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Keep Suing All the Lawyers: Recent Developments in Claims Against Lawyers for Aiding & Abetting a Client's Breach of Fiduciary Duty

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ARTICLE

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Keep Suing All the Lawyers[1]: Recent Developments in Claims Against Lawyers for Aiding & Abetting a Client's Breach of Fiduciary Duty

Abstract. Lawyers have increasingly become subject to liability under various legal theories, ranging from traditional legal malpractice or negligence liability claims to various third-party actions. Most recently, state and federal courts across the country have recognized attorney liability for aiding and abetting a client's breach of fiduciary duty. This Article will address the current status of the cause of action for a lawyer's aiding and abetting her client's breach of fiduciary duty, explain the commonalities and distinguish nuances as outlined by particular states, examine recent decisions by federal courts that have recognized the cause of action, and culminate in its conclusion by predicting how the cause of action will continue to develop in the long run.

Author. Professor of Law, South Texas College of Law Houston. This Article, along with all of my academic work, is dedicated to the precious memory of my father, Dr. Vladimir Z. Parton, who will always remain my inspiration. Special thanks go to my husband Dan, my children Alexandra and Michael, and to my mother for their endless love and support. In addition, I would like to express gratitude to my very gifted and dedicated research assistants, Teresa Lakho and Maggie Lu, for their assistance in preparation of this Article.

1. The original quote states, "[T]he first thing we do, let's kill all the lawyers." WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH, act 4, sc. 2. The author changed the quote to fit the topic of this article.

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I. INTRODUCTION

It has become the new norm for lawyers to face a high level of exposure under various legal theories, ranging from traditional legal malpractice or negligence liability claims to various third-party actions.[2] Specifically, a claim alleging the aiding and abetting of a client's breach of fiduciary duty has become rather common and accepted by many states in the last few years.[3] As will be discussed later, for example, when an attorney misappropriates funds by substantially assisting in preparing deeds with the knowledge that doing so will be to the detriment of others, a court will likely find a valid claim of aiding and abetting a client's breach of fiduciary duty.[4] Prior to 2008,[5] only twelve states recognized aiding and abetting a client's breach of fiduciary duty as a valid cause of action against attorneys,[6] and no reviewing court rejected its validity at that time.[7] Since 2008, eleven

2. *See* United Int'l Holdings, Inc. v. Wharf (Holdings), Ltd., 210 F.3d 1207, 1227 (10th Cir. 2000) (citing Mehaffy, Rider, Windholz & Wilson v. Cent. Bank Denver, 892 P.2d 230, 236 (Colo. 1995)) (explaining "[a] negligent misrepresentation claim is based not on a contractual duty but on an independent common law duty . . . to exercise reasonable care or competence in obtaining or communicating information on which other parties may justifiably rely"); *In re* Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig., 113 F.3d 1484, 1492 (8th Cir. 1997) ("One who undertakes . . . to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking . . . ." (quoting RESTATEMENT (SECOND) OF TORTS § 324A (1965))); *see also* First Nat'l Bank v. Lane & Douglass, 961 F. Supp. 153, 154 (N.D. Tex. 1997) (involving a claim of legal malpractice), *rev'd on other grounds*, 142 F.3d 802 (5th Cir. 1998). *But see First Nat'l Bank*, 961 F. Supp. at 156 ("In fact, several courts have held that an attorney owes no duty to a third party even when the attorney renders an opinion upon which he knows the third party will rely." (first citing FDIC v. Howse, 802 F. Supp. 1554, 1563–64 (S.D. Tex. 1992); then citing Marshall v. Quinn-L Equities, Inc., 704 F. Supp. 1384, 1494–95 (N.D. Tex. 1988); and then citing Banc One Capital Partners Corp. v. Kneipper, 67 F.3d 1187, 1198–99 (5th Cir. 1995))).

3. *See* Katerina P. Lewinbuk, *Let's Sue All the Lawyers: The Rise of Claims Against Lawyers for Aiding and Abetting a Client's Breach of Fiduciary Duty*, 40 ARIZ. ST. L.J. 135, 146 (2008) (discussing the growing trend in state courts to examine claims against lawyers for aiding and abetting a client's breach of fiduciary duty).

4. PNC Multifamily Capital Institutional Fund XXVI, L.P. v. Bluff City Cmty. Dev. Corp., 387 S.W.3d 525, 552 (Tenn. Ct. App. 2012).

5. *See* Lewinbuk, *supra* note 3, at 146 (focusing on developments in aiding and abetting a client's breach of fiduciary duty until 2008).

6. *See id.* (listing several jurisdictions recognizing aiding and abetting claims, including California, the District of Columbia, Illinois, Massachusetts, New Mexico, New York, Ohio, Oregon, Pennsylvania, South Dakota, and Texas).

7. *Id.* (reporting not one state has specifically rejected the validity of an aiding and abetting theory).

additional states have recognized this cause of action,[8] while a handful of recent decisions have questioned the theory or rejected it altogether.[9]

Moreover, several federal courts now allow a complaint for aiding and abetting a client's breach of fiduciary duty against an attorney, even though, in applicable states, state courts have not yet ruled upon the issue.[10] To

8. The eleven states are Arizona, Delaware, Georgia, Hawaii, Kentucky, Michigan, Minnesota, New Jersey, South Carolina, Tennessee, and Wisconsin. *See* Rivet v. State Farm Mut. Auto. Ins. Co., 316 F. App'x 440, 445–46 (6th Cir. 2009) (recognizing a cause of action for breach of fiduciary duty under Michigan law); *see also In re* Senior Cottages of Am., L.L.C., 482 F.3d 997, 1001 (8th Cir. 2007) (noting Minnesota has recognized that aiding and abetting a breach of fiduciary duty is a cause of action); Wiatt v. Winston & Strawn, L.L.P., 838 F. Supp. 2d 296, 307 (D.N.J. 2012) (acknowledging aiding and abetting a breach of fiduciary duty is a cause of action in New Jersey); Zazzali v. Hirschler Fleischer, P.C., 482 B.R. 495, 519 (D. Del. 2012) (articulating the elements of a breach of fiduciary duty under Delaware law); Chalpin v. Snyder, 207 P.3d 666, 677 (Ariz. Ct. App. 2008) (finding aiding and abetting is a valid cause of action against lawyers in Arizona); Kahn v. Britt, 765 S.E.2d 446, 454 (Ga. Ct. App. 2014) (reiterating the elements of a breach of fiduciary duty claim); Kahala Royal Corp. v. Goodsill, Anderson, Quinn & Stifel, L.L.P., 151 P.3d 732, 751–52, 756 (Haw. 2007) (recognizing a cause of action for aiding and abetting a breach of fiduciary duty, but refusing to grant relief because the elements for the cause of action were not satisfied); Goodman v. Goldberg & Simpson, P.S.C., 323 S.W.3d 740, 747 (Ky. Ct. App. 2009) (finding the duty a lawyer owes a client is higher than that of a typical agent-principal relationship (quoting Daugherty v. Runner, 581 S.W.2d 12, 16 (Ky. Ct. App. 1978))); Gordon v. Busbee, 723 S.E.2d 822, 830 (S.C. Ct. App. 2012) (reciting the elements of a cause of action for aiding and abetting a breach of fiduciary duty in South Carolina); *PNC Multifamily Capital Institutional Fund XXVI, L.P.*, 387 S.W.3d at 558 (finding a cause of action for aiding and abetting a breach of fiduciary duty is a "valid complaint" in Tennessee); Tensfeldt v. Haberman, 768 N.W.2d 641, 660 (Wis. 2009) (acknowledging aiding and abetting a breach of fiduciary duty is a valid claim in Wisconsin).

