Accessory Disloyalty: Comparative Perspectives on Substantial Assistance to Fiduciary Breach

By

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## I. Introduction

Culpable participation in another actor's wrongful conduct is an independent basis for liability, that of an accessory. Much about this contingent form of liability is open to dispute, including the operative definition of participation and other elements requisite to establishing liability, as well as whether criteria for liability should operate uniformly regardless of the field of substantive law that defines the primary wrong. Moreover, a primary wrongdoer's liability may be grounded in a type or degree of culpability that does not match the accessory's, leading to outcomes that may seem asymmetrical. To illuminate these questions and their consequences, this paper draws contrasts between the law in the United States and the United Kingdom, focusing on accessory liability when the primary wrong constitutes a breach of fiduciary duty.

In both jurisdictions, accessory liability is controversial but for reasons distinctive to each. In the United States, well-established general doctrine defines the elements requisite to establishing accessory liability, whether stemming from breach of fiduciary duty or another

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wrongful act.[1] What prompts controversy is how the doctrine applies to categories of actors, most recently investment bankers who advise boards of target companies in merger-and-acquisition ('M&A') transactions. When the Delaware Supreme Court upheld a $75.8 million judgment against an investment bank as an accessory to a board's breach of fiduciary duty,[2] accessory liability drew new interest from M&A lawyers and their clients. Although much attention focused on the bank's evident conflicts of interest in acting as an advisor to the target board, the court's analysis of the bank's liability additionally stressed the elements requisite to liability, which in the United States sounds in tort. In contrast, in the United Kingdom, accessory liability in connection with breach of trust or fiduciary duty is controversial because the law is less clear, in part as a consequence of significant shifts in doctrinal basics within a relatively short period of time. Additionally, private law in the United Kingdom particularizes accessory liability, defining its requisites differently depending on the nature of the primary wrong.

The paper's central claim is that in both jurisdictions, how the law categorizes a wrong matters for the elements of accessory liability. That is, breaching a fiduciary duty and culpably assisting a fiduciary's breach are both instances of wrongful conduct. Characterizing both as tortious, as does US law, has consequences for the elements of accessory liability. In contrast, within UK law, equity houses both wrongs, while the requisites for accessory liability in connection with a tort are very different. The contrast suggests that fundamental taxonomic choices about doctrinal organization can be consequential for doctrinal substance. Additionally, understood more functionally, accessory liability for breaches of fiduciary duty can operate

[1]Tortious interference with a contract has long been treated separately and is outside the scope of this paper. See *Restatement (Second) of Torts* § 766-767 (1979)(improper interference with contract; impropriety assessed through seven-factor test).

[2]*RBC Capital Markets, LLC v Jervis* 129 A 3d 816 (Del 2015).

interstitially to complement and supplement liability based on the primary wrong. Difficult though it would be to establish empirically, situating accessory liability in tort may facilitate its interstitial operation.

Section II introduces the doctrinal basics for the United States that specify when an actor's liability is contingent on another actor's breach of fiduciary duty. Section II also introduces the significance of factors distinct from private law that can shape the conduct of primary actors and those who advise or assist them, including formal regulation and extra-legal constraints. Against this background, Section III draws contrasts with UK law, surveying doctrinal legacies as well as more recent shifts in doctrine. Section IV focuses on recent applications of accessory liability to investment bankers in high-stakes M&A litigation in Delaware courts. Section V concludes. An introductory word about terminology is warranted. Throughout, the paper uses terminology that is consistent with the independent nature of accessory liability. This status is undercut when accessory liability is termed 'secondary',[3] 'derivative', or 'parasitic'.[4] Thus, although the paper uses the term 'primary' wrong, its overall terminology presupposes that an accessory's liability, albeit contingent, stems from the accessory's own wrongful conduct. Additionally, in no way is accessory liability an instance of vicarious liability, through which the law charges one actor with the legal consequences of another actor's conduct on the basis of the relationship between them.[5] Accessory liability is not

[3]P Davies, *Accessory Liability* (Oxford & Portland, Hart Publishing, 2015) 54 ('the language of 'secondary liability' might ... suggest that an accessory is secondarily liable for the same wrong as the primary wrongdoer'.); J Dietrich & P Ridge, *Accessories in Private Law* (Cambridge, Cambridge University Press, 2015) 7-8 ('secondary liability' misleading if understood to mean accessory must be liable for same wrong as primary wrongdoer and subject to same remedies).

[4]Davies, above n3 at 54 ('the parasitic nature of accessory liability is crucial').

[5]The quintessential example is the vicarious liability of an employer or other principal for

an offshoot of agency doctrine but an instance of wrongful conduct that directly subjects an actor to liability.

## II. United States: Basic Doctrine

### A. Accessory Liability and Breach of Fiduciary Duty

In the United States, private law has long situated within tort the liabilities that stem from breach of fiduciary duty as well as accessory liability for participating in a fiduciary's breach. As stated in the *Restatement (Second) of Torts*, an actor who stands 'in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation'.[6] The commentary to the *Restatement* recognizes that a tort claim for breach of fiduciary duty may supplement other remedies available to a plaintiff that do not require showing harm.[7] The section's remedial focus anchors the availability of compensatory damages for breach of fiduciary duty but does not define the circumstances under which such a duty arises.[8] For this task other law—agency, trusts, corporate law and the like—supplies the substance. Indeed, an action in tort is often not a plaintiff's first resort in response to a breach of fiduciary duty. In some settings, non-tort remedies are exclusive, as when a trustee breaches a duty to a trust beneficiary. While the standard remedy—an equitable surcharge to restore trust assets—can resemble the monetary outcome of a tort claim, the procedure that leads to the exclusive remedy

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torts committed by a servant or other agent. *Restatement (Third) of Agency* § 7.03 (2)(2006). When the principal's own fault subjects the principal to liability, the liability is direct, not vicarious. See ibid cmt b.

