintiff, who funded a "take out" of another bank's ("the debtor") interest in a credit facility, alleged the debtor's officers breached their fiduciary duty by approving the debtor's funding of over $600,000 for the purchase of almond farms for no consideration to the almond farm entities they controlled, and approving the debtor's entry into long-term leases at above-market rates.[225] The claim was premised on law holding that a debtor's officers and directors owe to a successor (or take-out) lender a fiduciary duty to preserve the debtor's corporate assets for the benefit of its creditors (including the take-out lender).[226]

The complaint alleged the original lender aided and abetted this breach by loaning $1.2 million to a particular trust that purchased the almond farms property while knowing that several debtor's officers had formed the almond farm entities. The loan was made for the express purpose of acquiring the almond acreage; and the original lender "knew or should have known" that the individual defendants could not develop the almond farms without draining additional funds from the debtor. Construing these allegations "broadly," the court found they supported the "inference" that the original lender knew its loan to the trust assisted the officers and directors of the debtor in their breach of fiduciary duties to the take-out lender.[227]

The original lender, however, contended that because it did not owe the same fiduciary duties as the debtors, it could not face liability for aiding and abetting their breach of fiduciary duty. The appellate court held this theory was erroneous because it essentially treated the cause of action identically to one for conspiracy, where a duty is owed directly by the defendant. By contrast, "[a] party need not

owe any fiduciary duty, let alone the same fiduciary duty, to be subject to liability for aiding and abetting another's breach."[228]

In *Neilson v. Union Bank of California, N.A.*,[229] a private money manager (Slatkin) allegedly set up investment funds as part of a classic Ponzi scheme: "i.e., he used monies paid by later investors to pay artificially high returns to initial investors, with the ultimate goal of attracting still more investors."[230] Investors alleged the banks "rubber-stamped" false information Slatkin gave to them and treated the client accounts as "one common pool of fungible and liquid assets."[231] They alleged the banks "knew or should have known that Slatkin was operating a Ponzi scheme, and that without the assistance provided by the banks, Slatkin's Ponzi scheme could not have succeeded."[232]

The court observed that while under Rule 9(b) of the Federal Rules of Civil Procedure, fraud must be pled with specificity, "'[m]alice, intent, knowledge, and other condition of mood of a person may be averred generally.'"[233] Nevertheless, the pleader must allege the nature of the information the defendant possessed; that is, "actual knowledge of the primary violation."[234] In *Neilson*, the complaint pled that "the banks knew [the primary actor, Slatkin] was committing fraud and was breaching his fiduciary duties to class members," and that each bank "actively participated in Slatkin's Ponzi scheme with knowledge of his crimes." These allegations, notably supported by use of "atypical banking procedures to service Slatkin's accounts," adequately stated the "knowledge" requirement for aidingabetting breach of fiduciary duty.[235]

Clearly, the more a bank knows about its borrower's business the greater the exposure to the bank in the event that "business" proves to have been a fraud scheme. Equally important is the number of financing transactions and extent of time over which the bank has furthered the borrower's objectives. And, as previously observed, the use of "atypical" banking procedures is considered very strong evidence of *scienter.*

C. BANKRUPTCY TRUSTEES' ACTIONS

A common fact-pattern involves a bankrupt corporation that formerly operated as a fraudulent enterprise. In bankruptcy, after ringleaders in upper management have been thrown out, the bankruptcy trustee not infrequently discovers that third-parties, such as suppliers, accountants or law firms, appeared to have facilitated the fraud.[236] Bankruptcy trustees in this position have sought recourse against these alleged aiders-abettors.

However, when the bankrupt corporation joined with a third party in defrauding its creditors, the trustee cannot recover against the third party for the damage to the creditors. "A bankruptcy trustee has no standing generally to sue third parties on behalf of the estate's creditors, but may only assert claims held by the bankrupt corporation itself . . . ."[237] The *in pari delicto* defense may be raised in aiding-abetting actions brought by the bankruptcy trustee when a participant in illegal, fraudulent or inequitable conduct (here, the trustee) seeks to recover from another participant in that conduct. Under those circumstances, the parties may be deemed *in pari delicto*, and the "law will aid neither, but rather, will leave them where it finds them."[238] For example, a claim against investment banks for aiding and abetting fraud by shareholders' representatives was subject to dismissal where the "essence" of the claims was a failure to tell others at the now-bankrupt company "what the shareholders-representatives already knew."[239]

However, in bankruptcy, the *in pari delicto* doctrine applies primarily to the trustee as representative of the "debtor" under Section 541 of the Bankruptcy Code, and not necessarily to the trustee in its status as "creditor." As "creditor," the trustee is not stepping into the shoes of the debtor company, but is assuming the status of hypothetical lien creditors who were not party to the breach of fiduciary duty.[240] Section 544(a)(1) of the Bankruptcy Code provides that the trustee shall have, as of the commencement of the case, the rights and powers of a "creditor that extends credit to the debtor . . . and that obtains . . . a judicial lien on all property on which a creditor on a simple contract could

have obtained such a judicial lien, whether or not such a creditor exists."[241] Thus, in *Anstine v. Alexander*,[242] the trustee had standing to bring aiding-abetting claims, given that any hypothetical judgment lien creditor would have had standing to sue the company's attorneys for malpractice causing injury to the company or for the president's breach of duty to his company. "Such a lien creditor would also have a cause of action against anyone who aided and abetted that breach of fiduciary duty."[243]

The availability of the *in pari delicto* defense in the case of creditors of a bankrupt estate depends upon the jurisdiction, with the Ninth Circuit, based on equitable considerations, restricting the defense, and the Second and Third Circuits, relying on their interpretation of Section 541 of the Bankruptcy Code, giving the defense broad sway.[244]

D. CORPORATE AFFILIATES

Separate corporate entities in the same family of entities under common control or controlling one another may be alleged to be perpetrator and aider-abettor, respectively. However, complexities arise when some affiliates are alleged to be primarily and others secondarily responsible. Subsidiaries are ordinarily treated as independent corporate entities; however, in reality they are sometimes "mere vehicles" through which an improper scheme is effectuated.[245] In *Rabkin v. Philip A. Hunt Chemical Corp.*,[246] former minority shareholders of the Philip A. Hunt Chemical Corp. presented such a case. Olin Corporation, Hunt's majority shareholder was named as defendant. The plaintiffs claimed that "since Olin allegedly breached its fiduciary duty in connection with a merger and Olin Acquisition was the corporate vehicle through which the merger was consummated, the subsidiary was a knowing participant liable for its parent's breach."[247] The court rejected the contention, though only because "no allegation [was ever made] that Olin Acquisition even existed at the time the merger proposal was presented to Hunt."[248]

It has been held that a corporation had requisite guilty knowledge and knowingly rendered substantial assistance in connection with securities fraud by a corporately separate "family business," where the family that committed the fraud owned and controlled the defendant corporation.[249] In that circumstance, the defendant corporation was deemed to possess the knowledge held by the company that primarily committed the fraud.[250]

E. DIRECTORS AND OFFICERS

Directors and officers of a company owe a fiduciary duty to the shareholders.[251] A rival, or corporate raider, may become liable for aiding and abetting breach of that duty should the rival or takeover suitor induce an officer of the company to act disloyally. In "greenmail" cases, the putative acquiring company may be exposed to liability after seeking to persuade the directors and officers to make business decisions that are antithetical to the company's interests in an attempt to fend off a takeover (that might be in the shareholders' interest).[252]

Allegations of a "street sweep" scheme, to *defeat* a hostile takeover, formed the subject of aiding-abetting claims in *Ivanhoe Partners v. Newmont Mining Corp.*[253] There, the board approved a dividend allegedly to finance a stock purchase by the company's largest corporate shareholder. That shareholder, if permitted, intended to acquire a sufficient share of the company to prevent the hostile tender offeror from acquiring a controlling share.[254] When the directors enacted a standstill agreement that bound the corporate shareholder to vote its shares for the company's director nominees, "it severely restricted" the shareholder's ability to dispose of its stock free of the standstill restrictions. "That agreement operated to entrench the [Company's] Board" and thus went beyond the reasonable goals of limiting a shareholder's ability to acquire a majority share.[255] This was a violation of the company's directors' duties, and given that the shareholder, as a contracting party, obviously knew of the "entrenchment effect" of those provisions, the shareholder "aided and abetted" that violation.[256]

Another legally viable aiding-abetting claim alleged that officers caused the company to "deepen its insolvency," to the prejudice of the plaintiff creditors, by "wrongfully prolonging the company's existence through the incurrence of spurious debt," largely by allowing sales on credit to an affiliated entity that they knew was becoming insolvent.[257] Applying New Jersey law, the court held that such allegations met the standard that (1) there had been a wrongful act in an underlying securities violation, (2) the alleged aider-abettor knew it, and (3) the aider-abettor "knowingly and substantially participated in the wrongdoing."[258]

As discussed above,[259] the *in pari delicto* defense often will bar claims by the bankruptcy trustee, including claims based on misconduct by the bankrupt entity's former officers and directors. However, in *In re Parmalat*,[260] the plaintiff sought to avoid the *in pari delicto* defense by alleging the officers and directors had been acting strictly for themselves in "looting" Parmalat. The court agreed: "By any standard, theft from a corporation by insiders is self-dealing by the insiders," not in the interest of the company, and thus the insiders' knowledge is not imputed to the company.[261]

F. GREENMAIL

"Greenmail" typically refers to the payment by a publicly traded company of a premium over market price to a "corporate raider" to repurchase the raider's shares of stock in the company. Corporate raiders, or takeover artists, may threaten a takeover of a company, thereby jeopardizing the job security of directors and officers (who may believe they will be ousted under the raider's regime). Such directors and officers have a duty to disregard that personal risk. Should those directors and officers, aiming to preserve their power and perks, cause the company to overpay to buy back the raider's shares in order to defeat the takeover, they may have breached their fiduciary duty to the company's shareholders. If the raider *intends* this result, the raider (or "greenmailer") may be liable to shareholders of the target

company as an aider and abettor. The entity pursuing the takeover must offer consideration to the company, not to officers at the company.