9. *See* Bottom v. Bailey, 767 S.E.2d 883, 889 (N.C. Ct. App. 2014) (concluding "no such cause of action [for aiding and abetting a client's breach of fiduciary duty] exists in North Carolina"); Veer Right Mgmt. Grp., Inc. v. Czarnowski Display Serv., Inc., No. 14 CVS 1038, 2015 WL 504977, at *3 (N.C. Feb. 4, 2015) ("Whether North Carolina recognizes a claim for aiding and abetting a breach of fiduciary duty remains an open question." (citing Battleground Veterinary Hosp., P.C. v. McGeough, No. 05 CVS 18918, 2007 WL 3071618, at *7 (N.C. Super. Ct. Oct. 19, 2007))); *see also* DeVries Dairy, L.L.C. v. White Eagle Coop. Ass'n, 974 N.E.2d 1194, 1195 (Ohio 2012) (concluding Ohio does not recognize tort claims against persons acting in concert); Highland Capital Mgmt., L.P. v. Looper Reed & McGraw, P.C., No. 05-15-00055-CV, 2016 WL 164528, at *5 (Tex. App.—Dallas 2016, no pet.) (holding "the trial court correctly dismissed [an aiding and abetting] claim" where an attorney did not engage in an independent tortious act or misrepresentation outside of the scope of the representation of his client).

10. *See* Invest Almaz v. Temple-Inland Forest Prods. Corp., 243 F.3d 57, 82–83 (1st Cir. 2001) (noting "[i]t is undisputed that . . . the New Hampshire Supreme Court has yet to expressly consider whether to adopt the tort of aiding and abetting a breach of fiduciary duty[,]" but concluding the Court "would recognize the tort, and would adopt a version incorporating . . . the Restatement (Second) of Torts"); *see also* Abrams v. McGuireWoods, L.L.P., 518 B.R. 491, 499–500 (N.D. Ind. 2014) (stating Indiana has not yet recognized a claim for aiding and abetting a breach of fiduciary duty, but concluding it would not be a departure from their current causes of action for aiding and abetting); Design Pallets,

support their position, some federal courts reasoned that state courts in applicable jurisdictions would likely consider aiding and abetting in a client's breach of fiduciary duty as a valid cause of action if called upon to decide.[11]

Part II of this Article will address the current status of a lawyer's aiding and abetting her client's breach of fiduciary duty as a cause of action ("aiding and abetting" cases), beginning with the prima facie case and its required elements. The Article will also explain commonalities and distinguish nuances as outlined by particular states, analyze how these distinctions may affect an accused attorney, and evaluate final outcomes in specific cases. It will then discuss the current state of aiding and abetting cases nationwide, focusing on recent opinions and how attorney liability has been addressed and resolved by different courts. Subsequently, the Article will examine recent decisions by federal courts recognizing the cause of action, while noting some instances where the courts held the cause of action valid despite lacking such determinations by the applicable state courts. That part of the Article will also discuss the factors that may have influenced the courts in their final determinations in aiding and abetting cases. The Article will culminate in its conclusion section by predicting how the cause of action will continue to develop in the long run and anticipate ways in which it will have an impact on the legal profession as a whole. It will also offer strategies for minimizing a lawyer's exposure in light of the current status quo of aiding and abetting causes of action nationwide.

Inc. v. GrayRobinson, P.A., 515 F. Supp. 2d 1246, 1258 (M.D. Fla. 2007) (refusing to dismiss an aiding and abetting claim because the plaintiff had "sufficiently alleged a fiduciary duty"); Reis v. Barley, Snyder, Senft & Cohen, L.L.C., 484 F. Supp. 2d 337, 351–52 (E.D. Pa. 2007) (recognizing state courts' refusal to expand Pennsylvania law for aiding and abetting due to lack of precedent from the Supreme Court of Pennsylvania, but still finding a valid claim against the attorney), *rev'd on other grounds*, 426 F. App'x 79 (3d Cir. 2011).

11. *See Reis*, 484 F. Supp. 2d at 350 (citing Pierce v. Rossetta Corp., No. 88-5873, 1992 WL 165817, at *20–23 (E.D. Pa. June 12, 1992)) (listing the three elements for a valid aiding and abetting breach of a fiduciary duty claim under Pennsylvania as outlined in *Pierce* to provide guidance to state courts); *see also Abrams*, 518 B.R. at 499–500 (discussing current causes of action for breach of fiduciary duty, aiding and abetting liability for torts, their relation to each other, and why a court would likely adopt aiding and abetting a breach of fiduciary duty as a valid cause of action). *But see Invest Almaz*, 243 F.3d at 82–84 (providing state courts with direction by explaining the "knowledge" element in the adopted RESTATEMENT (SECOND) OF TORTS § 876B despite the Supreme Court of New Hampshire not recognizing such claims).

II. CURRENT STATE OF THE CAUSE OF ACTION NATIONWIDE (2016)

Prior to 2008, twelve jurisdictions recognized a cause of action against a lawyer in aiding and abetting cases: California, Colorado, District of Columbia, Illinois, Massachusetts, New Mexico, New York, Ohio, Oregon, Pennsylvania, South Dakota, and Texas.[12] Since then, eleven states have acknowledged the cause of action's validity: Arizona,[13] Delaware,[14] Georgia,[15] Hawaii,[16] Kentucky,[17] Michigan,[18] Minnesota,[19] New Jersey,[20] South Carolina,[21] Tennessee,[22] and Wisconsin.[23] Accordingly, at least twenty-three states have adopted the theory to date.

In those states, the courts disposed of aiding and abetting cases in one of the four following ways. First, only two courts found an attorney liable under the alleged aiding and abetting theory.[24] Second, some courts acknowledged the accused attorney "may" or "could" be found liable under the aiding and abetting theory without actually arriving at a specific

12. *See* Lewinbuk, *supra* note 3, at 150 (enumerating jurisdictions recognizing aiding and abetting claims).

13. *See, e.g.*, *Chalpin*, 207 P.3d at 677 (finding aiding and abetting a breach of fiduciary duty a valid cause of action against lawyers in Arizona).

14. *See, e.g.*, Zazzali v. Hirschler Fleischer, P.C., 482 B.R. 495, 519 (D. Del. 2012) (articulating the elements of a cause of action for aiding and abetting a breach of fiduciary duty under Delaware law).

15. *See, e.g.*, Kahn v. Britt, 765 S.E.2d 446, 454 (Ga. Ct. App. 2014) (reciting the elements to prove a breach of fiduciary duty).

16. *See, e.g.*, Kahala Royal Corp. v. Goodsill, Anderson, Quinn & Stifel, L.L.P., 151 P.3d 732, 756 (Haw. 2007) (addressing and aiding and abetting claim, but refusing to find an attorney liable because the elements of such claim were not satisfied).

17. *See, e.g.*, Goodman v. Goldberg & Simpson, P.S.C., 323 S.W.3d 740, 747 (Ky. Ct. App. 2009) (addressing an aiding and abetting claim against the attorney, but finding the claim must fail because there was no fiduciary duty).