[6] *Restatement (Second) of Torts* § 874 (1979). The original *Restatement of Torts* contained a verbatim formulation. See *Restatement of Torts* § 874 (1939).

[7] ibid cmt b.

[8] For further discussion, see DA DeMott, 'Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences' (2006) 48 *Arizona Law Review* 925-934.

is equitable in character.[9] This eliminates the prospect of jury trial, which is a procedural backdrop to US tort litigation that arguably shapes tort doctrine in various ways.[10]

Likewise, tort law has long encompassed accessory liability for participation in a fiduciary's breach of duty. As detailed further in Section IV, this is so even in Delaware. Although law and equity have not been merged in Delaware, and equity jurisdiction resides in a separate court (the Court of Chancery, in which there are no jury trials), tort doctrine shapes significant aspects of fiduciary litigation. Moreover, across US jurisdictions, with the exception of tortious interference with contract,[11] the authoritative formulation of accessory liability is trans-substantive, that is, applicable across the board regardless of the nature of the primary wrong.[12] Some courts quote all or part of the relevant formulation in *Restatement (Second) of Torts* § 876 [13] as if it constituted primary statutory authority, not just persuasive secondary authority:

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[9]*Restatement (Third) of Trusts* § 95 (2012).

[10]On the tort claim in settings without specialized remedies, see *Kann v Kann*, 690 A 2d 509 (Md 1997); *Bank One, NA v Borse*, 812 NE 2d 1021 (Ill App 2004). On the civil jury's significance for tort doctrine, see MD Green, 'The Impact of the Civil Jury on American Tort Law' (2011) 38 *Pepperdine L Rev* 337, 340-345.

[11]See above n 1.

[12]In federal criminal law, the statutory formulation is also trans-substantive. A general statute provides that all actors who knowingly provide aid to persons committing federal crimes, with the intent of facilitating the crime, themselves commit a crime. See Act of Mar 4, 1909, ch 321, 35 Stat 1088, 1152, codified as 18 United States Code § 2.

[13]*Restatement (Second) of Torts* § 876 (1979). The first *Restatement of Torts* did not include tortious action in concert or pursuant to a common design, as stated in § 876 (a)(*Restatement (Second*). Instead, the first subsection subjected to liability an actor who 'orders or induces such [tortious] conduct, knowing that the conditions under which the act is done or intending the consequences which ensue'. *Restatement of Torts* § 876 (a)(1939). More contemporary formulations relocate many instances of 'ordering' another's tortious act to agency law. See *Restatement (Third) of Agency* § 7.03(1)(a) (2006) (principal subject to direct liability when agent acts with actual authority and agent's conduct is tortious). Inducing another actor's tortious conduct constitutes intentional action by the inducer. See *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 1 (2010).

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
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> > (a) does a tortious act in concert with the other or pursuant to a common design with him, or
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> > (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, or
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> > (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Although this section is entitled "Persons Acting in Concert," only subsection (a) addresses conduct pursuant to a common design or otherwise in concert.[14] On equal footing is subsection (b), applicable to conduct that 'gives substantial assistance or encouragement' to another actor whose conduct is known to constitute a breach of duty. One who gives such assistance or encouragement is often termed an aider and abettor to the primary wrongdoer. Aiding-and-abetting liability is premised, not on an agreement with the primary wrongdoer, but on giving assistance, knowing of the primary wrongdoer's breach of duty.[15]

Claims based on aiding-and-abetting theories of liability are often asserted when the primary wrongdoer is insolvent and is alleged to have engaged in tortious conduct in a

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[14]See *Heckmann v. Ahmanson*, 168 Cal App 3d 119, 214 Cal Rptr 177 (1985)(accessory defendants who purchased shares in target corporation agreed with directors to drop challenge to defensive acquisition in exchange for corporation's commitment to repurchase shares at above-market price, enabling target's directors to retain control; if directors breached fiduciary duty to corporation, accessory defendants subject to liability on the basis of action pursuant to common plan or design to commit a tort).

[15]RC Mason, 'Civil Liability for Aiding and Abetting' (2006) 61 *Business Lawyer* 1135, 1138. But see *Heckmann*, 127 Cal App 3d at 127, 214 Cal Rptr at 183-84 (characterizing acting pursuant to common design with primary wrongdoers as instance of aiding and abetting liability).

commercial setting.[16] A large majority of jurisdictions in the United States accept the premise of subsection (b) in some context, most typically when the primary wrong alleged is fraud or breach of fiduciary duty.[17] However, in 1994, the Supreme Court held in *Central Bank of Denver, NA v First Interstate Bank of Denver, NA*[18] that the general prohibition on fraud in the Securities Exchange Act of 1934 did not create or support a private cause of action based on aiding and abetting. Following *Central Bank*, the private-law liability of actors who facilitate federal securities fraud must be premised on violations of state securities statutes or common-law principles of accessory liability. Those principles, as stated above, operate generally, whether the primary wrong is fraud or breach of fiduciary duty.[19]

And now to return to questions of terminology. Section I characterized accessory liability as 'contingent'. Within tort doctrine, accessory liability is not a unique instance of contingent liability. For example, an actor who makes a material misrepresentation of fact, opinion, or law acts fraudulently when the maker knows that the representation is false.[20] But the maker is not subject to liability for the common-law tort of fraud unless the misstatement is made to induce another to act or refrain from acting.[21] Additionally, when the maker intends to mislead, the maker is not subject to liability unless the person to whom the misrepresentation was made

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[16] ibid at 1135.

[17] ibid at 1139-40. Accessory liability claims against lawyers may be subject to the assertion of privilege so long as the lawyer's action was on the client's behalf and within the scope of the attorney-client relationship. See HS Bryans, 'Claims Against Lawyers by Bankruptcy Trustees—A First Course on the *In Pari Delicto* Doctrine' (2011) 66 *Business Lawyer* 587, 594 n 52.

[18] *Central Bank of Denver, NA v First Interstate Bank of Denver, NA*, 511 US 164 (1994).