In seeking to establish liability on the part of the greenmailers, shareholders have alleged that the corporate directors breached their fiduciary duty to shareholders by incurring harmful debt and by paying the price of a targeted stock repurchase.[262] For example, in 1984, Saul Steinberg and Associates acquired more than two million shares of Walt Disney Productions.[263] Interpreting this action as an initial step in a takeover action, the Disney directors countered by acquiring a new company (Arvida) and thereby assuming $190 million in debt. Three months later the Disney directors repurchased all of the Steinberg shares for approximately $77 a share, which included a premium over the market price. This repurchase, which the court categorized as greenmail, was financed through increased borrowing. With the new combined borrowing, corporate debt rose to two-thirds of equity. This action harmed the shareholders because it negatively affected the corporation's credit rating and stock prices.[264]

In reviewing a lower court decision to issue an injunction, which, in effect, imposed a constructive trust on the profits of the repurchase, the court of appeals concluded that at the trial on the merits Steinberg could be held liable as an aider and abettor in the breach of fiduciary duty. Steinberg "knew or should have known" Disney was borrowing the $325 million purchase price. From his previous dealings with Disney, including an aborted purchase of Arvida, he knew the increased debt load would negatively affect Disney's credit rating and the price of its stock.[265] The argument that Steinberg had actual knowledge of harm flowing to Disney shareholders was strengthened by the fact that Steinberg, while still a shareholder, had brought his own derivative action in an attempt to *block* an acquisition of Arvida and the assumption of $190 million in debt. These facts suggested that Steinberg knew that the actual harm to shareholders exceeded the benefits.[266]

In *Gilbert v. El Paso. Co.*,[267] shareholders of the target corporation (El Paso) brought a class action. The putative acquirer, Burlington, had made a tender offer of $24 per share. The offer contained several conditions ("outs") which Burlington had the option to use. El Paso's Board initially opposed the offer, claiming the $24 price was inadequate; however, El Paso's shareholders evidently liked the offer, which represented a premium over market price because it was oversubscribed.

Surprisingly, to outsiders, the conflict suddenly became amicable. Burlington and El Paso announced they had an agreement. A new tender offer was announced at the same price, but for fewer shares. Some of El Paso's Directors were granted golden parachutes. The agreement allegedly had the effect of reducing the amount of the participation from the first to the second offer, thus denying the shareholders the premium for all shares tendered under the first offer.[268]

The court was able to infer that several conspiracy scenarios were possible. Under each, Burlington's superior bargaining position, was crucial. Burlington responded that its duty to its shareholders obligated it to get the best price possible, and that the transaction was an arm's length one. According to Burlington, "pursuit of the best available price in negotiations with opposing management can be undertaken without regard to the target management's fiduciary obligations to its shareholders."[269]

The court disagreed, ruling that if participation in a breach of duty occurred, there could have been no arm's length deal: "Thus, although an offeror may attempt to obtain the lowest possible price for stock through arm's length negotiations with the target's board, it may not knowingly participate in the target board's breach of fiduciary duty by extracting terms which require the opposite party to prefer its interests at the expense of the shareholders."[270]

Offering terms that afford special consideration to board members is a clear path to aider-abettor liability. When terms hold value that inures exclusively, or even

disproportionately, to officers and directors, courts have not found it difficult to infer the offeror knew it was inducing a breach of fiduciary duty to shareholders.

G. RICO

Based on *Central Bank*, it has been suggested that civil aiding and abetting liability under RICO appears to be traveling a path toward extinction. "[A] private cause of action for aiding and abetting a RICO violation cannot survive the Supreme Court's decision in Central Bank . . . . ," according to the Third Circuit Court of Appeals.[271] The Third Circuit has observed that the *Central Bank* court quoted directly from the text of the federal securities laws in abolishing all future civil aiding and abetting claims under § 10(b).[272] The Third Circuit and other courts have applied the reasoning of *Central Bank* to RICO and concluded the statute does not provide for aiding and abetting liability.[273] Nevertheless, state RICO laws, which may be more expansively construed than federal statues, may permit aiding and abetting actions.[274]

H. STATE LAW SECURITIES ACTIONS

The Securities Act of 1933 and the Securities Exchange Act of 1934 both contain explicit savings clauses that preserve state authority with regard to securities matters.[275] Consequently, courts long have recognized aiding-abetting liability in connection with securities actions brought pursuant to state law.[276]

The Texas Securities Act, for example, establishes both primary and secondary liability for securities violations.[277] An "aider" is defined as "[a] person who directly or indirectly with intent to deceive or defraud or with reckless disregard for the truth or the law materially aids a seller, buyer or issuer of a security."[278] The Texas Supreme Court has held in this context that "reckless disregard" requires that the aider be aware of the primary violator's improper activities. Thus, a broker's mere disregard for internal procedures that would have brought the fraud to light was, without more, insufficient to give rise to secondary liability.[279]

Post-*Central Bank*, much of the law of aider-abettor liability is developing in state courts, including under state securities statutes. This environment likely will produce a rich, and varied, body of decisional law.

I. TERRORISM

The Federal Anti-Terrorism Act provides civil remedies for victims of international terrorism, stating: "Any national of the United States injured in his or her person, property, or business by reasons of an act of international terrorism, or his or her estate, survivors or heirs, may sue therefore in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees."[280] While funding that indirectly reaches terrorist organizations itself may not, depending on the circumstances, always be sufficient to constitute an act of international terrorism under the Act, assistance that meets the definition of aiding and abetting terrorism does give rise to liability under the Act.[281]

In *Boim v. Quranic Literacy Institute and Holy Land Foundation for Relief and Development*, the court found that section 2333 can give rise to aiding and abetting liability because it provided for an express right of action for plaintiffs, and it was reasonable to infer that Congress intended to allow for aiding-abetting liability.[282] Further, the history of section 2333 showed Congress had intended to make applicable general tort principles. Moreover, Congress expressed its intent to "render civil liability at least as extensive as criminal liability in the context of terrorism cases." Given that criminal actors are subject to aiding-abetting liability under section 2339B,[283] civil liability should attach as well.[284]

Lastly, the court observed that Congress' intent to thwart financing of terrorism cannot be met unless liability extends beyond those directly involved in the acts of terrorism: "if we failed to impose liability on aiders and abettors who knowingly and intentionally funded acts of terrorism, we would be thwarting Congress' clearly expressed intent to cut off the flow of money to terrorists at every point along the

causal chain of violence."[285] In *Boim*, therefore, plaintiffs were permitted to attempt to prove that the defendants "knew of Hamas' illegal activities, that they desired to help those activities succeed, and they engaged in some act of helping the illegal activities."[286]

In early 2005, the U.S. District Court for the Southern District of New York ruled on a host of motions filed by defendants in *In re Terrorist Attacks on September 11, 2001*,[287] a multidistrict proceeding consolidating actions brought by victims and insurance carriers for injuries and losses arising from the September 11, 2001 terrorist attack. Citing *Boim*, the court observed that aider-abettor liability under the Anti-Terrorism Act required "general knowledge of the primary actor's conduct."[288] Therefore, absent allegations that a defendant, for example, knew its charities were supporting terrorism, certain of the aiding-abetting claims against defendants were deemed insufficient as a matter of law.[289]

A second round of motions, decided in November 2005, dismissed several additional defendants largely on the same basis, but ruled that claims that alleged "material support," in the form of financial transactions with al Qaeda, could be maintained under section 2339A.[290] Further, the court denied the motion to dismiss of a defendant who was alleged to be affiliated with al Qaeda operatives and to have aided al Qaeda by arranging for the delivery of a battery for a satellite phone used by Osama bin Laden.[291] This litigation is ongoing in the Southern District of New York.