18. *See, e.g.*, Rivet v. State Farm Mut. Auto. Ins. Co., 316 F. App'x 440, 445–46 (6th Cir. 2009) (acknowledging the cause of action for a breach of fiduciary duty exists in Michigan).

19. *See, e.g.*, *In re* Senior Cottages of Am., L.L.C., 482 F.3d 997, 1001–02 (8th Cir. 2007) (noting Minnesota has recognized that aiding and abetting a breach of fiduciary duty is a valid cause of action).

20. *See, e.g.*, Wiatt v. Winston & Strawn, L.L.P., 838 F. Supp. 2d 296, 307 (D.N.J. 2012) (finding aiding and abetting a breach of fiduciary duty is a valid cause of action in New Jersey).

21. *See, e.g.*, Gordon v. Busbee, 723 S.E.2d 822, 830 (S.C. Ct. App. 2012) (articulating the elements needed to prove breach of a fiduciary duty in South Carolina).

22. *See, e.g.*, PNC Multifamily Capital Institutional Fund XXVI, L.P. v. Bluff City Cmty. Dev. Corp., 387 S.W.3d 525, 556–58 (Tenn. Ct. App. 2012) (stating a valid complaint exists when pleading a cause of action for aiding and abetting the breach of a fiduciary duty).

23. *See, e.g.*, Tensfeldt v. Haberman, 768 N.W.2d 641, 660 (Wis. 2009) (recognizing aiding and abetting a breach of fiduciary duty is a valid claim in Wisconsin).

24. *See infra* Part II.B.1.

determination on the merits.[25] Third, other courts acknowledged the validity of an aiding and abetting theory, pointing to facts supporting the possibility of attorney liability while reversing summary judgment in the attorney's favor, and remanding for further proceedings.[26] Finally, a number of complaints were dismissed because the allegations did not support a finding of aiding and abetting liability on behalf of the accused attorney.[27]

A. *Elements Generally*

Section 876 of the Restatement (Second) of Torts provides guidance for courts to develop a standard for establishing liability for aiding and abetting cases:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.[28]

State courts frequently apply this standard to resolve allegations in aiding and abetting cases.[29] In such decisions, most discussions centered on the "knowledge and substantial assistance" aspect of the test.[30] While most states agree that in order to establish the prima facie case for aiding and abetting, the accused attorney must act outside the scope of representation,[31] state courts vary on whether constructive or actual

25. *See infra* Part II.B.2.

26. *See infra* Part II.B.3.

27. *See infra* Part II.B.4.

28. RESTATEMENT (SECOND) OF TORTS § 876 (AM. LAW. INST. 1979).

29. *See, e.g.*, Chalpin v. Snyder, 207 P.3d 666, 677 (Ariz. Ct. App. 2008) (discussing the validity of an aiding and abetting claim in Arizona, and noting the elements of such claim are embodied in the Restatement (Second) of Torts (quoting Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund, 38 P.3d 12, 23 (Ariz. 2002) (en banc))).

30. *See, e.g.*, Abrams v. McGuireWoods, L.L.P., 518 B.R. 491, 500 (N.D. Ind. 2014) (highlighting the importance of the Restatement's knowledge and substantial assistance elements).

31. *See* Reynolds v. Schrock, 142 P.3d 1062, 1062–63 (Or. 2006) (en banc) (holding an attorney is subject to joint liability for a client's breach of fiduciary duty only when the plaintiff shows the attorney was acting outside the scope of the attorney-client relationship); *see also* Kahala Royal Corp. v. Goodsill, Anderson, Quinn & Stifel, L.L.P., 151 P.3d 732, 752 (Haw. 2007) (concluding the plaintiff failed to allege that the attorneys "possessed a desire to harm . . . independent of the desire to protect their clients"); Leyba v. Whitley, 907 P.2d 172, 182 (N.M. 1995) (holding an attorney's duty to a

knowledge is required.[32] Moreover, of the courts that have outlined whether actual or constructive knowledge is required, some have dismissed cases due to a plaintiff's inability to present sufficient facts to meet the applicable standard.[33]

B. *New State Courts Recognizing the Cause of Action Since 2008*

As mentioned earlier, it is highly unlikely a court will find an attorney liable for aiding and abetting a client's wrongdoing, and, even less likely, for a client's breach of fiduciary duty.[34] Two case examples—the *Tensfeldt v. Haberman*[35] case decided by the Supreme Court of Wisconsin, and the *PNC Multifamily Capital Institutional Fund XXVI, L.P. v. Bluff City Community Development Corp.*[36] case decided by the Court of Appeals of Tennessee—are worthy of close examination.

1. Courts That Found Attorneys Liable for Aiding & Abetting

In *Tensfeldt*, the court held an attorney liable for aiding and abetting his client's unlawful act when the attorney created a will that violated the client's divorce judgment.[37] Although the attorney was aware of the stipulation in

statutory third-party beneficiary of an action is subject to an adversarial exception). In New Mexico, the Supreme Court explained that the adversarial exception negates the attorney's duty when "the third party knows or should know that he or she cannot rely on the attorney to act for his or her benefit." *Id.* Likewise, in *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398 (Tex. App.—Houston [1st Dist.] 2005, pet. denied), the court found no cause of action for aiding and abetting a breach of fiduciary duty absent allegations of a tortious act or misrepresentation committed outside the attorney's representation. *Id.* at 407.

32. *See* Zazzali v. Hirschler Fleischer, P.C., 482 B.R. 495, 519 (D. Del. 2012) (finding "routine" practice for a corporation is not enough to show "how and why" an attorney's position as corporate attorney was used to aid and abet his client, and, that instead, "knowing participation" must be proven); *see also* Chambers v. Weinstein, No. 157781/2013, 2014 WL 4276910, at *3–4 (N.Y. Sup. Ct. Aug. 22, 2014), *aff'd in part*, 135 A.D.3d 450 (App. Div. 2016) (mem.) (requiring actual knowledge, and finding that e-mails are sufficient to prove or dispute knowledge); Bullmore v. Ernst & Young Cayman Island, 846 N.Y.S.2d 145, 148 (App. Div. 2007) (stating actual knowledge is required); Kaufman v. Cohen, 760 N.Y.S.2d 157, 169 (App. Div. 2003) (finding actual knowledge is required, and that constructive knowledge is legally insufficient to impose liability under an aiding and abetting theory); Chem-Age Indus., Inc. v. Glover, 652 N.W.2d 756, 776–78 (S.D. 2002) (holding constructive knowledge may suffice).

33. *See, e.g.*, *Chambers*, 2014 WL 4276910, at *13 (dismissing an aiding and abetting claim when the plaintiff failed to meet the proper knowledge standard).

34. *See supra* Part II.A.

35. Tensfeldt v. Haberman, 768 N.W.2d 641 (Wis. 2009).

36. PNC Multifamily Capital Institutional Fund XXVI, L.P. v. Bluff City Cmty. Dev. Corp., 387 S.W.3d 525 (Tenn. Ct. App. 2012).