[19] Although most aiding-and-abetting claims concern fraud, 'breaches of fiduciary duty are close behind'. Mason, above n 15 at 1159.

[20] *Restatement (Third) of Torts: Liability for Economic Harm* § 10 (Tentative Draft No. 2, 2014).

[21] ibid §§ 9 & 11.

suffers economic loss caused by justifiable reliance on the misstatement.[22] Thus, one who knowingly makes a material misrepresentation of fact may meaningfully be said to act fraudulently,[23] but whether the actor is subject to liability for the tort of common-law fraud is contingent on the presence of additional elements that define the tort.[24] Accessory liability, likewise, is contingent on the presence of several distinct elements defining the wrong. One, of course, is the occurrence of a primary wrong. Thus, private-law accessory liability, while not inchoate,[25] is nonetheless contingent.

B. Elements of Claim

Based on the reported cases, accessory liability claims in connection with breaches of fiduciary duty fall into clusters defined by typical types of defendants. Lawyers, directors and

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[22]ibid. On the significance of reliance as a distinct element, see Rosen v. Spanierman, 894 F 2d 28 (2d Cir 1990); JCP Goldberg, AJ Sebok & BC Zipursky, 'The Place of Reliance in Fraud' (2006) *48 Arizona Law Review* 1001-1026. A plaintiff may premise a claim on third-party reliance when misrepresentations are and are intended to be communicated to the plaintiff through a third party and thereby relied upon to the plaintiff's detriment. See *Mid Atlantic Framing, LLC v Varish Construction, Inc.*, 117 F Supp 3d 145, 153 (SDNY 2015)(applying New York law).

[23]This is especially so when through the misrepresentation some other wrong is perpetrated. See Goldberg et al, above n 22 at 1003. Relatedly, an actor who drives a car at high speed on a city street may meaningfully be said to act negligently, although no one (or thing) is hit. For the classic statement, see *Palsgraf v Long Island R Co*, 248 NY 339, 349 (1928)('Should we drive down Broadway at a reckless speed, we are negligent whether we strike an approaching car or miss it by an inch'.)(Andrews J dissenting). Under contemporary tort law, if the driver of the approaching car or her passenger suffers severe emotional harm resulting from the perception of imminent bodily harm from what appears to be an imminent collision, the harm may be compensable. See *Restatement (Third) of Torts* § 47(a) cmt e, Illus 2 (elaborating on 'zone of danger' principle).

[24]One might say the presence of these elements completes the tort; for Professor Goldberg and his co-authors, that reliance is essential to the definition of common-law fraud underscores the tort's relational quality. Goldberg et al, above n 22 at 1026.

[25]Davies, above n 3 at 32. In criminal law, in contrast, inchoate liability is distinct from accomplice liability. MS Moore, *Causation and Responsibility* (Oxford, Oxford University Press, 2009) 284.

officers, and financial intermediaries of various sorts are frequent defendants, as they are in cases in which fraud constitutes the alleged primary wrong. An accessory claim requires that the plaintiff allege: (1) the existence of a fiduciary relationship; (2) a breach of duty by the fiduciary; (3) the accessory defendant's knowing participation in the breach; and (4) damages to the plaintiff as a result of the accessory defendant's participation and the fiduciary's breach. Thus, an aiding-and-abetting claim necessarily fails when no fiduciary relationship exists[26] or when no one has breached a fiduciary duty.[27]

Some cases restrict the availability of aiding-and-abetting claims to defendants who are not themselves fiduciaries.[28] But if an aiding-and-abetting claim fails against a defendant on this basis, the defendant's conduct might well have breached a fiduciary duty it owed to the plaintiff. In *Calesa Associates, L.P. v. American Capital, Ltd.* [29], a recent Delaware case, minority shareholders alleged breaches of fiduciary duty in connection with the corporation's dilutive issuance of new equity. The plaintiffs alleged that a substantial shareholder, a private equity firm, coerced members of the corporation's board of directors into authorizing the issuance, which redounded to the private equity firm's distinct benefit. The court held that the minority

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[26]For a recent example, see *Rocky Mountain Exploration, Inc. v Davis Graham & Stubbs LLP*, 2016 WL 908640 (Colo Ct App 2016). In *Rocky Mountain*, a law firm represented an entity in connection with its purchase of oil and gas interests owned by the plaintiff. The purchasing entity acted as an unidentified principal represented by an agent, also represented by the law firm. The court held that the agreements between the plaintiff and unidentified principal's agent did not create a fiduciary relationship. Thus the plaintiff's aiding-and-abetting claim against the law firm 'necessarily fails'. ibid *7.

[27]See discussion above accompanying n 25 of inchoate liability.

[28]See *Metro Life Insurance Co v Tremont Group Holdings, Inc.*, 2012 WL 6632681 *18 (Del Ch Dec. 20, 2012). The Delaware Supreme Court's own statements of the elements of the claim do not include this qualification. See *Malpiede v Towson*, 780 A2d 1075, 1098 (Del 2001).

[29]*Calesa Associates, LP v. American Capital, Ltd*, 2016 WL 770251 (Del Ch Feb. 29, 2016).

shareholders' aiding-and-abetting claim against the private equity firm would fail were the court to find that the firm was a controlling stockholder at the time of the transaction because that status would, under Delaware law, itself impose fiduciary duties on the private equity firm owed to the other shareholders.[30] But, in the alternative, as a non-fiduciary, if the private equity firm aided and abetted breaches of fiduciary duty committed by the company's directors, it would be subject to liability.[31] More generally, the alternative claims elaborated in *Calesa* underscore the independent nature of accessory liability for breach of fiduciary duty. Albeit dependent on the commission of a primary wrong, the accessory claim does not duplicate its elements.[32]

Consistent with *Restatement (Second)* section 876(b), an accessory's liability requires that the accessory know of the fiduciary's breach of duty. Most courts define "knowledge" to mean actual knowledge of the fiduciary relationship and the breach,[33] rejecting a standard of constructive knowledge that charges a defendant with such knowledge as would have been obtained through the exercise of reasonable care.[34] Conscious avoidance—suspecting a fact, realizing its probability, and refraining from confirming the fact—implies a culpable state of mind, as opposed to the imputed state of mind that follows constructive knowledge on a

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[30]The criterion is whether the shareholder owns a majority interest in the corporation or exercises control over its business affairs. *Kahn v Lynch Communications Systems, Inc.*, 638 A2d 1110, 1113 (Del 1994). The Delaware corporation statute does not include oppression remedies; Delaware's functional alternative to a statutory oppression remedy to protect minority equity investors is the imposition of fiduciary duties on controlling shareholders.