Also late in 2005, the U.S. District Court for the Eastern District of New York agreed with *Boim* that section 2333 "does not limit the imposition of civil liability only to those who directly engage in terrorist acts."[292] U.S. citizens, estates, survivors and heirs of United States citizens, who had been victims of terrorist attacks in Israel, have sued a Jordanian bank, alleging the bank had provided financing and support to agents of terrorist organizations, such as Hamas. In ruling that the Anti-Terrorism Act allowed for aiding-abetting liability, the court distinguished *Central Bank* on the basis that in enacting the Anti-Terrorism Act

Congress had expressed a desire to "import general tort law principles," including aiding and abetting liability.[293] Congress also had expressed an intent to make civil liability at least as expansive as criminal liability. Moreover failing to allow aiding and abetting liability would be "contrary to Congress' stated purpose of cutting off the flow of money to terrorists at every point along the chain of causation."[294]

The court, applying the fact pleading standard pursuant to Federal Rule of Civil Procedure 8(a), held the plaintiffs' allegations properly pled aiding and abetting liability. Plaintiffs had alleged the bank had facilitated terrorism chiefly by (1) creating a death and dismemberment plan for the benefit of Palestinian terrorists, and (2) knowingly provided banking services to Hamas (a designated terrorist organization) and its fronts. The allegations supported the inferences that (i) the bank would supply needed financial services to organizations that would themselves carry out terrorist acts, which constituted "substantial assistance," and (ii) that administration of the benefit plan encouraged terrorists to act.[295]

The court rejected the bank's protestation that plaintiffs needed to show knowledge as to each specific terroristic act. Aiding and abetting violations of the AntiTerrorism Act require only knowledge "that the organization to which material support is provided is designated or is engaged in terrorist activities . . . ."[296] Nor, for purposes of "causation," did plaintiffs need to prove that acts of "assistance" caused a particular injury from terrorism: the creation of an incentive to commit such acts, generally, imposes secondary liability. The court did conclude that for purposes of the Anti-Terrorism Act, allegations of recklessness would fall short of the statutory standard.[297]

VI. CONCLUSION

The doctrine of civil liability for aiding and abetting warrants, and promises to receive, expansive treatment in the context of suits for personal injuries resulting from terrorism that has been assisted by its financiers and others facilitators. Tort liability expanded during the twentieth

century in large part to provide a measure of civil deterrence for defendants regarded, in isolated instances, as having put the public at risk.[298] The public risk from a single act of terrorism may vastly exceed the risk created by corporate negligence or distribution of defective products.

More generally, aiding and abetting liability is in the process of achieving broad acceptance as a doctrine uniquely suited to address wrongdoing that occurs in transactional matrices that as of the year 2006 frequently are of breathtaking complexity. The former centerpiece of aiding-abetting liability—suits against facilitators of federal securities fraud—was removed by the Supreme Court's 1994 decision in *Central Bank*.[299] But the doctrine itself has flourished, perhaps in part because of the attention it received when *Central Bank* was followed within seven years by massive financial scandals.

As of this writing, the larger scandals temporarily have subsided (though this may well be a temporary lull preceding the demise of one or two large hedge funds).[300] The scandal cases, including those involving Enron and WorldCom, have contributed with other aiding and abetting case law addressing conventional financial fraud and commercial misconduct to produce a body of law that has helped to refine the law of aiding-abetting civil liability.

This refinement is particularly evident in connection with the test for "knowledge of wrongdoing," where recognized fact patterns have emerged as predictive of liability or nonliability (as the case may be).[301] Recent court decisions have shown that use of "atypical" banking procedures are a critical signifier of "knowledge" and thus potential liability.[302] Motive has emerged as a significant factor in favor of showing unlawful *scienter*, though motive is not, or should not be, itself an element of liability.[303] It has become equally plain that even with knowledge of wrongdoing one may stand by, absent the existence of some affirmative duty or other special circumstances, and allow another to be defrauded by one's own client or customer.[304] Also, decisions, particularly those concerning terrorism, have held

that "causation" usually requires only that the harm caused by the principal actor was a reasonably foreseeable result of the aider-abettor's assistance.[305]

The increase in well-considered decisional law is timely. Based on apparent trends in the number of reported decisions, aiding-abetting cases are increasing in frequency. From its beginning as an obscure civil doctrine concerned with "isolated acts of adolescents in rural society"[306] to a modern liability doctrine flexible enough to provide remedies for bank fraud, greenmail, and terrorism, civil liability for aiding and abetting has evolved because of the special need for recourse where the wrongdoer had the assistance of important allies.

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1. 511 U.S. 164, 191 (1994).

2. *See* Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571, 583 (E.D.N.Y. 2005).

3. *See generally Central Bank*, 511 U.S. at 182–83.

4. *See* Book 47, Title 2, Corpus Juris Civilis ("Anyone who assists a thief is not always himself a manifest thief; hence it happens that he who furnished assistance is liable for non-manifest theft, and he who was caught in the act is guilty of manifest theft of the same property.").

5. 1 M. Hale, PLEAS OF THE CROWN 615 (1736), *cited in* United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).

6. 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 231 (1883), *cited in* Standefer v. United States, 447 U.S. 10, 15 (1980).

7. *Standefer*, 447 U.S. at 15.

8. Act of Mar. 4, 1909, ch. 321, § 332, 35 Stat. 1088, 1152.

9. Nye & Nissen v. United States, 336 U.S. 613 (1949). As such, under the 1909 Act, and under the law of most states, an accessory to a crime is subject to criminal liability even if the principal actor is acquitted. *Standefer*, 447 U.S. at 20.

10. *See* Sir John Heydon's Case, 11 Co. Rep. 5, 77 Eng. Rep. 1150 (1613).

11. *See generally* Bird v. Lynn, 10 B.Mon. 422, 49 Ky. 422 (Ky. Ct. App. 1850) (Defendant who said that a child, who "sauced" defendant, deserved to be whipped, may be subject to liability for a whipping the child received but only if defendant incited such act desiring that it occur); Brown v. Perkins, 83 Mass. 89 (1861) (defendant subject to liability if it were to be found he encouraged crowd of women armed with hatchets to ransack liquor store).

12. Halberstam v. Welch, 705 F.2d 472, 489 (D.C. Cir. 1983); Doe I v. Unocal Corp., 395 F.3d 932, 947–53 (9th Cir. 2002), *opinion vacated and rehearing in banc granted*, 395 F.3d 978, 979 (9th Cir. 2003) ("[I]t is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court."), *on rehearing en banc*, 403 F.3d 708 (9th Cir. 2005) (district court opinion vacated and case dismissed with prejudice pur- suant to parties' stipulation).

13. Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1133 (C.D. Cal. 2003).

14. Beck v. Prupis, 529 U.S. 494, 500 (2000).

15. Pittman by Pittman v. Grayson, 149 F.3d 111, 122–23 (2d Cir. 1998), *cert. denied*, 528 U.S. 818 (1999).

16. *Neilson*, 290 F. Supp. 2d at 1133.

17. *See Halbertstam*, 705 F.2d at 478 (citing examples).

18. *Neilson*, 290 F. Supp. 2d at 1133.

19. *Id.* at 1134 (citing *Halbertstam*, 705 F.2d at 478).

20. *Id.* at 1133.

21. *Halbertstam*, 705 F.2d at 477.

22. Applied Equipment Corp. v. Litton Saudi Arabia Ltd., 869 P.2d 454, 459–60 (Cal. 1994).

23. *See* Wells Fargo Bank v. Ariz. Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund, 38 P.3d 12, 23 (Ariz. 2002); Saunders v. Superior Court, 33 Cal. Rptr. 2d 438, 446 (Cal. Ct. App. 1994); Holmes v. Young, 885 P.2d 305, 308 (Col. Ct. App. 1994); Feen v. Benefit Plan Adm'rs, Inc., No. 406726, 2000 WL 1398898, *10–11 (Conn. Super. Ct. Sept. 7, 2000); Pipher v. Burr, No. C.A. 96C-08-011, 1998 WL 110135, *9–10 (Del. Super. Ct. Jan. 29, 1998); Halberstam v. Welch, 705 F.2d 472, 477–78 (D.C. Cir. 1983); Tew v. Chase Manhattan Bank, N.A., 728 F. Supp. 1551, 1568–69 (S.D. Fla. 1990), *amended on reconsideration*, 741 F. Supp. 220 (S.D. Fla. 1990); Sanke v. Bechina, 576 N.E.2d 1212, 1218–19 (Ill. Ct. App. 1991), *appeal denied*, 584 N.E.2d 140 (Ill. 1991); Heick v. Bacon, 561 N.W.2d 45, 51–52 (Iowa 1997); Emig v. Am. Tobacco Co., Inc., 184 F.R.D. 379, 386 (D. Kan. 1998); Hart Enterp., Inc. v. Cheshire Sanitation, Inc., No. 98-416-P-H, 1999 WL 33117189, *3 (D. Me. Feb. 22, 1999); Alleco, Inc. v. Harry & Jeanette Weinberg Found., Inc., 665 A.2d 1038, 1049 (Md.1995); Kurker v. Hill, 689 N.E.2d 833, 837 (Mass. Ct. App. 1998); Echelon Homes, LLC v. Carter Lumber Co., 683 N.W.2d 171 (Mich. Ct. App. 2004), *rev'd in part*, 694 N.W.2d 544 (Mich. 2005); Casino Res. Corp. v. Harrah's Entm't, Inc., No. 98-2058ADM/AJB,