37. *Tensfeldt*, 768 N.W.2d at 644.

the divorce judgment that required his client to leave two-thirds of his net estate to his three children, the attorney intentionally drafted an estate plan where a majority of the estate fell into an *inter vivos* trust.[38] When the client died and the children did not receive two-thirds of the client's estate per the divorce judgment, the children filed suit and alleged an aiding and abetting theory—among other torts—against the attorney.[39] The attorney raised a defense of immunity and privilege and argued he was protected from third-party suits because he merely acted in his role as the client's attorney.[40] The court agreed that this defense is typically valid; however, the court held that the attorney was not entitled to qualified immunity because he was informed of the stipulations and was given a copy of the divorce judgment by both the client and the client's previous attorney. Nevertheless, the attorney drafted documents attempting to give his client "something he was not legally entitled to—an estate plan that violated a court judgment."[41]

The *Tensfeldt* court explained that, although an attorney is typically immune from third-party liability "based on the attorney's failure to perform a duty owed to a client[,] . . . [his] failure to perform an obligation to a client is entirely distinct from conduct that assists the client committing an unlawful act to the detriment of a third party."[42] More specifically, such "immunity does not apply when the attorney acts in a malicious, fraudulent or tortious manner which frustrates the administration of justice or to obtain something for the client to which the client is not justly entitled."[43] Therefore, the attorney was found liable for aiding and abetting his client's unlawful act when he knowingly drafted an estate plan that was in violation of a court order; and, as such, was not entitled to the privilege of immunity.[44]

Similarly, in *PNC Multifamily Capital Institutional Fund XXVI, L.P.*, the court reversed the lower court's dismissal of an aiding and abetting claim, and found liability for breach of a fiduciary duty owed to several

38. *Id.* at 645–46.
39. *Id.* at 647.
40. *Id.* at 656.
41. *Id.* at 645–46, 656–58.
42. *Id.* at 656.
43. *Id.* at 657.
44. *Id.* at 658.

partnerships.[45] The court found a valid claim when the attorney prepared joint-use agreements and quitclaim deeds without prior written consent and with knowledge that doing so would violate previous agreements with other partnerships.[46] In that case, several entities entered into three partnership agreements to create and manage apartment complexes between 2004 and 2005.[47] Though represented by a firm, one attorney had the responsibility of preparing documents and opinion letters regarding the legitimacy and execution of the agreements.[48] Thus, when the partnerships discovered the general partner was misappropriating funds, they filed suit and subpoenaed documents from the attorney.[49] It was at that time they filed an amended complaint to include a lawsuit against the attorney and firm for aiding and abetting the breach of fiduciary duty.[50]

Although the court found the complaint "too vague to satisfy the requirements" and not adequate to demonstrate the "substantial" assistance requirement for a valid aiding and abetting cause of action, it recognized a need to view the allegation in full context.[51] In doing so, two specific instances demonstrating the attorney's substantial assistance and knowledge were found.[52] Therefore, the court allowed the tort of aiding and abetting a breach of fiduciary duty, and reversed the lower court's decision.[53]

2. Courts That Found an Attorney *Could* be Liable for Aiding & Abetting

In an attempt to clarify the existing uncertainty and lack of specific guidance on the issue, a few courts examined the allegations and found that the facts *may* or *could* support a determination that the attorney is subject to liability under the aiding and abetting theory.[54] In many of those cases,

45. *See* PNC Multifamily Capital Institutional Fund XXVI, L.P. v. Bluff City Cmty. Dev. Corp., 387 S.W.3d 525, 558 (Tenn. Ct. App. 2012) (reversing the trial court's dismissal of a claim for aiding and abetting a breach of fiduciary duty).

46. *Id.* at 552–53.

47. *Id.* at 533.

48. *Id.* at 533–34.

49. *Id.* at 534–35.

50. *Id.* at 535.

51. *Id.* at 552.

52. *Id.*

53. *Id.* at 552, 558.

54. *See* Panoutsopoulos v. Chambliss, 68 Cal. Rptr. 3d 647, 654 (Ct. App. 2007) (finding an attorney may be liable for aiding and abetting a client to commit fraud); *see also* Alexander v. Anstine,

however, the courts did not reach a determination on the merits for varying reasons.[55]

The prima facie standard for an aiding and abetting claim varies slightly from state to state, even among those jurisdictions that clearly accept the theory as a whole. For example, one California court noted that "a defendant can be liable for aiding and abetting a breach of fiduciary duty in the absence of an independent duty owed to the plaintiff[,]"[56] while a Colorado court held in *Alexander v. Anstine*,[57] that "attorneys do not owe a fiduciary duty to non-clients, but . . . anyone who knowingly participates in the principal's breach may be held liable for aiding and abetting the breach."[58]

Similarly, a Georgia court granted a defendant's motion for summary judgment, reiterating that an aiding and abetting tort requires a plaintiff to establish the following elements:

> (1) *through improper action or wrongful conduct and without privilege*, the defendant acted to procure a breach of the primary wrongdoer's fiduciary duty to the

152 P.3d 497, 500 (Colo. 2007) (en banc) (discussing whether an attorney may be held liable for aiding and abetting a breach of fiduciary duty to a non-client).

55. *See Panoutsopoulos*, 68 Cal. Rptr. 3d at 654 (recognizing aiding and abetting as a potential claim, but not deciding the issue because the plaintiff could not prove the attorneys acted beyond their representative role); *see also Alexander*, 152 P.3d at 503 (addressing aiding and abetting, but not deciding the issue on the basis of standing).

56. *Am. Master Lease*, 171 Cal. Rptr. 3d at 567. An interesting comparison can be drawn to a distinct California case—*Panoutsopoulos v. Chambliss*—where a California Court of Appeals addressed a different legal theory alleged against a lawyer. *See* 68 Cal. Rptr. 3d at 654 (citations omitted) ("An attorney may be held liable for conspiring with his or her client to commit actual fraud or for the intentional infliction of emotional distress. But plaintiffs can state a viable claim only if the attorneys' actions went beyond their role as attorneys . . . ."). In that case, the plaintiff failed to state a viable claim. *Id.* at 654–55. Distinctively, however, California cases have long supported the notion that an attorney can be liable for participation in a breach. *See* Pierce v. Lyman, 3 Cal. Rptr. 2d 236, 243 (Ct. App. 1991) (finding an attorney liable for participating in the trustees' breach of fiduciary duty), *superseded by statute*, 1991 CAL. STAT. 4108, *as recognized in* Pavicich v. Santucci, 102 Cal. Rptr. 2d 125, 136 (Ct. App. 2000); *see also* King v. Johnston, 101 Cal. Rptr. 3d 269, 280–81 (Ct. App. 2009) (imposing liability on a third-party for her participation in a breach of trust); Wolf v. Mitchell, Silberberg & Knupp, 90 Cal. Rptr. 2d 792, 793 (Ct. App. 1999) (holding an attorney liable for his involvement in a breach of trust); City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 80 Cal. Rptr. 2d 329, 356 (Ct. App. 1998) (finding a financial advisor liable for its participation in a breach of trust).