[31]See also *Carsonaro v.Bloodhound Technologies, Inc.*, 65 A3d 618, 658 (Del Ch 2013).

[32]For a rare example to the contrary that characterizes aiding-and-abetting liability as superfluous and duplicative of elements of primary wrong, see *Sompo Japan Insurance, Inc v Deloitte & Touche, LLP*, 2005 WL 1412741 (NC Superior Ct June 10, 2005), discussed in Mason, above n 15 at 1163.

[33]Mason, above n 15 at 1160.

[34]*Invest Almaz v Temple Inland Forest Products Corp*, 243 F.3d 57, 83 (1st Cir 2001).

negligence theory.[35] Regardless of the applicable standard, the analytic focus is the accessory's knowledge of the fiduciary relationship and its breach. Participation in the fiduciary's breach with knowledge of the fiduciary relationship and the breach establishes the accessory's culpability. These requisites have consequences for how the tort is characterized for some purposes under US law, including claims for contribution, discussed in Section IV.

Conduct through which an actor participates in a primary wrong is susceptible to further parsing. 'Substantial assistance or encouragement', as in the *Restatement* formulation, may imply that accessory liability cannot stem from conduct that induces or otherwise initiates another actor's breach of duty. In Christopher Kutz's terminology, accessories are by definition never the exclusive authors of harm to the plaintiff; instead, accessories would always be inclusive authors of harm-producing actions in which they culpably participate.[36] But knowingly to induce a breach of fiduciary duty is a significant basis for accessory liability, as is evident in Section IV; one might view inducement as a form of 'encouragement' of an initiatory, not a tag-along sort, constituting both exclusive and inclusive authorship. However styled, an accessory's participation in a fiduciary's breach of duty is not a basis for liability unless it is connected to harm suffered by the plaintiff. The *Restatement* formulation requires that the assistance or encouragement have been 'substantial', that is, 'a substantial factor in causing the resulting tort', which excludes minimal or slight conduct.[37]

More generally, as prior scholarship recognizes, conventional but-for tests of causal

[35] *Fraternity Fund Ltd v Beacon Hill Asset Management, LLC*, 479 F Supp 2d 349, 368 (SDNY 2007). Some Delaware cases formulate the standard to encompass constructive knowledge as an alternative to actual knowledge but also require that the aider and abettor have acted with *scienter*. See Section IV.

[36] C Kutz, *Complicity* 105-106 (Cambridge, Cambridge University Press, 2000).

[37] *Restatement (Second) of Torts* § 876 cmt d.

connection do not work well when a series of multiple autonomous actors each engages in distinct conduct that results in an indivisible injury to a third party.[38] Positing, as did HLA Hart and Tony Honoré, a special form of causality for interpersonal situations, does not generate a causally-framed test for liability.[39] An alternative, championed by Michael Moore, recognizes that harms may have co-causes and treats causation itself as a 'primitive', a 'factor' with a scalar quality that does not operate in binary fashion.[40] As Paul Davies proposes, it may be best to focus on participatory linkages through which an actor made more than a minimal contribution to the primary wrong.[41] More descriptively, one might acknowledge that situations in which multiple autonomous actors choose in various ways to contribute to a primary wrong are not the prototypes assumed by conventional formulations of causation.

Accessory liability requires culpable participation in the primary wrongdoer's breach of fiduciary duty. This requisite calls into question whether accessory liability might be premised on failure to act when the accessory knows that the primary culprit is engaged in wrongdoing but remains silent, resulting in loss for the plaintiff. Framing accessory liability within tort law makes salient a bedrock principle of common-law tort: the absence of a duty to rescue when an actor has not created or increased the risk of harm and is outside the ambit of relationships in which such a duty is implied.[42] To be sure, typical illustrations of the bite of the no-duty-to-rescue principle involve actors who know that they could easily save others from physical harm at no jeopardy to themselves. But the principle operates more generally as a justification for non-

[38]Davies, above n 3 at 33-40; Kutz, above n 36 at 169-170.

[39]Kutz, above n 36 at 170; see HLA Hart & Tony Honoré, *Causation in the Law*, 2nd edn (Oxford, Clarendon Press, 1985) 388.

[40]Moore, above n 25 at 300.

[41]Davies, above n 3 at 40.

[42]*Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 40, cmt f.

intervention, just as duty serves as a central organizing concept across tort law.[43]

Thus, banks and comparable institutions generally owe non-customers no duty to protect them from fraud perpetrated by bank customers.[44] However, once a bank has 'clear evidence' that trust funds on deposit in a fiduciary account have been misappropriated, the bank breaches its duty to safeguard the funds if it fails to investigate.[45] But a bank owes a duty to safeguard trust funds on deposit with it. The bank breaches its implied duty to prevent diversion through a passive failure to make reasonable inquiry once aware that improprieties may be occurring. In contrast, when a bank owes no duty to a plaintiff, the bank is not subject to liability when it fails to inform the plaintiff that a customer may be engaged in fraud.[46]

One practical generalization is that substantial assistance may be easier to establish when the primary wrong is breach of fiduciary duty than when it is fraud. This may be due to 'the higher level of duty owed by the fiduciary', which may make more apparent the connection between the accessory's conduct and the harm to the plaintiff.[47] Alternatively, an accessory who knows that the primary wrongdoer is tied to the plaintiff by a fiduciary relationship may seem more readily to join in as a co-author of harm to the plaintiff than accessories who become aware of another actor's fraud.