2002 WL 480968, *13 (D. Minn. March 22, 2002); Joseph v. Marriott Int'l, Inc., 967 S.W.2d 624, 629–30 (Mo. Ct. App. 1998); Invest Almaz v. Temple-Inland Forest Prods. Corp., 243 F.3d 57, 82-82 (1st Cir. 2001) (New Hampshire); Judson v. People's Bank and Trust Co., 134 A.2d 761 (N.J. 1957); GCM, Inc. v. Ky. Cent. Life Ins. Co., 947 P.2d 143, 147–48 (N.M. 1997); Koken v. Steinberg, 825 A.2d 723 (Pa. Commw. Ct. 2003); Hirsch v. Penn. Textile Corp., Inc. (*In re* Centennial Textiles, Inc.), 227 B.R. 606, 611 (Bankr. S.D.N.Y. 1993); Dow Chemical Co. v. Mahlum, 970 P.2d 98, 112–13 (Nev. 1998); Mc- Millan v. Mahoney, 393 S.E.2d 298, 300 (N.C. Ct. App. 1990); Aetna Cas. & Sur. Co. v. Leahey Constr. Co., Inc., 219 F.3d 519, 533–34 (6th Cir. 2000) (Ohio); Granewich v. Harding, 985 P.2d 788, 792–93 (Or. 1999); Groff v. Maurice, C.A. No. 86-3808, 1993 WL 853801, *3 (R.I. Super. April 7, 1993); Future Group, II v. Nationsbank, 478 S.E.2d 45, 50 (S.C. 1996); Lawyers Title Ins. Corp. v. United Am. Bank of Memphis, 21 F. Supp. 2d 785, 795 (W.D. Tenn. 1998); Estate of Hough *ex rel.* LeMaster v. Estate of Hough *ex rel.* Berkeley County Sheriff, 519 S.E.2d 640, 648–49 (W. Va.1999); Winslow v. Brown, 371 N.W.2d 417, 421–23 (Wis. Ct. App.1985), *rev. denied*, 378 N.W.2d 291 (Wis. 1985). Courts in three other states have held that the viability of such claims remains an open question. *See* Unity House, Inc. v. N. Pac. Invests., Inc., 918 F. Supp. 1384, 1390 (D. Haw. 1996); Daniel Boone Area Sch. Dist. v. Lehman Bros., Inc., 187 F. Supp. 2d 400, 413 (W.D. Pa. 2002); Shinn v. Allen, 984 S.W.2d 308, 310 (Tex. Ct. App. 1998).

24. *Central Bank*, 511 U.S. at 181–82. *See* Premier/Georgia Mgt. Co., Inc. v. Realty Mgt. Corp., 613 S.E.2d 112 (Ga. Ct. App. 2005); FDIC v. S. Prawer & Co., 829 F. Supp. 453, 457 (D. Me. 1993) (in Maine, "[i]t is clear . . . that aiding and abetting liability did not exist under the common law, but was entirely a creature of statute"); Meadow Ltd. Partnership v. Heritage Sav. & Loan Assn., 639 F. Supp. 643, 653 (E.D. Va. 1986) (aiding and abetting tort "not expressly recognized by the state courts of the Commonwealth of Virginia); Sloane v. Fauque, 784 P.2d 895, 896 (Mont. 1989) (aiding and abetting tort liability is issue of "first impression" in Montana).

25. *See generally* Ronald M. Lepinskas, *Civil Aiding and Abetting Liability in Illinois*, 87 ILL. B.J. 532, 533 (Oct. 1999).

26. 511 U.S. 164 (1994).

27. *Id.* at 182.

28. *See infra* discussion in § V(I).

29. To implement § 10(b) of the Securities Exchange Act of 1934, ch. 404, Title I § 10, 48 Stat. 881, 891 (codified at 15 U.S.C. § 78j), in 1942, the SEC adopted Rule 10b-5, which provides, in relevant part:

It shall be unlawful for any person, directly or indirectly . . . (a) [t]o employ any device, scheme or artifice to defraud; (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (2005).

30. 17 C.F.R. § 240.10b-5(b) (2005). *See* Robert S. DeLeon, *The Fault Line Between Primary Liability and Aiding and Abetting Claims Under Rule 10b-5*, 22 J. CORP. LAW 723, 729 (1997).

31. 17 C.F.R. § 240.10b-5(a), (c) (2005). “The first and third subsections of Rule 10b-5, which use the verbs ‘employ’ and ‘engage,’ have narrower meanings than the second subsection.” DeLeon, *supra* note 30, at 728. For statements or omissions, “make” can mean to “create,” to “bring into being,” to “compose” or “write,” to “give rise to,” or to “cause to be announced.” *Id* at 729. “Accordingly, to the extent a defendant can be said to ‘employ’ a fraudulent device or ‘engage’ in fraudulent conduct in the preparation of issuer disclosures, that conduct arguably is captured by Rule 10b-5’s prohibition on ‘making’ misstatements or omissions.” *Id.*

32. *See, e.g.*, Cleary v. Perfectune, Inc., 700 F.2d 774, 777 (1st Cir. 1983); IIT v. Cornfeld, 619 F.2d 909, 922 (2d Cir. 1980); Monsen v. Consol. Dressed Beef Co., 579 F.2d 793, 799–800

(3d Cir.), *cert. denied*, 439 U.S. 930 (1978); Schatz v. Rosenberg, 943 F.2d 485, 496–497 (4th Cir. 1991), *cert. denied*, 503 U.S. 936 (1992); Fine v. American Solar King Corp., 919 F.2d 290, 300 (5th Cir. 1990), *cert. dismissed*, 502 U.S. 976 (1991); Moore v. Fenex, Inc., 809 F.2d 297, 303 (6th Cir.), *cert. denied sub nom.* Moore v. Frost, 483 U.S. 1006 (1987); Schlifke v. Seafirst Corp., 866 F.2d 935, 947 (7th Cir. 1989); K & S P'ship v. Cont'l Bank, N.A., 952 F.2d 971, 977 (8th Cir. 1991), *cert. denied*, 505 U.S. 1205 (1992); Levine v. Diamanthuset, Inc., 950 F.2d 1478, 1483 (9th Cir. 1991); Farlow v. Peat, Marwick, Mitchell & Co., 956 F.2d 982, 986 (10th Cir. 1992); Schneberger v. Wheeler, 859 F.2d 1477, 1480 (11th Cir. 1988), *cert. denied*, 490 U.S. 1091 (1989). The only court not to have squarely recognized aiding and abetting in private section 10(b) actions prior to *Central Bank* did so in an action brought by the SEC, *see Dirks v. SEC*, 681 F.2d 824, 844 (D.C. Cir. 1982), *rev'd on other grounds*, 463 U.S. 646 (1983), though it suggested that such a claim was available in private actions. *See* Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 35–36 (D.C. Cir. 1987).

33. Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673, 680 (N.D. Ind. 1966).

34. Zatkin v. Primuth, 551 F. Supp. 39 (S.D. Cal. 1982).

35. Resnick v. Touche Ross & Co., 470 F. Supp. 1020 (S.D.N.Y. 1979).

36. Sandusky Land, Ltd. v. Uniplan Groups, Inc., 400 F. Supp. 440 (N.D. Ohio 1975).

37. *In re* Caesar's Palace Sec. Litig., 360 F. Supp. 366 (S.D.N.Y. 1973).

38. *Brennan*, 259 F. Supp. at 680–81 (corporation alleged to have assisted improper actions of brokerage firm).

39. 15 U.S.C. § 78j (2000).

40. *Central Bank*, 511 U.S. at 182. Instead, Congress had taken a "statute-by-statute approach to civil liability for aiding and abetting." *Id.* In statutes such as the Commodity Exchange Act, 7 U.S.C. § 25(a)(1)(2000), the National Bank Act, 12 U.S.C. §504(h) (2000), and the Packers and Stockyards Act, ch. 64, § 202, 42 Stat. 161 (1921) (codified at 7 U.S.C. § 192(g)), Congress had been "quite explicit" in imposing aiding and abetting liability. In contrast, in connection with Securities Exchange Act violations, it had neither in 1934 nor since employed express language to impose such liability. *Central* Bank, 511 U.S. at 182–83.

41. *Id.* at 186 ("[O]ur observations on the acquiescence doctrine indicate its limitations as an expression of congressional intent.") (quoting Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 650 (1990)).

42. *Id.* at 188–9 (citation omitted).

43. *Id.* at 189. The Court observed that on the other hand there were policy arguments in favor of aiding and abetting liability. "The point here, however, is that it is far from clear that Congress in 1934 would have decided that the statutory purposes would be furthered by the imposition of private aider and abettor liability." *Id.* at 189–90.

44. *Id.* at 189–90.

45. While commentators, supported by abundant evidence, have identified *Central Bank* as one factor leading to the encouragement, during the 1990s, of misconduct by accountants and other players in the financial industry, e.g., Scott Siamas, *Primary Securities Fraud Liability for Secondary Actors: Revisiting Central Bank of Denver in the Wake of Enron, Worldcom, and Arthur Andersen*, 37 U.C. DAVIS L. REV. 895, 897 (2004), critics of *Central Bank* have had less success exposing any genuine error in the reasoning of that opinion. Most commonly, commentators emphasize the Court's over- ruling of nearly thirty years of lower court precedent dating back to 1966, e.g., Tauine, M. Zeitzer, *In Central Bank's Wake, RICO's Voice Resonates: Are Civil Aiding and Abetting Claims Still Tenable?*, 29 COLUM. J.L.&

SOC. PROBS. 551, 557 (1996), a point that may only beg the question why courts deciding cases closer in time to enactment of the 1933 and 1934 acts seemingly did not perceive any cause of action for aiding and abetting.