57. Alexander v. Anstine, 152 P.3d 497 (Colo. 2007) (en banc).

58. *Id.* at 500. The Colorado court, however, did not address the merits of the case because the plaintiff lacked standing. *Id.* at 503. As a result, deciding whether the attorney was liable for a valid claim of aiding and abetting was left "for another day." *Id.*

> plaintiff; (2) with knowledge that the primary wrongdoer owed the plaintiff a fiduciary duty, the defendant acted purposely and with malice and the intent to injure; (3) the defendant's wrongful conduct procured a breach of the primary wrongdoer's fiduciary duty; and (4) the defendant's tortious conduct proximately caused damage to the plaintiff.[59]

In that case, the plaintiff was involved in a land dispute and was ordered to pay an awarded amount.[60] Prior to the judgment, the plaintiff transferred his personal assets into a trust and hired several attorneys to protect it.[61] When the plaintiff failed to pay the judgment, his creditors filed suit claiming he and his co-trustees fraudulently transferred assets to prevent collection of the judgment.[62] With the attorneys' advice, the trustee settled the dispute and sold a part of the assets, specifically a cattle ranch, without the plaintiff's approval.[63] As a result, the plaintiff filed suit against the attorneys for aiding and abetting, but summary judgment was awarded to the defense attorneys because all elements for aiding and abetting were not met.[64] The court emphasized that aiding and abetting cases required an attorney to act improperly and without privilege, which meant acting outside the scope of representation.[65] Thus, summary judgment was proper because the attorneys took an active role in all aspects of the litigation and were not strangers to the trust.[66] Much like the above-discussed decisions, the Georgia court was deprived of the opportunity to further address the details of the claim when it granted the summary judgment motion.[67]

59. Kahn v. Britt, 765 S.E.2d 446, 458 (Ga. Ct. App. 2014) (emphasis added) (quoting White v. Shamrock Bldg. Sys., Inc., 669 S.E.2d 168, 172 (Ga. Ct. App. 2008)). In *Kahn*, the defense was granted summary judgment on the aiding and abetting claim. *Id.* at 459.

60. *Id.* at 452.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 458–59.

65. *See id.* at 458 (concluding the elements for an aiding and abetting claim were not met).

66. *Id.* at 459.

67. *See id.* (upholding a grant of summary judgment).

3. Courts That Reversed and Remanded Summary Judgment Because Existing Facts Do or May Support the Finding of Liability for Aiding & Abetting

Many courts have recently,[68] and previously,[69] addressed aiding and abetting allegations and determined such allegations were possibly supported by proper grounds. As such, these courts reversed summary judgments issued by lower courts, and remanded for further determination.[70] Similar to others, these courts expressed their approval of the theory and attached liability, but did not engage in the factual determination and final case disposition.[71] For example, in one case, the court ruled that the allegations made were sufficient to satisfy the elements of an aiding and abetting cause of action.[72] Similarly, in a different case, the

68. *See* Stueve Bros. Farms, L.L.C. v. Berger Kahn, 166 Cal. Rptr. 3d 116, 133 (Ct. App. 2013) (reversing a lower court's decision to allow a cause of action for aiding and abetting, and explaining "a third[-]party who knowingly assists a trustee in breaching his or her fiduciary duty may, dependent upon the circumstances, be held liable along with that trustee for participating in the breach of trust"). In *American Master*, two theories of liability for aiding and abetting were recognized by the court. Am. Master Lease, L.L.C. v. Idanta Partners, 171 Cal. Rptr. 3d 548, 569 (Ct. App. 2014) ("Thus, there are two different theories pursuant to which a person may be liable for aiding and abetting a breach of fiduciary duty."). Under the first theory, the court required "that the aider and abettor owe a fiduciary duty to the victim and . . . that the aider and abettor provide substantial assistance to the person breaching his or her fiduciary duty." *Id.* Under the second theory, liability arises "when the aider and abettor commits an independent tort"—i.e., makes a "conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act." *Id.* at 568–69. The second theory was argued and proved by the plaintiffs in *American Master*, which established a valid claim. *Id.*

69. *See, e.g.*, Thornwood, Inc. v. Jenner & Block, 799 N.E.2d 756, 769 (Ill. App. Ct. 2003) (reversing the lower court's decision to dismiss a claim). Although Illinois courts have never found attorneys liable for aiding and abetting a client in the commission of an unlawful act, courts "have not prohibited such actions." *Id.* at 768. Illinois courts have established that, an attorney "may not use his license to practice law as a shield to protect himself from the consequences of his participation in an unlawful or illegal conspiracy." *Id.* (quoting Celano v. Frederick, 203 N.E.2d 774, 778 (Ill. App. Ct. 1964)). Moreover, "[t]he same policy should prevent an attorney from escaping liability for knowingly and substantially assisting a client in the commission of a tort." *Id.* The case was reversed and remanded to allow an aiding and abetting claim against the attorney. *Id.*

70. *See* Echelon Homes, L.L.C. v. Carter Lumber Co., No. 267233, 2006 WL 1867716, at *11 (Mich. Ct. App. July 6, 2006) (reversing and remanding for a jury trial to determine if aiding and abetting a breach of a fiduciary duty claim was viable); *Thornwood*, 799 N.E.2d at 769 (reversing and remanding for further inquiry).

71. *See, e.g.*, *Am. Master Lease*, 171 Cal. Rptr. 3d at 567 (noting attorneys may be liable for aiding and abetting a breach of a fiduciary duty only if the necessary elements are met, and remanding for further determination).

72. *See In re* Senior Cottages of Am., 482 F.3d 997, 1007 (8th Cir. 2007) (finding a tort was committed against the plaintiff, that the defendant's attorney knew the primary tortfeasor's conduct was in breach of a duty, and that the attorney substantially assisted in that breach).

court found grounds for a valid aiding and abetting claim based on the attorney's knowledge and participation in the breach that resulted in the plaintiff's damages.[73] In another case, the court explained that although it appeared all aiding and abetting elements were met, an additional showing of specific instances of "substantial" assistance were required—a statement alone was too vague to satisfy the element.[74]

As an example, the Court of Appeals of Arizona in *Chalpin v. Snyder*[75] reversed the lower court's decision that aiding and abetting liability was not valid and remanded for further consideration.[76] In that case, an insurer added the insured's president's daughter to a commercial vehicle liability policy.[77] When the daughter was in a car accident, the insurer affirmed that the accident would be covered and that the insurer would defend the litigation.[78] A law firm was hired by the insurer to attempt to disavow coverage when settlement attempts failed.[79] Although the attorney and law firm opined that the insurer could not deny coverage, they nevertheless suggested filing a declaratory claim.[80] Even though judgment was rendered in favor of the insured, the insured filed a suit against the law firm and the attorney for aiding and abetting, as well as for malicious prosecution.[81]

In *Chalpin*, the court reiterated that aiding and abetting claims have been previously determined valid in civil lawsuits by Arizona courts.[82] Moreover, it explained Arizona's higher court previously clarified "lawyers have no special privilege against civil suit."[83] Accordingly, it rejected the lower court's finding that aiding and abetting liability is not a valid cause of action against lawyers and remanded for further proceedings.[84]

73. *See* Tamposi v. Denby, 974 F. Supp. 2d 51, 61–62 (D. Mass. 2013) (affirming the plaintiff had a valid aiding and abetting claim).

74. *See* PNC Multifamily Capital Institutional Fund XXVI, L.P. v. Bluff City Cmty. Dev. Corp., 387 S.W.3d 525, 552–53 (Tenn. Ct. App. 2012) (highlighting two specific instances where the attorney provided substantial assistance, and concluding a reasonable inference could be made that the attorney acted with knowledge in aiding and abetting a breach of fiduciary duty, allowing the tort to survive a motion to dismiss).

75. Chalpin v. Snyder, 207 P.3d 666 (Ariz. Ct. App. 2008).

76. *Id.* at 678.