C. Regulation and Environmental Circumstances

Private law doctrines do not operate in isolation as constraints against wrongful conduct, including breaches of fiduciary duty and conduct that knowingly assists such breaches. In some

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[43] For the same principle, see *Fitzalan-Howard v. Hibbert* [2009] EWHC 2855 [44].

[44] *MLSMK Investment Co v. JP Morgan Chase & Co*, 431 Fed Appx 17, 20 (2d Cir 2011); Tamar Frankel, *The Ponzi Scheme Puzzle* (New York, Oxford University Press, 2012) 180.

[45] *Lerner v. Fleet Bank , NA*, 459 F 3d 273, 295 (2d Cir. 2006).

[46] *In re Sharp International Corp*, 403 F 3d 43, 52 n 2 (2d Cir 2005).

[47] Mason, above n 15 at 1163-1164.

settings, the general law may operate to supplement requirements imposed by statutes and regulation. For example, broker-dealer firms that operate as clearing firms provide essential clearing services for accounts, including trading, settlement, and delivery of securities. Clearing firms typically have no customer contact for accounts for which they perform these services. But regulation requires that clearing firms monitor accounts for illegal activity, including violations of trading and anti-money laundering rules.[48] Regulation positions such firms—which are few in number—as gatekeepers on behalf of investors and market integrity more broadly, distinct from the firms' relationships with their direct clients. Likewise, when a firm operates as a prime broker and learns that a hedge-fund client has overvalued investment portfolios, the prime broker's regulatory responsibilities include reporting the situation to the SEC.[49] In contrast, investment banks that serve as M&A advisors—the focus of Section IV—are not positioned by regulation as gatekeepers comparable to the financial institutions discussed above. Nor does industry self-regulation define responsibilities for M&A advisors or sanction departures from defined responsibilities,[50] comparable to the ethical rules and professional disciplinary systems applicable to lawyers.[51] As a consequence, the significance of general legal doctrine and its enforcement may be amplified when specialized regulation does not constrain harmful conduct.[52]

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[48] *Re Goldman Sachs Execution & Clearing, LP f/k/a Spear, Leeds & Kellogg. LP*, Securities Exchange Act Release No 55,465 (March 14, 2007).

[49] For an example, see *Fraternity Fund Ltd*, 479 F Supp 2d at 357 (prime broker precipitated collapse of fraudulent investment scheme when it refused to provide additional financing and reported over-valued investment portfolios to SEC).

[50] See generally AF Tuch, 'The Self-Regulation of Investment Bankers' (2014) 83 *George Washington L Rev* 101.

[51] On debates concerning the adequacy of constraints on lawyers' conduct in financial transactions, see D Howarth, *Law as Engineering* (Cheltenham & Northhampton, Edward Elgar, 2013) 97-140 ; D Kershaw & R Moorhead, 'Consequential Responsibility for Client Wrongs: Lehman Brothers and the Regulation of the Legal Profession' (2013) 76 *MLR* 26.

[52] Admittedly, the interplay between courts and legislatures in this connection is complex,

Beyond the law and formal regulation as well as structured self-regulation, wrongful conduct may be constrained by an actor's concern to establish and maintain a good reputation. It's open to question whether reputational constraints now operate more weakly than in the past in some environments, including those populated by financial firms and professional-services firms.[53] However, intense journalistic scrutiny may enhance what might otherwise seem weak incentives to avoid problematic conduct, in this context conduct that enters or closely skirts the boundaries of accessory liability. As Section IV explores in greater detail, conflicted investment banks that serve as M&A advisors are potentially subject to accessory liability through conduct that places directors in jeopardy of breaching their fiduciary duties. These widely reported risks triggered quantifiable changes in how target boards choose their advisors. That many more targets now choose advisors free of potentially conflicting lines of business suggests the power of accessory liability to amplify the force of other constraints on conduct by inducing greater care in selecting an advisor.[54]

The advice lawyers give their clients can also strengthen incentives to steer away from legally problematic conduct. When legal doctrine is unclear or the consequences of breach uncertain, counsel may be less resolute or categorical in advising clients. The reported reaction of English counsel is instructive. During a period recounted in Section III, accessory liability for breach of trust turned on whether the accessory acted with a dishonest state of mind, not just on

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requiring close attention to the prototypical actor assumed by general legal principles. See S Gardner, 'Knowing assistance and knowing receipt: taking stock' (1996) 112 *LQR* 56, 78-84(distinguishing situation of 'ordinary traders' from professional agents).

[53]See J Macey, *The Death of Corporate Reputation* (Upper Saddle River, FT Press, 2013).

[54]L Hoffman, 'Firms Ask: Are Our Bankers Conflicted' *Wall Street Journal*, March 3, 2016)(reporting rise to 19% of M&A advisory revenue earned in 2015 by "boutique" advisory firms that specialize in advisory services, up from 8% in 2008). For a broader account, see WW

whether the accessory *was* dishonest (or acted with knowledge of the trustee's breach of duty, as US law formulates the counterpart of this element of liability). The Law Lord who dissented from this turn in doctrine explained extra-judicially: 'As the majority left it, the law was incoherent. The profession recognized this, and many members of the Bar whose opinions I respected told me that they were dismayed by the decision which they considered made it difficult to make directors and other liable when they behaved dishonestly'.[55] Later developments arguably shifted the law to conform to the dissenter's view, as discussed in Section III. For present purposes, the point is that how lawyers understand legal doctrine and how they advise their clients are crucial to mechanisms of translation and transmission.[56]

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## III. The United Kingdom

A. Doctrinal Structure

To some readers, the generality of so much private-law accessory doctrine in the United States may come as a surprise. For in the United Kingdom, just as tort and equity occupy distinct precincts in the overall taxonomy of private law, accessory liability is not generalized, and the substantive requisites for accessory liability differ based on the nature of the primary wrong. It may seem counterintuitive that generality and relative doctrinal certainty characterize the United States, a jurisdiction organized with multiple sovereign states that is also known for relatively high levels of litigation between private parties and jury trials in civil cases.