46. *Central Bank*, 511 U.S. at 189–90.

47. *Id.* at 191.

48. 235 F. Supp. 2d 549 (S.D. Tex 2002).

49. *Id.* at 584–85.

50. Siamas, *supra* note 45, at 902.

51. Daniel L. Brockett, *Line Between Primary and Secondary Liability Still Blurred in Securities Cases*, 50 FED. LAW. 29, 32 (Aug. 2003).

52. *See* Shapiro v. Cantor, 123 F.3d 717, 721 n.2 (2d Cir. 1997). Until recently, however, most courts adhered to a "bright line" test pursuant to which a party cannot be liable unless it directly made the offending statement to the public. Wright v. Ernst & Young, 152 F.3d 169, 175 (2d Cir. 1998), *cert. denied*, 525 U.S. 1104 (1999); *In re* MTC Elec. Tech. Shareholders Litig., 898 F. Supp. 974 (E.D.N.Y. 1995), *vacated in part on reconsideration*, 993 F. Supp. 160 (E.D.N.Y. 1997).

53. DeLeon, *supra* note 30, at 732 (citing Knapp v. Ernst Whinney, 90 F.3d 1431, 1440–41 (9th Cir. 1996); O'Neil v. Appel, 897 F. Supp. 995, 1000 (W.D. Mich. 1995)).

54. DeLeon, *supra* note 30, at 730 (citing SEC v. Fehn, 97 F.3d 1276, 1293 (9th Cir. 1996)).

55. *Id.*

56. *Wright*, 152 F.3d at 175; *In re* Rent-Way Sec. Litig., 209 F. Supp. 2d 493 (W.D. Pa. 2002); Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1205–06 (11th Cir. 2001).

57. *Wright*, 152 F.3d at 175 (quoting Anixter v. Home-stake Prod. Co., 77 F.3d 1215, 1225 (10th Cir. 1996)).

58. *In re* Ikon Office Solutions, Inc., 277 F.3d 658, 667 (3d Cir. 2002) (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976)).

59. *Id.* at 667 (quoting SEC v. Infinity Group Co., 212 F.3d 180, 192 (3d Cir. 2000)).

60. *In re* Software Toolworks, Inc. Sec. Litig., 50 F.3d 615 (9th Cir. 1994), *cert. denied sub nom*, 516 U.S. 907 (1995).

61. *Id.*

62. 235 F. Supp. 2d at 587–88.

63. *Id.* at 590–92.

64. *See* Brockett, *supra* note 51, at 32.

65. A "liberal notice pleading" standard should govern aiding-abetting claims, pursuant to FED. R. CIV. P. 8(a). *See* Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571, 579–80 (E.D.N.Y. 2005).

66. Unicredito Italiano SpA v. J.P. Morgan Chase Bank, 288 F. Supp. 2d 485, 502 (S.D.N.Y. 2003) (quoting Gabriel Capital, L.P. v. Nat. West Fin., Inc., 94 F. Supp. 2d 491, 511 (S.D.N.Y. 2000) (financial institutions subject to liability for assisting Enron Ponzi scheme)).

67. Fiol v. Doellstedt, 58 Cal. Rptr. 2d 308, 312 (Cal. Ct. App. 1996); Saunders v. Superior Ct., 33 Cal. Rptr. 2d 438, 446 (Cal. Ct. App. 1994). *See also* RESTATEMENT (SECOND) OF TORTS § 876(c) (1979).

68. *Neilson*, 290 F. Supp. 2d at 1135.

69. FED. R. CIV. P. 9(b).

70. *See* Conley v. Gibson, 355 U.S. 41, 47 (1957), *cited in* Picinich v. United Parcel Service, 321 F. Supp. 2d 485, 517 (N.D.N.Y. 2004); *see also Linde*, 384 F. Supp. 2d at 579–80.

71. *See* PROSSER & KEETON ON LAW OF TORTS §§ 322–24 (1984).

72. *See generally In re* Parmalat Sec. Litig., 383 F. Supp. 2d 587 (S.D.N.Y. 2005); *cf. Unocal*, 395 F.3d 932 (human rights violations by foreign government). In *Unocal*, the court applied a slightly modified version of the RESTATEMENT test, given the international nature of the controversy. 395 F.3d at 951.

73. *In re* AHT Corp., 292 B.R. 734, 746 (S.D.N.Y. 2003), *aff 'd*, 123 Fed. Appx. 17 (2d Cir. 2005).

74. *Id.*

75. *Id.* at 737–38.

76. *Id.*

77. *Id.* at 746.

78. Nathan Isaac Combs, *Civil Aiding and Abetting Liability*, 58 VAND. L. REV. 241, 291 (2005).

79. Woodward v. Metro Bank of Dallas, 522 F.2d 84, 95 (5th Cir. 1975), *cited in* Combs, *supra* note 78, at 291.

80. Ronald A. Brown, Jr., Note, *Claims of Aiding and Abetting a Director's Breach of Fiduciary Duty— Does Everybody Who Deals with a Delaware Director Owe Fiduciary Duties to that Director's Shareholders?*, 15 DEL. J. CORP. L. 943, 956 (1990) (citing numerous unpublished cases).

81. *See generally* Javitch v. First Montauk Financial Corp., 279 F. Supp. 2d 931 (N.D. Ohio 2003).

82. 290 F. Supp. 2d 1101 (C.D. Cal. 2003).

83. *Id.* at 1120–21 (citing Aetna Cas. & Sur. Co. v. Leahey Constr. Co., 219 F.3d 519, 536 (6th Cir. 2000)); Camp v. Dema, 948 F.2d 455, 459 (8th Cir. 1991); Woods v. Barnett Banks of Ft. Lau- derdale, 765 F.2d 1004, 1010 (11th Cir. 1985); Woodward v. Metro Bank of Dallas, 522 F.2d 84, 87 (5th Cir 1975)).

84. *Neilson*, 290 F. Supp. 2d at 1122 n.70 ("While it may ultimately prove to be the case that the Banks did not know Slatkin had investors other than the account holders, the court must, for purposes of this motion, accept as true the allegations to the contrary contained in plaintiffs' third amended complaint.").

85. Rolf v. Blyth, Eastman & Dillon & Co., 570 F.2d 38 (2d Cir. 1978), *amended*, 1978 WL 4098 (2d Cir. May 22, 1978), *cert. denied*, 439 U.S. 1039 (1978).

86. 219 F.3d 519 (6th Cir. 2000).

87. *Leahey*, 219 F.3d at 535–36.

88. *Leahey*, 219 F.3d at 536 (citing Camp. v. Dema, 948 F.2d 455, 459 (8th Cir. 1991) and Wood- ward v. Metro Bank of Dallas, 522 F.2d 84, 97 (5th Cir. 1975) ("[I]f the method or transaction is atypical . . . , it may be possible to infer the knowledge necessary for aiding and abetting liability.")); *see also Neilson*, 290 F. Supp. 2d at 1120.

89. No. 99-CV-5938 (JG), 2000 WL 1375265, at *9 (E.D.N.Y. Sept. 20, 2000).

90. *Id.* at *9.

91. Ins. Co. of N. Am. v. Dealy, 911 F.2d 1096, 1100 (5th Cir. 1990) (an investor in a limited partnership could not escape liability under an indemnification it owed to the surety, holding that the mere contention that the surety may have known the general partner had engaged in prior securities law violations was insufficient to establish that the surety was an aider or abettor).

92. 46 F.3d 258 (3d Cir. 1995).

93. *Id.* at 270.

94. *Id.* at 271.

95. *Leahey*, 219 F.3d at 532–34.

96. Dubai Islamic Bank v. Citibank N.A., 256 F. Supp.2d 158, 166 (S.D.N.Y. 2003).

97. Sterling Nat'l. Bank v. Ernst & Young, LLP, No. 121916/2003, 2005 WL 3076341, at *7 (N.Y. Sup. Ct., Jan. 7, 2005) (unpublished disposition).

98. Primavera Familienstiftung v. Askin, 173 F.R.D. 115, 127 (S.D.N.Y. 1997).

99. *See generally* Feela v. Israel, 727 F.2d 151, 158 (7th Cir. 1984).

100. Resolution Trust Corp. v. Farmer, 823 F. Supp. 302 (E.D. Pa. 1993).

101. *Id.* at 309.

102. *See* City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 80 Cal. Rptr. 2d 329 (Calif. Ct. App. 1998).

103. *Neilson*, 290 F. Supp. 2d. at 1127.

104. *Id.* at 1128.

105. "[T]he very nature of fraud tends to be sneaky, behind-the-scenes, and indirect . . ." Robert A. Prentice, *Locating that "Indistinct" and "Virtually Nonexistent" Line Between Primary and Secondary Liability under Section 10(b)*, 75 N.C. L. REV. 691, 732 (1997).

106. *See* Tew v. Chase Manhattan Bank, N.A., 728 F. Supp. 1551 (S.D. Fla. 1990), *amended on reconsideration*, 741 F. Supp. 220 (S.D. Fla. 1990); *see also* Levine v. Diamanthusel, Inc., 950 F.2d

1478, 1483 (9th Cir.1991); FDIC v. First Interstate Bank of Des Moines, N.A., 885 F.2d 423, 432–33 (8th Cir. 1989).