77. *Id.* at 668–69.

78. *Id.* at 669.

79. *Id.*

80. *Id.* at 669–70.

81. *Id.* at 670.

82. *Id.* at 677.

83. *Id.*

84. *Id.* at 678.

Similar to many previous decisions, numerous courts confirmed the theoretical validity of aiding and abetting claims, while offering very little in terms of the specific factual guidelines to be applied to predict the outcome in specific scenarios.[85] Based on varying precedent from across the nation, it is now obvious the aiding and abetting theory is an overall acceptable avenue for relief that can *potentially* be established.[86] However, it remains unclear what type of facts will likely lead to a guaranteed recovery and monetary gain under the theory.[87]

4. Courts That Have Dismissed the Cause of Action Because the Facts and Allegations Did Not Support a Finding of Aiding & Abetting Liability

A number of cases nationwide examined the aiding and abetting allegations in the past, and determined that the plaintiffs had failed to establish liability due to insufficient facts for various reasons.[88] Similarly, various courts examined the facts presented and determined that the plaintiffs failed to establish one or more elements needed for the prima facie

85. *See* Lewinbuk, *supra* note 3, at 150 ("Although a number of jurisdictions agree on the essential elements that need to be established in order to state a claim for attorney's aiding and abetting her client's breach of fiduciary duty, these courts' requirements are certainly not identical.").

86. *See id.* ("Most states require the plaintiff to demonstrate knowledge or knowing participation, substantial assistance in the breach, and damages. The threshold requirement in virtually all jurisdictions is for the plaintiff to demonstrate that defendant attorney's client owed a fiduciary duty to the plaintiff.").

87. *See id.* (arguing courts are not consistent when establishing the requirements of a claim for attorneys aiding and abetting a breach of fiduciary duty).

88. *See* Alexander v. Anstine, 152 P.3d 497, 503 (Colo. 2007) (concluding a lawsuit against an attorney for aiding and abetting cannot be sustained when the plaintiff is unable to prove the attorney's client breached a fiduciary duty in the first place); Goodman v. Goldberg & Simpson, P.S.C., 323 S.W.3d 740, 746 (Ky. Ct. App. 2009) ("[T]he claim for aiding and abetting breach of fiduciary duty must fail as a matter of law because there was no duty."); Witzman v. Lehrman, Lehrman & Flom, 601 N.W.2d 179, 188–89 (Minn. 1999) (reasoning the plaintiff failed to establish substantial assistance in the breach because he lacked "actual knowledge" that the primary tort-feasor's conduct was wrongful); Durham v. Guest, 171 P.3d 756, 762–63 (N.M. Ct. App. 2007) (noting "[t]he social benefit of proper legal advice and assistance often makes it appropriate not to hold lawyers liable for activities in the course of a representation[;]" however, the plaintiff failed to establish a cause of action because the alleged aiding and abetting attorney acted only to protect the client's interests and was not outside the scope of her duties); Bullmore v. Ernst & Young Cayman Island, 846 N.Y.S.2d 145, 148–49 (App. Div. 2007) (dismissing a claim for aiding and abetting the breach of fiduciary duty because the plaintiff failed to prove actual knowledge or substantial assistance); Kaufman v. Cohen, 760 N.Y.S.2d 157, 169–70 (App. Div. 2003) (determining the plaintiff was unable to establish all elements of an aiding and abetting claim because the knowledge requirement was based on conclusory statements).

case of aiding and abetting.[89] One court, for example, reiterated that in order to state a claim for breach of fiduciary duty under Delaware law, a Plaintiff must show: "(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, and (3) a knowing participation in that breach by [the alleged aider and abettor]."[90] Similarly, a different court emphasized "public policy demands that attorneys, in the exercise of their proper functions as such, shall not be civilly liable for their acts when performed in good faith and for the honest purpose of protecting the interests of their clients."[91] In that case, determining the attorney did not act outside the scope of his duty, the court explained, "[W]here one acts only in the execution of the duties of his calling or profession, and does not go beyond it, and does not actually participate in the trespass, he is not liable, though what he does may aid another in its commission."[92]

In one particular instance, the court determined a plaintiff failed to establish the "knowing participation" requirement of the claim because "routine" practices for a corporation are not enough to show "how and why" an attorney's position as a corporate lawyer was used for aiding and abetting purposes.[93] Similarly, a different court held a plaintiff failed to establish the "actual knowledge" element of an aiding and abetting claim, explaining that "[t]o find a defendant secondarily liable as aiding and abetting an unlawful breach of fiduciary duty, the defendant aider and abettor *himself* must know that the primary wrongdoer's conduct constitutes a breach of duty and give substantial assistance or encouragement to that wrongdoer to so act."[94] To further clarify the requirements of the substantial assistance element, a different court explained that conditional advice must have a direct link to a defendant's actions thereafter "however suspect and legally vulnerable it might be."[95] In that case, the plaintiff failed to establish the injury and damages element pertaining to the claim.[96]

89. *See, e.g.*, *Bullmore*, 846 N.Y.S.2d at 148 (describing the elements of a cause of action for aiding and abetting, and finding the plaintiff failed to allege actual knowledge or substantial participation against the defendants).

90. Zazzali v. Hirschler Fleischer, P.C., 482 B.R. 495, 519 (D. Del. 2012) (citation omitted).

91. Art Capital Grp., L.L.C. v. Neuhaus, 896 N.Y.S.2d 35, 37 (App. Div. 2010).

92. *Id.* (quoting Ford v. Williams, 13 N.Y. 577, 584 (1856)).

93. *Zazzali*, 482 B.R. at 519.

94. Wiatt v. Winston & Strawn, L.L.P., 838 F. Supp. 2d 296, 307–08 n.1 (D. N.J. 2012).

95. *In re* Senior Cottages of Am., L.L.C., 438 B.R. 414, 427 (D. Minn. 2010).

96. *Id.* at 428.

Despite a majority consensus on the validity of the aiding and abetting theory, it is rather difficult to prevail on such a claim. Since only a handful of plaintiffs actually recover damages against an attorney under the aiding and abetting theory, it is difficult to predict which specific facts would be needed to guarantee, or at least improve, the chances of recovery.[97]

5. Federal Courts That Have Recognized the Cause of Action

Since 2008, several federal courts have recognized claims for aiding and abetting a client's breach of fiduciary duty, even though state courts in the applicable jurisdiction have not.[98] In recognizing a cause of action for aiding and abetting a fiduciary breach, some federal courts provided a specific analysis, discussing why the pertinent state would have likely recognized the cause of action, and how the state court would have decided the issue—if given the opportunity.[99] Federal courts often had to respond to a defendant lawyer's motion to dismiss the cause of action, and their rulings in those cases varied.[100] Among those, some decisions took an

97. *See, e.g.*, PNC Multifamily Capital Institutional Fund XXVI, L.P. v. Bluff City Cmty. Dev. Corp., 387 S.W.3d 525, 558 (Tenn. Ct. App. 2012) (remanding to the chancery court to try the case on its merits).