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Bratton & ML Wachter, 'Bankers and Chancellors' (2014) 93 *Texas L Rev* 1.

[55]P Millett, *As In Memory Long* (London, Wildy, Simmonds & Hill Publishing, 2015) 176-77.

[56]Such anecdotes suggest that formally-structured dialog between court and counsel do not exhaust the possibilities for exchanges that may prove influential. On forms of judicial dialog specific to the House of Lords and the UK Supreme Court, see A Paterson, *Final Judgment*

Two institutional factors concerning the United States are necessary preludes to further discussion of the United Kingdom. First, Delaware's Court of Chancery is the most prominent court in articulating and applying doctrines that define accessory liability for breach of fiduciary duty, at least in high-profile disputes grounded in corporate law. But as the court's name suggests, it is—distinctively if not uniquely in the United States—a court of equity. As Section IV elaborates, Delaware situates accessory liability in tort; indeed the court characterizes breach of fiduciary duty as an 'equitable tort'[57] and readily accommodates accessory liability within a framework structured within tort doctrine. Second, although the United States is a large and remarkably varied country in which basic areas of private law are within the province of each state, centripetal or centralizing forces operate as well. To be sure, unlike Canada, the United States has no national-level corporations legislation, but in practice many publicly-held corporations are incorporated in Delaware. *De facto* Delaware's corporation statute, plus the Court of Chancery and Supreme Court, all operate on a national plane. Additionally, over the twentieth century, courts in some states influenced sister states' courts, while the Restatements served to make decisional law more uniform, albeit not evenly so on all points within private law.[58]

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(Oxford and Portland, Hart Publishing, 2013).

[57]*In re Rural/Metro Corp Stockholders Litigation*, 88 A 3d 54, 98 (Del Ch 2014), affd sub nom *RBC Capital Markets v Jervis*, 129 A3d 816 (Del 2015)('a breach of fiduciary duty is an equitable tort')('*Rural/Metro I*'). As the author of *Rural/Metro I* wrote extra-judicially, 'a breach of fiduciary duty is in fact a tort, although a unique species historically called an 'equitable tort''). JT Laster & MD Morris, 'Breaches of Fiduciary Duty and the Delaware Uniform Contribution Act' (2010) *Delaware Law Review* 71, 71. UK courts apply the term 'equitable tort' to characterize dishonest assistance (e.g. bribery) to induce or assist a breach of fiduciary duty. See P Davies, 'Gain-Based Remedies for Dishonest Assistance' (2015) 131 *LQR* 173, 176.

[58]Likewise, the Uniform Commercial Code was a major force toward greater uniformity in contract law, even for portions not encompassed by the Code. See E A Farnsworth, *Contracts*, 4th edn (New York, Aspen, 2004) 40, 298-299, 596.

B. Legacies and Evolution

*i. Tort*

As Paul Davies recounts the situation, accessory liability in tort, now subsumed into 'joint tortfeasance', is somewhat obscure and dominated by concepts of conspiracy.[59] No doubt history beyond the scope of this paper explains much. In general, the conduct requisite to accessory liability consists of combination, authorisation, or procurement.[60] Absent a common design, an actor who furnishes substantial assistance to another actor's tort is not subject to accessory liability.[61] When fraud is the primary or underlying wrong, the reasoning in prominent judgments excludes the possibility of imposing liability on an actor who assisted the primary fraudfeasor but was not party to a common design.[62]

One potential justification for defining accessory liability so narrowly is fear lest the requisite that assistance be 'knowing' be weakened by pressures to demand less than actual knowledge of the primary wrong.[63] The US experience suggests that judicial vigilance is necessary but achievable. That civil juries significantly feature in US tort cases (but not in the Delaware Court of Chancery) may help explain this stringency. Additionally, if the policy justifications for a narrow definition of accessory liability presuppose, as a prototypical tort,

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[59]Davies, above n 3 at 178-79. The UK Supreme Court expressly adopted the terminology of accessory liability in tort in *Fish & Fish Ltd v. Sea Shepherd* [2015] AC 1229.

[60]ibid at 188, adopting formulation in H Carty, 'Joint Tortfeasance and Assistance Liability' (1999) 19 *Legal Studies* 489.

[61]Davies, above n 3 at 195. See also P Davies, 'Accessory Liability in Tort' (2016) 132 *LQR* 15. In general, accessory liability requires that an actor have assisted the commission of an act by the primary wrongdoer, that the assistance be pursuant to a common design, and that the primary wrongdoer's act constitute a tort as against the claimant. *Fish & Fish*, [2015] AC at 1248.

[62]Davies, above n 3 at 198, discussing judgment in *Credit Bank Lyonnais NV v Export Credits Guarantee Department*, [2000] AC 486 (HL).

[63]ibid at 220.

fraud or copyright infringement, the risk is that accessories to torts commonly viewed as working more fundamental harms—battery, for example—will be under-deterred and their victims under-acknowledged and under-compensated outside the ambit of criminal law and its administration.[64]

*ii.* *Equity*

A crucial starting point is the nature of duties characterized as 'fiduciary'. Famously, Millett L.J. said in *Bristol & West Building Society v. Mothew* that '[t]he expression "fiduciary duty" is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties'.[65] As becomes evident in Section IV, US terminology is not as sparing in using the term 'fiduciary'.[66] In particular, corporate directors who breach their duties of care, even in the absence of a conflicting interest, are viewed as having breached a fiduciary duty. But for present purposes this may not matter much because had US law confined the label of 'fiduciary' breach to directors' loyalty-related transgressions, directors' breaches of the duty of care would (one thinks) have been litigated as torts, and claims against accessories would have proceeded within the generalized framework elaborated in Section II.[67]

Overall, in equity, accessory liability developed somewhat haltingly, from a long-lived legacy of restrictive definition toward relatively greater clarity and coherence.[68] In particular, the

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[64]Davies, above n 3 at 220 (criticizing implication that an expectation of loyalty from a fiduciary should rank higher than 'the right to bodily integrity and freedom').