107. *See generally* Javitch v. First Montauk Fin. Corp. 279 F. Supp. 2d 931, 941 (N.D. Ohio 2003).

108. *See In re* WorldCom, Inc. Sec. Litig., 382 F. Supp. 2d 549, 560 (S.D.N.Y. 2005); Primavera Familienstifung v. Askin, 130 F. Supp. 2d 450, 507 n. 64 (S.D.N.Y. 2001), *amended on reconsideration, in part*, 137 F. Supp. 2d 438 (S.D.N.Y. 2001).

109. *See, e.g., In re* Citigroup, Inc. Sec. Litig., 330 F. Supp. 2d 367 (S.D.N.Y. 2004).

110. Commodity Futures Trading Corp. v. Sidoti, 178 F.3d 1132, 1136 (11th Cir. 1999) (aiding and abetting occurred though decision to hire sales personnel exclusively from various companies with histories of sales practice fraud coupled with absence of training or attempt to restrain practices).

111. Abbott v. Equity Group, Inc., 2 F.3d 613, 623 n.33 & 626 (5th Cir. 1993), *cert. denied sub nom*, 510 U.S. 1177 (1994).

112. *See generally In re* IKON Office Solutions, Inc., 277 F.3d 658, 673 (3d Cir. 2002).

113. 334 F.3d 1183 (10th Cir. 2003).

114. *Id.* at 1188–91.

115. *Id.* at 1195.

116. Am. Auto. Accessories, Inc. v. Fishman, 175 F.3d 534, 543 (7th Cir. 1999).

117. Ins. Co. of N. Am. v. Dealy, 911 F.2d 1096, 1100 (5th Cir. 1990).

118. RESTATEMENT (SECOND) OF THE LAW OF TORTS § 876 cmt. d (1979).

119. *E.g.*, Halberstam v. Welch, 705 F.2d 472, 484 (D.C. Cir. 1983).

120. Ryan v. Hunton & Williams, No. 99-CV-5938 (JG), 2000 WL 1375265, at *9 (E.D.N.Y. 2000); accord Abbott v. Equity Group, Inc., 2 F.3d 613, 623 n. 33 (5th Cir. 1993), cert. denied sub nom, 510 U.S. 1177 (1994) (merely acting as surety and bonding agent for fraud perpetrator was, "even if substantial . . . merely 'grist of the mill.' "). In connection with the Bennett Funding equipment-leasing Ponzi scheme, investors alleged that Sphere Drake Insurance Co. had aided and abetted the perpe- trators. *See In re* Bennett Funding Group, Inc., 258 B.R. 67 (N.D.N.Y. 2000). There, it was alleged that a reinsurer assisted the perpetrators in deceiving investors by issuing reinsurance subject to a hidden indemnity owed to it by the insured. This arrangement allegedly created an illusion of financial protection that helped persuade investors to participate in Bennett's investment proposals.

121. *Leahey*, 219 F.3d at 537.

122. *Leahey*, 219 F.3d at 535; *Rolf*, 570 F.2d at 48; *see also Linde*, 384 F. Supp. 2d at 582 (financing provided to known terrorist subjects bank to aiding-abetting liability).

123. Diamond State Ins. Co. v. Worldwide Weather Trading LLC, No. 02 Civ. 2900 LMM GWG, 2002 WL 31819217, at *5 (S.D.N.Y. Dec. 16, 2002).

124. *Unicredito*, 288 F. Supp. 2d at 502.

125. *Cf. Rolf*, 570 F.2d at 48 ("[S]ubstantial assistance might include . . . executing transactions or investing proceeds, or perhaps . . . financing transactions.").

126. Crowe v. Henry, 43 F.3d 198, 206 (5th Cir. 1995).

127. 403 F.3d 43 (2d Cir. 2005).

128. *Id.* at 50–51.

129. *Id.* at 51.

130. *Id.* at 52 (quoting Kaufman v. Cohen, 307 A.D. 2d 113, 126, 750 N.Y.S. 2d 157 (N.Y. App. Div. 2003)).

131. *Id.* at 52–53.

132. *Id.*

133. *Id.*

134. *Sharp Int'l*, 403 F.3d at 50.

135. *Id.* at 50 (quoting BLACK'S LAW DICTIONARY at 790 (8th ed. 2004)).

136. Liberty Sav. Bank, FSB v. Webb Crane Serv., Inc., No. Civ. A03CV2218REBCBS, 2005 WL 1799300, at *5 (D. Colo. July 27, 2005).

137. Bonilla v. Trebol Motors Corp., Civil No. 92-1795 (JP), 1997 WL 178844, at *51 (D.P.R. Mar. 27, 1997), *rev'd in part, vacated in part*, 150 F.3d 88 (1st Cir. 1998).

138. *Halberstam*, 705 F.2d at 484.

139. *In re* Temporamandibular Joint (TMJ) Implants Products Liability Litig., 113 F.3d 1484, 1496 (8th Cir. 1997).

140. *See, e.g.*, Corsair Cap. Partners, L.P. v. Wedbush Morgan Sec., Inc., 24 Fed. Appx. 795, 797 (9th Cir. 2001).

141. 288 F. Supp. 2d at 502.

142. *See* S. REP. NO. 108-421, at 133–34 (December 7, 2004) (discussing role of special purpose entities in Enron fraud).

143. *See* Calcutti v. SBU, Inc., 273 F. Supp. 2d 488 (S.D.N.Y. 2003).

144. Austin v. Bradley, Barry & Tarlow, PC, 836 F. Supp. 36, 40–41 (D. Mass. 1993).

145. Kaufman v. Cohen, 760 N.Y.S. 2d 157, 170 (N.Y. App. Div. 2003); *Dubai Islamic Bank*, 256 F. Supp. 2d at 166; *accord Ryan*, 2000 WL 1375265, at *10.

146. *Leahey*, 219 F.3d at 536.

147. *Abbott*, 2 F.3d at 622.

148. *Id.*

149. *See* McDaniel v. Bear Stearns & Co., 196 F. Supp. 2d 343, 352 (S.D.N.Y. 2002); Martin v. Pepsi-Cola Bottling Co., 639 F. Supp. 931, 934–35 (D. Md. 1986).

150. Combs, *supra* note 78, at 268 (citing Josephine Willis, Note, *To (B) or Not to (B); The Future of Aider and Abettor Liability in South Carolina*, 51 S.C.L. REV. 1045, 1056 (2000)). Combs criticizes the premise of the "sliding scale" test and calls into question its logic. *Id.*

151. *McDaniel*, 196 F. Supp. 2d at 352.

152. Combs, *supra* note 78, at 267.

153. *Id.* (citing *In re* Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig., 113 F.3d 1484, 1495 (8th Cir. 1997)).

154. *E.g., In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.*, 113 F.3d at 1495; Witzman v. Lehrman, Lehrman & Flom, 601 N.W. 2d 179, 188 (Minn. 1999).

155. Cromer Finance Ltd. v. Berger, 137 F. Supp. 2d 452, 470 (S.D. NY 2001).

156. *Id.* (quoting Kolbeck v. LIT Am., Inc., 939 F. Supp. 240, 249 (S.D.N.Y. 1996)).

157. *Neilson*, 290 F. Supp. 2d at 1135; Metge v. Bachler, 762 F. 2d 621, 624 (8th Cir. 1985), *cert. denied sub nom*, 474 U.S. 1057, 1072 (1986) (must be a " 'substantial causal connection between the culpable conduct of the alleged aider and

abettor and the harm to the plaintiff[,]' . . . or a showing that 'the encouragement or assistance is a substantial factor in causing the resulting tort' ").

158. *See* Primavera Familienstifung v. Askin, 130 F. Supp. 2d 450, 503 n.54 (S.D.N.Y. 2001), amended on reconsideration, in part, 137 F. Supp 2d 438 (S.D.N.Y. 2001).

159. *See generally*, Bondi v. Citigroup, Inc., No. BER-L-10902-04, 2005 WL 975856, at *18 (N.J. Super. Law Div. 2005).

160. *E.g.* AmeriFirst Bank v. Bomar, 757 F. Supp. 1365, 1380 (S.D. Fla. 1991).