98. *See* Abrams v. McGuireWoods, L.L.P., 518 B.R. 491, 499–500 (N.D. Ind. 2014) (rejecting a plausible aiding and abetting claim, and explaining that "even if it hasn't yet recognized the cause of action, the Indiana Supreme Court would do so," because aiding and abetting liability is not a separate tort, "but rather a theory for holding a person liable who knowingly assists . . . a wrongdoer"). The court further reasoned that recognizing an aiding and abetting claim would "not represent a departure for Indiana courts . . . for the particular tort of breach of fiduciary duty." *Id. But see* Crystal Valley Sales, Inc. v. Anderson, 22 N.E.3d 646, 656 (Ind. Ct. App. 2014) ("Indiana does not recognize such a cause of action [for aiding and abetting]. We believe that the decision to adopt a new cause of action for aiding and abetting in the breach of fiduciary duty is a decision better left to the legislature or our supreme court.").

99. For example, in *Reis v. Barley, Snyder, Senft & Cohen, L.L.C.*, 484 F. Supp. 2d 337 (E.D. Pa. 2007), *rev'd on other grounds*, 426 F. App'x 79 (3d Cir. 2011), the court predicted that, if given the opportunity, the "Supreme Court of Pennsylvania would recognize a cause of action for aiding and abetting breach of a fiduciary duty." *Id.* at 350. In particular, the court set forth three elements for aiding and abetting breach of a fiduciary duty under Pennsylvania law: "(1) a breach of a fiduciary duty owed to another; (2) knowledge of the breach by the aider and abettor; and (3) substantial assistance or encouragement by the aider and abettor in effecting that breach." *Id.* In a separate case and jurisdiction, the court stated that the "New Hampshire Supreme Court has yet to expressly consider whether to adopt the tort of aiding and abetting a breach of fiduciary duty . . . [but] would recognize the tort, and would adopt a version incorporating the principles of aiding and abetting liability set forth in the *Restatement (Second) of Torts*." Invest Almaz v. Temple-Inland Forest Prods. Corp., 243 F.3d 57, 82–83 (1st Cir. 2001).

100. *See, e.g.*, Design Pallets, Inc. v. GrayRobinson, P.A., 515 F. Supp. 2d 1246, 1258 (M.D. Fla. 2007) (refusing to grant a defendant's motion to dismiss because the plaintiff alleged valid claims and

approach similar to the one adopted by state courts, determining the plaintiff had insufficient facts to establish liability under the aiding and abetting theory.[101] As an example, one such claim failed because the court determined no fiduciary duty existed, and accordingly, the plaintiff could not establish the element of substantial assistance.[102]

In that case, the plaintiff, acting on behalf of several hedge funds, brought suit for aiding and abetting a breach of fiduciary duty, among other claims, against its former directors and fund administrators for damages caused directly to the hedge funds.[103] In particular, the plaintiff claimed the defendants did not adequately inform investors in the hedge funds about specific securities each fund held, and thus acted fraudulently for their own personal gain.[104] The plaintiff failed, though, to allege facts that showed the "special circumstances" necessary to allege a fiduciary duty on the part of the primary wrongdoer, as is required by state law.[105] The court further clarified that the complaint only stated conclusory allegations as "conscious intent" and, in doing so, relied on an opinion that provided no support to its claim.[106] Accordingly, the court dismissed the claim because the first element for a valid aiding and abetting cause of action could not be met.[107]

damages existed). In *Abrams*, however, the court actually dismissed the complaint because the plaintiff could not plausibly establish the element of substantial assistance—i.e., that an underlying breach of fiduciary duty actually occurred. *Abrams*, 518 B.R. at 504. The court further reasoned Indiana law does not recognize the claim but likely would if given the opportunity. *Id.*

101. *See, e.g.*, Cont'l Cas. Co. v. Compass Bank, No. 04-0766-KD-C, 2006 WL 566900, at *12 (S.D. Ala. Mar. 4, 2006) (granting a defendant's motion to dismiss for failure to state a claim).

102. *See, e.g.*, Court Appointed Receiver of Lancer Offshore, Inc. v. Citco Grp. Ltd., No. 05-60080-CIV, 2011 WL 1233126, at *4 (S.D. Fla. Mar. 30, 2011) ("As analyzed in the section on gross negligence, the Court finds that the Receiver's attempt to allege that CGL and CFS-USA owed the Funds a duty to disclose is untenable.").

103. *Id.* at *1 n.1, *4.

104. *Id.* at *3 n.4, *3.

105. *See id.* at *4 ("Here, . . . Receiver argues the Director Defendants' fiduciary duty should be imputed to CGL and CFS-USA . . . . [T]he Court concludes that this claim fails . . . .").

106. *Id.* at *5.

107. *See id.* ("Since it cannot be said that CGL and CFS-USA had a duty to disclose . . . and because the SAC does not contain allegations that set forth the requisite degree of scienter for conscious intent, this [aiding and abetting claim] will be dismissed with prejudice.").

C. *States That Do Not Recognize the Cause of Action or Remain Unsure*

While only some courts in a handful of states, such as Alabama,[108] Michigan,[109] and Texas,[110] have previously declined to recognize aiding and abetting a client's breach of fiduciary duty as a cause of action, a few jurisdictions have recently joined them.[111] Specifically, Louisiana law does not recognize aiding and abetting as a cognizable claim, though its courts admit other states like New York and Delaware do.[112] In *Broyles v. Cantor Fitzgerald & Co.*,[113] the court dismissed the complaint, reasoning that even though the plaintiff was able to establish aiding and abetting elements, such a claim was not actionable in the state of Louisiana.[114]

Some courts remain confused on the issue of validity regarding the aiding and abetting theory in their jurisdiction, while others believe such a claim would not be recognized by their state.[115] For example, a North Carolina

108. *See* Cont'l Cas. Co. v. Compass Bank, No. 04-0766-KD-C, 2006 WL 566900, at *13 (S.D. Ala. Mar. 4, 2006) (granting a defendant's motion to dismiss for failure to state a claim). There, the court stated it was unable to "find any substantial support . . . that the common law tort of aiding and abetting a fiduciary breach exists under Alabama law." *Id.* at *11.

109. *See* Kraniak v. Cox, Hodgman & Giarmarco, P.C., No. 230028, 2002 WL 1308783, at *3 (Mich. Ct. App. June 11, 2002) (per curiam) ("No such cause of action in relation to a legal malpractice claim has been recognized in Michigan and we are not inclined to create such a claim in this case . . . . [E]ven if there were authority to support such a claim in Michigan, Plaintiff's claim would fail.").

110. Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398, 407 (Tex. App.—Houston [1st. Dist.] 2005, no pet.) ("[W]e decline [plaintiff]'s invitation to expand Texas law to allow a non-client to bring a cause of action for 'aiding and abetting' a breach of fiduciary duty, based upon the rendition of legal advice to an alleged tortfeasor client.").

111. *See* DeVries Dairy, L.L.C. v. White Eagle Coop. Ass'n, 974 N.E.2d 1194, 1194 (Ohio 2012) (choosing not to recognize a civil action for aiding and abetting tortious conduct); *see also* Sacksteder v. Senney, No. 24993, 2012 WL 4480695, at *16 (Ohio Ct. App. Sept. 28, 2012) (dismissing a malpractice action against a corporate lawyer for participating in a breach of fiduciary duty); Broyles v. Cantor Fitzgerald & Co., Nos. 10-864-JJB, 10-857-JJB, 2013 WL 1681150, at *13 (M.D. La. Apr. 17, 2013) ("However, the Court also recognizes that under Louisiana law, [aiding and abetting a breach of fiduciary duty] is not a cognizable claim.").