[65]*Bristol & West Building Society v.Mothew*, [1998] Ch 1 (CA) 16, [1997] 2WLR 436, 448.

[66]But some bodies of doctrine do not characterize as 'fiduciary' all duties that an actor might owe. Agency law, for example, differentiates an agent's duties of performance from duties of loyalty. See *Restatement (Third) of Agency*, Topic 1 (Agent's Duties to Principal).

[67] English law on the applicable framework is not clear. See Davies, above n 3 at 100.

[68]Davies, above n 3 at 88. For a detailed account, see EP Ellinger, E Lomnicka & CVM Hare, *Ellinger's Modern Banking Law*, 5th edn, (Oxford, Oxford University Press, 2011) ch. 7,

definition of the primary wrong requisite for accessory liability in connection with breach of fiduciary duty expanded. Nonetheless, the constitutive elements of accessory culpability may retain an overhang of precedent requiring not only that an accessory have acted dishonestly but that the accessory have been self-aware of acting dishonestly, a requisite focused on a defendant's conscience that owes much to criminal law.[69]

One legacy of the nineteenth-century precedent, *Barnes v. Addy,*[70] was a two-limbed specification of accessory conduct derived from a case in which the accessory defendants acted as a solicitors for an initial trustee and his (bankrupt) successor, who misappropriated trust property. The initial trustee's solicitor advised him of the risk that the successor might misappropriate trust property, but the initial trustee thought this unlikely. The successor trustee's solicitor, acting on his client's instructions, prepared the deeds requisite for the transfer. As Lord Selborne formulated the bases for liability, non-trustees could be subject to liability stemming from a trustee's breach when 'they are found making themselves trustees *de son tort*', or 'actually participating in any fraudulent conduct of the trustee to the injury of the c*estui que trust*'.[71] Separately, a non-trustee's receipt of trust property may subject the receiver to liability in restitution.[72] More generally, wrote Lord Selborne, 'strangers are not to be made constructive

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pt. 5. As applied to banks, regulation may have substantially overtaken the potential risk of accessory liability under English law; 'a bank that has been used for the diversion of trust assets or as part of some other fraudulent or criminal scheme may well have other more pressing concerns'. ibid at 289.

[69] Davies, above n 3 at 119. Whether dishonesty for civil law purposes should be defined differently than in criminal law is open to dispute. See *Starglade Properties Ltd v. Nash* [2010] EWCA Civ 1314 [42]-[44](Lord Leveson).

[70] *Barnes v.Addy* (1874) LR 9 Ch App 244 (CA). On the longevity of the two-limbed doctrine and the cases preceding *Barnes v. Addy*, see WMC Gummow, *Knowing assistance* (2013) 87 *Australian Law Journal* 311-19.

[71] *Barnes v. Addy* (1874) LR 9 Ch App 244 (CA) 251-252.

[72] Unless the recipient has a defense, such as change of position.

trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove... unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees'.[73] Thus, unless the accessory received trust property through the trustee's breach of trust, this precedent limited accessory liability to instances of fraudulent and dishonest misconduct by trustees in which the accessory 'actually' participated.

As Paul Davies suggests, the narrowness with which *Barnes v. Addy* formulated requisites for accessory liability may reflect its time, in which trustees' liability encompassed 'innocent incompetence'.[74] Anachronistic though the comparison might seem, 'innocent incompetence' characterizes some breaches of directors' duties under Delaware corporate law, as Section IV explains. Additionally, it's worth noting that the facts of *Barnes v. Addy* are unpromising as a basis for liability under US law, based on the *Restatement* formulation. The solicitors lacked anything approaching actual knowledge that the successor trustee planned to misappropriate trust property. And how did the solicitors 'encourage' the successor trustee's breach? To be sure, the breach was preceded by advice to the initial trustee from his solicitor and by drafting done by the successor trustee's solicitor, but these actions fall far short of culpability.

Over one hundred years later (1995), the Privy Council broadened the scope of accessory liability by rejecting the requirement that the primary wrong constitute (as it did in *Barnes v. Addy*) dishonesty.[75] In *Royal Brunei Airlines Sdn Bhd v Tan*,[76] an insolvent travel company defaulted on its debt to an airline. The airline sued the company's principal director and

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[73] *Barnes v. Addy* (1874) LR 9 Ch App 244 (CA) 251-252.

[74] Davies, above n 3 at 94.

[75] For Australia, the scope of accessory liability retains the formulation in *Barnes v Addy*. See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 [161].

shareholder. Delivered by Lord Nicholls, the judgment jettisoned the requirement that the trustee's breach have been dishonest and fraudulent; what mattered was the accessory's fault and its character, not the character of the trustee's fault. Indeed, explained Lord Nicholls, 'the case for liability of the dishonest [accessory] seems stronger when the trustee is innocent, because in such a case the [accessory] alone was dishonest and that was the cause of the subsequent misappropriation of trust property'.[77] Put differently, were the accessory honest, unless the accessory made an honest mistake, most likely the breach of trust would not have occurred. To define 'dishonesty', *Tan* adopted an objective standard that expected an individual 'to attain the standard which would be observed by an honest person placed in those circumstances'.[78] An honest person—a legal construction, like the reasonable person in tort law[79]—has regard to known circumstances, which may dictate what course of action to take, including asking questions and possibly declining to become involved.[80] Premised as it is on the accessory's knowledge, liability under *Tan* appears to follow consistently with US doctrine, albeit in equity not tort.