161. Casey v. U.S. Bank Assoc., 26 Cal. Rptr. 3d 401, 405-06 (Cal. Ct. App. 2005); Holmes v. Young, 885 P.2d 305, 308 (Colo. Ct. App. 1994); Malpiede v. Townson, 780 A.2d 1075, 1097 (Del. 2001); Nerbonne, N.V. v. Lake Bryant Int'l Properties, 689 So.2d 322, 325 (Fla. Dist. Ct. App. 1997); Thornwood, Inc. v. Jenner & Block, 799 N.E.2d 756, 768–69 (Ill. App. Ct. 2003), *appeal denied*, 807 N.E.2d 982 (Ill. 2004); Kuhlman Elec. Corp. v. Chappell, Nos. 2003-CA-001232-MR, 2004-CA-000633-MR, 2005 WL 3243498, at *8 (Ky. Ct. App. Dec. 2, 2005.); Cacciola v. Nellhaus, 733 N.E.2d 133, 139 (Mass. Ct. App. 2000); Carson Fischer, PLC v. Standard Fed. Bank, Nos. 248125, 248167, 2005 WL 292343, at *6 (Mich. Ct. App. Feb. 8, 2005), *rev'd in part*, 2006 WL 1303137 (Mich. May 12, 2006); Witzman v. Lehrman, Lehrman & Flom, 601 N.W.2d 179, 186–87 (Minn. 1999); Branch Banking & Trust Co. v. Lighthouse Fin., No. 04 CVS 1523, 2005 WL 1995410, at *7 (N.C. Super. Ct. July 13, 2005); Bondi v. Citigroup, Inc., No. BER-L-10902-04, 2005 WL 975856, at *18 (N.J. Super. Ct. Law Div. Feb. 28, 2005); Fate v. Owens, 27 P.3d 990, 997–98 (N.M. Ct. App. 2001), *cert. denied*, 27 P.3d 476 (N.M. 2001); Shearson Lehman Bros. Inc. v. Bagley, 614 N.Y.S.2d 5 (N.Y. App. Div. 1994); Future Group II v. Nationsbank, 478 S.E.2d 45, 50 (S.C. 1996); Chem-Age Indus., Inc. v. Glover, 652 N.W.2d 756, 773–76 (S.D. 2002); Toles v. Toles, 113 S.W.3d 899, 917 (Tex. Ct. App. 2003); Halifax Corp. v. Wachovia Bank, 604 S.E.2d 403, 412–14 (Va. 2004); Lenticular Europe, LLC *ex rel* Van Leeuwen v. Cunnally, 693 N.W.2d 302, 309 (Wis. Ct. App. 2005). Georgia does not recognize a claim for aiding and abetting a breach of fiduciary duty. Monroe v.

Board of Regents of the University System of Georgia, 602 SE 2d 219, 224 (Ga. Ct. App. 2004). There are conflicting decisions concerning Pennsylvania law. *Compare* Adena, Inc. v. Cohn, 162 F. Supp. 2d 351, 357 (E.D. Pa. 2001) (predicting Pennsylvania would recognize a claim for aiding-abetting breach of fiduciary duty) *with* Daniel Boone Area School Dist. v. Lehman Bros., Inc., 187 F. Supp. 2d 400, 413 (W.D. Pa. 2002) (concluding adoption of RESTATEMENT (SECOND) OF TORTS § 6876 would "expand" Pennsylvania law).

162. Metro. Trans. Auth. v. Contini, No. 04-CV-0104 DGTJMA, 2005 WL 1565524, at *7 (E.D.N.Y. July 6, 2005).

163. *In Re* Lee Memory Gardens, Inc., 333 BR 76, 81 (Bankr. M.D.N.C. 2005) (citing BLACK'S LAW DICTIONARY at 888 (8th Ed. Rev. 2004)).

164. Invest Almaz v. Temple Inland Forest Prods. Corp., 243 F.3d 57, 83 (1st Cir. 2001).

165. *Id.*

166. 806 N.Y.S.2d 339 (N.Y. Sup. Ct. 2005).

167. The NYSE reportedly settled with the group, agreeing to undertake a fresh opinion on the deal. In December 2005, the merger was approved by a vote of NYSE members. See (http://www/)http://www.secinfo.com/drDX9.z1b2.htm (http://www.secinfo.com/drDX9.z1b2.htm) (last visited, May 23, 2006).

168. *Higgins*, 806 N.Y.S.2d at 344. The discussion here relates to the allegations in plaintiff 's complaint.

169. *Id.* at 345.

170. *Id.* at 365.

171. *Id.* at 364.

172. *Id.* at 365.

173. *Id.*

174. Hashimoto v. Clark, 264 B.R. 585 (D. Ariz. 2001).

175. *Id.* at 591–92.

176. *Id.* at 592.

177. *Id.*

178. *Id.* at 599.

179. Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270 (2d Cir. 1992).

180. L.I. Headstart Child Dev. Servs., Inc. v. Frank, 165 F. Supp. 2d 367, 371 (E.D.N.Y. 2001).

181. Fraternity Fund Ltd. v. Beacon Hill Asset Mgt. LLC, 376 F. Supp. 2d 385 (S.D. N.Y. 2005).

182. *Id.* at 412–13.

183. *Tew*, 728 F. Supp. at 1568; Andreo v. Friedlander, Gaines, Cohen, Rosenthal & Rosenberg, 660 F. Supp. 1362, 1367 (D. Conn. 1987); *cf.* OSRecovery, Inc. v. One Groupe, Int'l, Inc., 354 F. Supp. 2d 357, 378 (S.D.N.Y. 2005).

184. Gen. Cable Corp. v. Highlander, No. 1:05-CV-00083, 2005 WL 2875380, at *4 (S.D. Ohio Nov. 2, 2005).

185. Sompo Japan Ins., Inc. v. Deloitte & Touche, LLP, No. 03 CVS 5547, 2005 WL 1412741, *4 (N.C. Sup. Ct. June 10, 2005). In *Sompo*, the court concluded that knowledge of the underlying fraud (plus assistance) was prerequisite to aiding-abetting fraud and because, in the court's view, these elements duplicated a fraud claim, aider-abettor liability was superfluous. The court made a fairly obvious error. Fraud arises from the making of a misrepresentation or the commission of some other deception, whereas aiding-abetting may involve a degree of assistance that in no way (by itself) deceives anyone.

186. Anstine v. Alexander, 128 P.3d 249, 265 (Colo. Ct. App. 2005), *cert. granted*, 2006 WL 390192 (Colo. 2006).

187. *Cacciola*, 733 N.E. 2d at 139–40. There, however, counsel had an independent duty to the partnership. *Id.* at 137.

188. Rabobank Nederland v. Nat'l. Westminster Bank, Nos. A104604, A104632, A106145, 2005 WL 1840108, at *9–11 (Cal. Ct. App. Aug. 4, 2005).

189. *E.g.*, Reynolds v. Schrock, 107 P.3d 52 (Or. Ct. App. 2005), *appeal allowed*, 124 P.3d 1248 (Or. 2005); Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C., 331 F.3d 406, 412, 414 (3d Cir. 2003); Thornwood, Inc. v. Jenner & Block, 799 N.E. 2d 756 (Ill. Ct. App. 2003), *appeal denied*, 807 N.E.2d 982 (Ill. 2004); Cacciola v. Nellhaus, 733 N.E.2d 133, 136, 139–40 (Mass. Ct. App. 2000); Kurker v. Hill, 689 N.E.2d 833, 837 (Mass. Ct. App. 1998); Noel v. Hall, No. Civ. 99-649-AS, 2000 WL 251709, at *7 (D. Or. Jan. 18, 2000), *on reconsideration*, 2000 WL 1364227 (D. Or. Sept. 15, 2000). A trustee's attorney may be liable for a trustee's breach of the trust if the attorney "knew *or should have known* that he was assisting the trustee to commit a breach of trust." AUSTIN WAKERMAN SCOTT AND WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS, § 326.4 (4th ed. 1989) (emphasis added).

190. *See supra* § IV(B)(2).

191. *Reynolds*, 107 P.3d at 60.

192. *Id.* at 59.

193. *Id.*

194. Morganroth & Morganroth v. Norris, McLaughlin & Marcus, 331 F.3d 406 (3d Cir. 2003).

195. *Id.* at 409.

196. *Id.*

197. *Morganroth*, 331 F.3d at 408–09.

198. *Id.* at 409.

199. *Id.* at 415 n.3 (quoting RESTATEMENT (SECOND) OF TORTS § 876(b) (1964)).

200. No. C-03-05474 RMW, 2005 WL 2989298 (N.D. Cal. Nov. 7, 2005).

201. *Id.* at *1.

202. *Id.*

203. *Id.* at *3–4.

204. *Id.* at *4.

205. *Id.* at *5 (citing Casey v. U.S. Bank Nat'l Ass'n, 127 Cal. App. 4th 1138, 1151 (2005)).

206. Allied Irish Banks, PLC v. Bank of America, N.A., No. 03 CV 3748 (DAB), 2006 WL 278138 (S.D.N.Y. Feb. 2, 2006).

207. Complaint, Allied Irish Banks, PLC v. Bank of America, N.A., No. 03 CV 3748, at ¶ 71 (on file with *The Business Lawyer*).

208. *Id.* at ¶ 40.

209. *Id.* at ¶¶ 73–80.

210. *Id.* at ¶ 87.

211. Allied Irish Banks, PLC v. Bank of America, N.A., No. 03 CV 3748 (DAB), 2006 WL 278138, at *11–12 (S.D.N.Y. Feb. 2, 2006).

212. *Id.* at *11.

213. *Id.* at *12.

214. 383 F. Supp. 2d 587 (S.D.N.Y. 2005). The discussion here relates to the allegations in the complaint.

215. *Id.* at 600.

216. *Id.* at 590.

217. *Id.*

218. *Id.* at 591.

219. *Id.*

220. *Id.*

221. *Id.* at 592.

222. *Id.*

223. *Id.* at 599.

224. Nos. A104604, A10A632, A106145, 2005 WL 1840108 (Cal. Ct. App. Aug. 4, 2005).

225. *Id.* at *2–4.

226. *Id.* at *8.

227. *Id.* at *8–9.

228. *Id.* at *9 (citing Casey v. U.S. Bank Ass'n, 127 Cal. App. 4th 1138, 1145 (2005)).

