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THE LIABILITY

Why you should understand the five tests of civil aiding and abetting in Texas.

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Civil aiding and abetting claims have steadily gained recognition over the past 50 years. In fact, there are now at least five different tests for civil aiding and abetting. Texas state courts rely on several "distinct lines of [aiding and abetting] cases without distinguishing or acknowledging the different lines."[1] Significantly, aiding and abetting claims are not only predicated on fraud claims or securities law violations but also on a wide range of torts, from assault[2] to breach of the duty of good faith and fair dealing.[3] Given the widespread number of situations under which aiding and abetting liability could arise, all practitioners should at least have a cursory understanding of it.

This article identifies tests for aiding and abetting liability, their origin, their elements, the scope of their applicability, and which ones have been adopted by the Texas Supreme Court. Recognizing the distinctions between each of these tests is crucial because some have significantly higher scienter requirements than others. For example, if a bank is accused of aiding and abetting a Ponzi scheme, it might be liable under one test but not another. If the bank noticed that the perpetrator of the Ponzi scheme was engaged in some sort of fraud, turned a blind eye to the fraud, and continued to provide routine banking services while generally aware of the perpetrator's fraud, then the bank might be liable under one of the tests but not under all of them. Some tests require essentially nothing more than proof of the aider and abettor's general awareness of the perpetrator's fraud while providing ordinary banking assistance. However, there is at least one test that requires not only general awareness of the fraud but also proof of the aider and abettor's intent to assist the perpetrator in committing the fraud. Under such circumstances, identifying the proper test could determine the outcome of the aiding and abetting claim against the bank. For this reason, it is important to understand the nuances of each test and under what situations they apply.

Overview

Until about 50 years ago, civil aiding and abetting claims were rarely asserted. This changed in the 1960s after federal courts recognized a civil aiding and abetting claim predicated on a federal securities violation. Subsequently, there was an explosion of such claims. Throughout the 1970s, civil aiding and abetting claims were largely confined to those made in securities fraud cases.[4]

In the 1980s, many courts began to expand the scope of civil aiding and abetting liability to apply to claims predicated on a variety of common law torts. This trend began in *Halberstam v. Welch,* 705 F.2d 472 (D.C. Cir. 1983) when the court applied the aiding and abetting test developed under the securities laws to a claim for aiding and abetting a wrongful death.[5] The U.S. Supreme Court has described *Halberstam* as a "comprehensive opinion on the subject."[6]

Several states have adopted the test set forth in *Halberstam* to determine aiding and abetting liability predicated on a common law tort.[7] Other states have adopted the test set forth in Section 876(b) of the Restatement (Second) of Torts to determine liability predicated on a common law tort.[8] However, neither of these tests has been applied uniformly. For example, as noted by the U.S. Supreme Court, Section 876(b) "has been at best uncertain in application."

The Texas Supreme Court has not adopted either the *Halberstam* test or the Section 876(b) test for common law torts. Nonetheless, intermediate appellate courts in Texas and federal courts applying Texas law have generally assumed that the Texas Supreme Court would recognize an aiding and abetting claim predicated on a common law tort.[9] If the Texas Supreme Court were to do so, it is unclear which test would be applied by the court. Presumably, the court would follow the lead of other states by adopting either the *Halberstam* test or the Section 876(b) test.

The Texas Supreme Court has issued opinions identifying the tests for aiding and abetting a breach of a fiduciary duty and for aiding and abetting a violation of the Texas Securities Act. In addition, the court has issued an opinion commenting on how it would construe Section 876(b) if it were to recognize such a claim. Below is a brief summary of these tests and others.

Breach of Fiduciary Duty

The oldest test for aiding and abetting in Texas was developed in the context of a claim for breach of fiduciary duty. In *Kinzbach Tool Co. v. Corbett-Wallace Corp.,* 160 S.W.2d 509, 514 (Tex. 1942), the Texas Supreme Court adopted a cause of action for knowing participation in the breach of duty of a fiduciary. Subsequently, Texas courts began referring to this cause of action as one for "aiding and abetting a breach

of fiduciary duty."[10] The elements are: (1) a breach of fiduciary duty by a third party; (2) the aider's knowledge of the fiduciary relationship between the fiduciary and the third party; and (3) the aider's awareness of his participation in the third party's breach of its duty.[11]

Of course, such a claim is limited to those cases where there is an underlying fiduciary duty owed by the primary violator to the plaintiff.[12] Moreover, the aider and abettor must not only know of the fiduciary duty but also be "aware of his participation in the third party's breach of its duty."[13]

A Violation of the Texas Securities Act

In 1977, the Texas Legislature amended the Texas Securities Act to provide for civil aiding and abetting liability. However, it was not until the Texas Supreme Court's decision in *Sterling Trust Co. v. Adderley,* 168 S.W.3d 835 (Tex. 2005) that it construed aiding and abetting under the TSA and set forth the test for such a cause of action. For the most part, the Texas Supreme Court adopted the test that federal courts use to evaluate an aiding and abetting claim predicated on the violation of a securities statute. However, the Texas Supreme Court modified this test to require nothing less than the aider's "general awareness that his role was part of an overall activity that is improper."[14] In other words, recklessness alone will not satisfy the scienter requirement under the aiding and abetting provision of the TSA. This is in contrast to federal appellate court decisions that have applied a "recklessness standard" under certain circumstances to satisfy the scienter element of an aiding and abetting claim.[15]

The Texas Supreme Court adopted the general awareness standard by referring to federal court decisions on aiding and abetting liability issued in the mid-1970s (at about the time that the Texas Legislature amended the TSA to provide for aiding and abetting liability).[16] In addition, the Texas Supreme Court based its decision on its own precedent equating recklessness to conscious indifference.[17] In doing so, the court concluded that even though the TSA expressly requires nothing more than "reckless disregard for the truth or the law" to demonstrate liability, proof of "general awareness" is necessary to establish aiding and abetting liability under the TSA.[18]

In sum, "[t]o prove aider-and-abettor liability under the Texas Securities Act ("TSA"), the plaintiff must demonstrate: (1) that a primary violation of the securities laws occurred; (2) that the alleged aider had general awareness of its role in this violation; (3) that the alleged aider rendered substantial assistance in this violation; and (4) that the alleged aider either (a) intended to deceive plaintiff or (b) acted with reckless disregard for the truth of the representations made by the primary violator."[19] Under Adderley, the "general awareness" and "reckless disregard" elements may be satisfied by demonstrating the aider's "conscious indifference" to the primary violation.[20]

Under Restatement (Second) of Torts § 876(b) aka Concert of Action Claim

Section 876(b) of the Restatement (Second) of Torts reads as follows: "[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he ... (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." This test for aiding and abetting liability is often referred to as the "modern application of civil aiding and abetting."[21]

Across the nation, both federal and state courts often make at least a passing reference to Section 876(b) when evaluating an aiding and abetting claim. However, as explained by various courts and commentators, including the U.S. Supreme Court, "the doctrine has been at best uncertain and limited in application."[22] Texas courts construing Section 876(b) have likewise applied the doctrine in a limited fashion.

When Texas courts first considered a claim under Section 876(b), it was not even expressly identified as a form of aiding and abetting liability. Instead, they simply referred to it as a "concert of action" claim.[23] In *Juhl v. Airington,* 936 S.W.2d 640 (Tex. 1996), the Texas Supreme Court construed this concert of action

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