112. *See, e.g.*, *Broyles*, 2013 WL 1681150, at *13 (acknowledging Louisiana law does not find aiding and abetting to be a cognizable claim, but finding sufficient facts for a valid claim of aiding and abetting under New York and Delaware law).

113. Broyles v. Cantor Fitzgerald & Co., No. 10-864-JJB, 2013 WL 1681150 (M.D. La. Apr. 17, 2013).

114. *Id.* at *13.

115. *See* Veer Right Mgmt. Grp., Inc. v. Czarnowski Display Serv., No. 14 CVS 1038, 2015 WL 504977, at *4 (N.C. Super. Ct. Feb. 4, 2015) (admitting uncertainty about whether North Carolina recognizes aiding and abetting); Cont'l Cas. Co. v. Compass Bank, No. 04-0766-KD-C, 2006 WL 566900, at *13 (S.D. Ala. Mar. 4, 2006) ("Alabama law does not recognize the common law cause of action of aiding and abetting breach of fiduciary duty . . . .").

court has stated the validity of a claim for aiding and abetting "remains an open question,"[116] while another found that "no such cause of action exists in North Carolina[,]" and that it remains "undisputed that the Supreme Court of North Carolina has never recognized such cause of action."[117] Distinctively, another North Carolina court reiterated the lack of clarity on the issue by stating "[a]s numerous North Carolina decisions have now recognized . . . it is . . . unclear whether North Carolina recognizes a claim for aiding and abetting a breach of fiduciary duty."[118]

However, even jurisdictions that declined to accept the aiding and abetting theory as a cause of action against attorneys have not done so in absolute terms.[119] For instance, Texas common law states that it is "well settled that an attorney does not owe a professional duty of care to third parties who are damaged by the attorney's negligent representation of a client[;]"[120] and, Texas courts remain consistent in their refusal "to expand Texas law to allow a non-client to bring a cause of action for 'aiding and abetting' a breach of fiduciary duty, based upon the rendition of legal advice to an alleged tortfeasor client."[121] Simultaneously, it has been clarified "attorneys are immune from civil liability to non-clients if they conclusively establish their alleged conduct was within the scope of their legal representation of a client,"[122] because this "attorney-immunity defense is intended to ensure 'loyal, faithful, and aggressive representation by attorneys employed as advocates.'"[123] As such, an attorney is not shielded from liability to non-clients for their "actions when they do not qualify as 'the kind of conduct in which an attorney engages when discharging his duties to his client.'"[124] According to Texas courts, the protection from liability

116. *Veer Right Mgmt. Grp.*, 2015 WL 504977, at *3.

117. Bottom v. Bailey, 767 S.E.2d 883, 889 (N.C. Ct. App. 2014).

118. Bradshaw v. Maiden, No. 14 CVS 14445, 2015 WL 4720387, at *15 (N.C. Super. Ct. 2015).

119. *See* Cantey Hanger, L.L.P. v. Byrd, 467 S.W.3d 477, 481 (Tex. 2015) (finding it "well settled that an attorney does not owe a professional care to third parties who are damaged by the attorney's negligent representation of a client").

120. *Id.*

121. Span Enters. v. Wood, 274 S.W.3d 854, 858 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (quoting Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398, 407 (Tex. App.—Houston [1st Dist.] 2005, pet. denied)).

122. Highland Capital Mgmt., L.P. v. Looper Reed & McGraw, P.C., No. 05-15-00055-CV, 2016 WL 164528, at *3 (Tex. App.—Dallas Jan. 14, 2016, no pet.).

123. *Id.*

124. *See Cantey Hanger*, 467 S.W.3d at 482, 485 (quoting Dixon Fin. Servs., Ltd. v. Greenberg, Peden, Siegmyer & Oshman, P.C., No. 01-06-00696, 2008 WL 746548, at *9 (Tex. App.—Houston [1st Dist.] Mar. 20, 2008, pet. denied)) (holding petitioner law firm was entitled to summary

does not apply because such actions are "entirely foreign to the duties of an attorney" and "not part of the discharge of an attorney's duties in representing a party."[125]

III. CONCLUSION

Currently, a majority of states accept the validity of the aiding and abetting theory against attorneys, stating the specific elements required to establish its prima facie case, while offering very little guidance on how plaintiffs can successfully meet the burden by supporting it with sufficient facts. What makes the matter more complicated is a lack of precedent awarding plaintiffs' recovery under an aiding and abetting theory,[126] and the failure to provide guidance regarding which facts are sufficient to result in an award. At the moment, it appears unlikely that new decisions offering specificity are on the way, as none of the courts are likely to commit to creating a new standard that will reshape the confusion in that area; thereby, providing guidance on the issue. Thus, the actual theory exists and appears to be an option to pursue, but what would it take for a plaintiff to succeed?

That question remains unanswered, creating a tremendous challenge for attorneys who need clear guidance on liability and exposure prevention for their clients, as well as themselves. At this time, it appears the best attorneys can do to protect themselves from liability in that area is to strictly stay within the boundaries of "merely providing legal advice" to their client. Even that concept, however, is not clearly defined, placing various scenarios in a gray area—that is, defining what "pure legal advice" actually means. In addition, legal malpractice insurers need to factor aiding and abetting claims into their calculations of policy costs and, due to the lack of guidance, insurers are likely to overcharge their customers as a precaution. One

judgment on its immunity defense because it established that its alleged conduct was within the scope of its legal representation of its client); *see also Highland Capital Mgmt.*, 2016 WL 164528, at *1 (affirming summary judgment because the defendant attorney acted within the scope of his representation of his client, and was protected by qualified immunity).

125. *Highland Capital Mgmt.*, 2016 WL 164528, at *4.

126. *See, e.g.*, *In re* Senior Cottages of Am., L.L.C., 482 F.3d 997, 1007 (8th Cir. 2007) (demonstrating the difficult burden of proof faced by plaintiffs in aiding and abetting cases, where there is no standard in place and damages are often speculative).

previously proposed solution is to resolve the issue by statute,[127] but sadly that solution has not been adopted.

Interestingly, a number of lawyers do not fear this theory for themselves or their clients because they do not learn about it in law school or in practice (unless they specialize in legal malpractice), which invites the famous saying: "ignorance is bliss."[128] However, ignorance is obviously not a solution. Courts need to take the aiding and abetting theory seriously, i.e., not merely offer theoretical guidance on what it takes to prove its prima facie case, but also examine the applicable facts closely and offer true guidance—a long time needed precedent—that lawyers, judges, and the legal system itself can properly use in future cases. We must have the opportunity to use stare decisis in every area of law, including aiding and abetting a client's breach of fiduciary duty claims against lawyers!

127. Lewinbuk, *supra* note 3, at 171–72 (proposing to enact statutes to reduce claims, save time and expenses, and allow judges the ability to become familiar with the type of claims to help render decisions).

128. THOMAS GRAY, SELECT POEMS OF THOMAS GRAY 54 (New York, Harper & Bro's 1895) (coining the term "ignorance is bliss"); Michael Brandon, *The 100 Most Famous Quotable Quotes of all Time*, CURATED QUOTES (Mar. 11, 2015), http://www.curatedquotes.com/famous-quotes/ [https://perma.cc/N6KJ-QDSL] (including the phrase "ignorance is bliss" in the "hall of fame" of quotes).