229. 290 F. Supp. 2d 1101 (C.D. Cal. 2003).

230. *Id.* at 1108.

231. *Id.* at 1110.

232. *Id.*

233. *Id.* at 1119 (quoting FED.R.CIV.P. 9(b)).

234. *Id.*

235. *Id.* at 1120.

236. *See generally* Tanvir Alam, *Fraudulent Advisors Exploit Confusion in the Bankruptcy Code: How In Pari Delicto Has Been Perverted to Prevent Recovery for Innocent Creditors*, 77 AM. BANKR. L.J. 305, 306–08 (2003).

237. *In re* M. Silverman Laces, Inc., No. 01 Civ. 6209 (DC), 2002 WL 31412465, at *7 (S.D.N.Y. Oct. 24, 2002) (trustee could not sue bank for allegedly acting in concert with the debtor's share- holders and principals to defraud the creditors, because the debtor itself could not file such a suit).

238. Sender v. Kidder, Peabody & Co., Inc., 952 P.2d 779, 782 (Colo. Ct. App. 1997).

239. Adelphia Communications Corp., 330 B.R. 364, 385 (Bankr. S.D.N.Y. 2005).

240. *See* 11 U.S.C § 544(a)(1) (2000).

241. *Id.*

242. 128 P.3d 249 (Colo. Ct. App. 2005), *cert. granted*, 2006 WL 390192 (Colo. 2006).

243. 128 P.3d at 254; *but see* Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., 267 F.3d 340 (3d Cir. 2001) (creditors' committee had standing to pursue "deepening insolvency claim on behalf of debtor corporations" but defense of *in pari delicto* barred claim).

244. *See* Alam, *supra* note 236, at 306–08. Section 541 provides that all legal and equitable causes of action belong to the estate, 11 U.S.C. §541(a)(1), which, some courts hold, situates all trustees' actions in the shoes of the bankrupt company. Alam, *supra* note 236, at 306–08.

245. *See* Brown, *supra* note 80, at 963.

246. 547 A.2d 963 (Del. Ch. 1986).

247. *Id.* at 968.

248. *Id.*

249. Farley v. Henson, 11 F.3d 827 (8th Cir. 1993).

250. *Id.* at 836.

251. Bodell v. General Gas & Elec. Corp., 132 A. 442, 446 (Del. Ch. 1926), *aff'd*, 140 A. 264 (Del. 1927).

252. *See infra* § V(G).

253. 533 A.2d 585, 589–90 (Del. Ch. 1987), *aff'd*, 535 A.2d 1334 (Del. 1987).

254. 533 A.2d at 589.

255. *Id.* at 608–09.

256. *Id.*

257. *In re* LTV Steel Co., Inc., 333 B.R. 397, 403–04 (N.D. Ohio 2005).

258. *Id.* at 414 (citing First Pennsylvania Bank, N.A. v. Monsen, 439 U.S. 930 (1978)).

259. *See supra* § V(B).

260. 383 F. Supp.2d 587 (S.D.N.Y. 2005).

261. *Id.* at 599.

262. Marcia L. Walter, *Aiding and Abetting the Breach of Fiduciary Duty: Will the Greenmailer Be Held Liable?*, 39 CASE W. RES. L. REV. 1271, 1272 (1989).

263. Heckman v. Ahmanson, 214 Cal. Rptr. 177 (Cal. Ct. App. 1985).

264. *Id.* at 180–81.

265. *Id.* at 183.

266. *Id.* at 187.

267. 490 A.2d 1050 (Del. Ch. 1984), *aff 'd*, 575 A.2d 1131 (Del. 1990). The description of events is based on plaintiffs' allegations.

268. *Id.* at 1052–53.

269. *Id.* at 1058 (citing Weinberger v. United Financial Corp. of Cal., No. 5915, 1983 WL 20290 (Del. Ch. Oct. 13, 1983)).

270. *Id.*

271. Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 656 (3d Cir. 1998).

272. *Id.*

273. *See, e.g.*, Jubelirer v. MasterCard Int'l, 68 F. Supp. 2d 1049, 1054 (W.D. Wis. 1999); Touhy v. Northern Trust Bank, No. 98 C 6302, 1999 WL 342700, at *3–4 (N.D. Ill. May 17,1999) ("Thus, even though this court must construe RICO liberally . . . this court cannot ignore the clear indication by Congress in failing to reference 18 U.S.C. § 2 in the language of § 1962(c) as well."); Sorrano v. New York Life Ins. Co., No. 96 C 7882, 1999 WL 104403, *7–8 (N.D. Ill. Feb. 24, 1999); *In re* Lake States Commodities, Inc., 936 F. Supp. 1461, 1475 (N.D. Ill. 1996); Pennsylvania Ass'n of Edwards Heirs v. Rightenour, 235 F.3d 839, 843–44 (3d Cir. 2000); Ling v. Deutsche Bank, No. 04 CV 4566 (HB), 2005 WL 1244689 (S.D.N.Y. May 26, 2005); Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison, 955 F. Supp. 248, 256 (S.D.N.Y. 1997) ("Following the reasoning in *Central Bank*, this Court declines to create a private right of action for aiding and abetting a RICO violation. Nowhere in the text of Section 1962 is there any indication that Congress intended to impose aiding and abetting liability for a violation of the RICO statute."); Dep't of Econ. Dev. v. Arthur Andersen & Co., 924 F. Supp. 449, 475–77 (S.D.N.Y.

1996); Wuliger v. Liberty Bank, N.A., No. 3:02 CV 1378, 2004 WL 3377416 (N.D. Ohio Mar. 4, 2004); *In re* MasterCard Int'l, Inc., 132 F. Supp. 2d 468, 494–95 (E.D. La. 2001), *aff'd*, 313 F.3d 257 (5th Cir. 2002).

274. *See* Bondi v. Citigroup, Inc., No. BER-L-10902-04, 2005 WL 975856, *24 (N.J. Super. Law Div. Feb. 28, 2005), *leave to appeal granted*, 878 A.2d 850 (N.J. 2005).

275. *See* 15 U.S.C. § 78bb(a) (2000); 15 U.S.C. § 77p (2000).

276. State v. Superior Court of Maricopa County, 599 P.2d 777, 784 (Ariz. 1979), *overruled in part*, State v. Gunnison, 618 P.2d 604 (Ariz 1980); *In re* LTV Steel Co., Inc., 333 B.R. 397, 414–15 (Bankr. N.D. Ohio 2005).

277. *Adderly*, 168 S.W. 3d at 839 (citing TEX. REV. CIV. STAT. ANN. ART. 581-33A(2) (Vernon Supp. 2004–05)).

278. *Id.* (citing TEX. REV. CIV. STAT. ANN. ART. 581-33F(1)(2) (Vernon Supp. 2004–05)).

279. *Id.* at 843.

280. 18 U.S.C.A. § 2333(a) (2000).

281. Boim v. Quranic Lit. Institute and Holy Land Foundation for Relief and Development, 291 F.3d 1000, 1027 (7th Cir. 2002).

282. *Id.* at 1020.

283. 18 U.S.C.A. § 2339B (West 2000 & Supp. 2006).

284. 291 F.3d at 1019, 1021.

285. *Id.* at 1021.

286. *Id.* at 1023.

287. 349 F. Supp. 2d 765 (S.D.N.Y. 2005), *on reconsideration*, 292 F. Supp. 2d 539 (S.D.N.Y. 2005).

288. 349 F. Supp. 2d at 832 (citing *Boim*, 291 F.3d at 1023).

289. *Id.* at 833.

290. *In re:* Terrorist Attacks on September 11, 2001, 392 F. Supp. 2d 539, 572 (S.D.N.Y. 2005). These claims met the statutory standard for "material" support of terrorism.

291. *Id.* at 567. Cozen O'Connor represents certain insurers in connection with this litigation.

292. Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571, 582 (E.D.N.Y. 2005).

293. *Id.* at 583 (citing *Boim*, 291 F.3d at 1018–21). The court, citing *Boim*, further observed that in *Central Bank* the court was addressing an implied right of action (private securities fraud suits), not an express right of action such as that provided by the Anti-Terrorism Act. *Id.*

294. *Id.* at 583 (citing *Boim*, 291 F.3d at 1019).

295. *Id.* at 584.

296. *Id.* at 587 n. 11.

297. *Id.* at 585.

298. See, e.g., Judge Traynor's influential concurring opinion in *Escola v. Coca-Cola Bottling Co. of* Fresno, 150 P.2d 436, 441–42 (Cal. 1944).

299. *See supra* § IIIB.

300. *See More Heat on Hedge Funds: Regulators are Probing Trades by Managers With Inside Access*, BUSINESS WEEK ONLINE (Feb. 6, 2006), available at www.BusinessWeek.com (http://www.BusinessWeek.com) (last visited, Feb. 13, 2006).

301. *See supra* § IV(A)(2).

302. *See Leahey*, 219 F.3d at 536 and discussion *supra* in text accompanying notes 86–88.

303. *See Farmer*, 823 F. Supp. 302 and discussion *supra* in text accompanying notes 98–104.

304. *See Sharp Int'l*, 403 F.3d at 52–53.

305. *See Linde*, 384 F. Supp. 2d at 585.

306. *See Halberstam*, 705 F.2d at 489.

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