Seven years later (2002), the force and clarity of *Tan* were undercut by the House of Lords in *Twinsectra Ltd v Yardley*.[81] Four of five judgments rejected *Tan*'s objective standard grounded in the accessory defendant's knowledge for a more subjective and inward-looking test; as Lord Hutton wrote, 'it would be less than just for the law to permit a finding that a defendant

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[76] *Royal Brunei Airlines SDN v Tan* [1995] 2 AC 378.

[77] *Royal Rrunei Airlines SDN v* Tan [1995] 2 AC 378, 385.

[78] *Royal Brunei Airlines SDN v Tan* [1995] 2 AC 378, 390.

[79] Of course, as legal standards, honesty and reasonableness make different demands on the actors subject to them.

[80] *Royal Brunei Airlines SDN v Tan* [1995] 2 AC 378, 390-391.

[81] *Twinsectra Ltd v Yardley* [2002] 2 AC 164. And to some observers, *Tan* itself 'left room for doubt and uncertainly as to the precise test' for dishonesty. Ellinger, above n 68 at 282.

had been “dishonest” in assisting a breach of trust where he knew of the facts which created the trust and its breach *but had not been aware that what he was doing would be regarded by honest men as being dishonest*.[82] The accessory defendant in *Twinsectra* was a solicitor acting for a property entrepreneur. Acting on his client’s instructions, he paid over borrowed money to his client knowing that it would not be used to acquire property although the solicitor knew that the money had been received from the lender with an undertaking that it would be retained until applied to acquire property.[83] Cross-examined at trial about his state of mind, the solicitor testified he ‘merely’ followed his client’s instructions and had no reason to disbelieve his client’s statement that the money would be used to buy property. But the client used the money for other purposes and failed to repay the loan. In the assessment of Lord Millett, the dissenter, the solicitor was unaware of no relevant fact. Although he was not willfully blind to the facts, he did close his eyes to their implications, ‘that is to say the impropriety of putting the money at [his client’s] disposal’.[84]

As Lord Millett wrote extrajudicially, *Twinsectra* weakened the force of the law and thus of advice lawyers could give to their clients, premised as accessory liability was on a defendant’s own subjective appreciation of wrongfulness.[85] In fairness to the majority, a standard of culpability geared solely to an accessory defendant’s knowledge catapults the court into a fraught body of English law defining ‘knowledge’, from which the majority sought to avert (as did Lord Nicholls in *Tan*). But the *Twinsectra* majority did not explain why the relevant standard should instead protect accessory defendants who—unlike the solicitor for the successor trustee in

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[82] *Twinsectra Ltd v Yardley* [2002] 2 AC 164, 174 (Lord Hutton)(emphasis added).
[83] *Twinsectra Ltd v Yardley* [2002] 2 AC 164, 168 (Lord Hoffman).
[84] *Twinsectra Ltd v. Yardley* [2002] 2 AC 165, 203 (Lord Millett).
[85] As reported above n 55.

*Barnes v. Addy*—know all relevant facts, fail to appreciate their consequences, and act to facilitate breach of fiduciary duty.

Two years later (2004), the Privy Council appears to have agreed with Lords Nicholls and Millett. In *Barlow Clowes International Ltd v Hamilton*,[86] the principal directors of a company providing off-shore financial services facilitated the operation of a fraudulent investment scheme by transferring investors' funds as directed by the scheme's organizer into transactions with no apparent commercial purpose. And one director, fully aware of the nature of the organizer's business and how it sourced liquid funds, came to know enough to suspect misappropriation but nonetheless authorized transfers of investors' funds into accounts controlled by the organizer and his confederates. The *Barlow Clowes* judgment does not deal straightforwardly with *Twinsectra* and its implications. Instead, acknowledging 'an element of ambiguity' susceptible of being read to encompass the defendant's subjective views of honesty, *Barlow Clowes* claims to clarify that what was required was 'only that his knowledge of the transaction had to be such as to render his participation contrary to normally accepted standards of honest conduct'.[87] Given the facts, it's remarkable that the defendant's argument had any prospect of success, for unlike the other accessory defendants in this sequence of cases, the accessory knew his client was engaged in major criminal misconduct via out-and-out misappropriation of investors' money.

## IV. Investment Bankers as Accessories

Although the general structure of accessory liability is well established in the United States, its application to categories of actors can be controversial, most recently among

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[86] *Barlow Clowes International Ltd v Hamilton* [2005] UKPC 37, [2006] 1WLR 1476

[87] *Barlow Clowes International Ltd v*. Hamilton, [2005] ULPC 37, [2006] 1WLR 1476,

investment banks and the lawyers who advise them. This section opens with a brief description of salient features of Delaware corporate law that shape liability in the M&A context. The section next reviews recent applications of accessory doctrine to investment bankers, focusing mostly on the best-developed and most recent case, and then explores implications of accessory liability in this setting.

A. Duties, Liabilities, and Roles

In contrast to the sparing definition of 'fiduciary' that typifies UK doctrine, Delaware law characterizes directors' fiduciary duties as multi-faceted, consisting of a duty of loyalty (which incorporates a duty of good faith) and a duty of care.[88] Cases fleshing out distinctive content for the duty of good faith cast it as a component of the duty of loyalty that prohibits knowing or reckless conduct detrimental to the corporation's interests.[89] When directors initiate or consider engaging in an M&A transaction that would end the company's separate existence or otherwise transfer control, the duties that directors owe to the target and its shareholders remain the fiduciary duties of loyalty (and good faith) and care; but the object toward which the duties should be exercised narrows to obtaining the best deal reasonably available for the target's shareholders.[90] To fulfill their duties, target directors often retain an expert advisor to assist in estimating the company's value relative to the price and other terms on which it might be sold.[91]

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1481.

[88]On the history of the duty of good faith as a component of the duty of loyalty, see AS Gold, 'The New Concept of Loyalty in Corporate Law' (2009) 43 *UC Davis Law Review* 457.

[89]ibid.

[90]The intricacies of a sizable number of cases articulating the specifics are beyond the scope of this paper. Conventionally, though, target directors are said to owe *Revlon* duties, a label derived from *Revlon Inc v Macandrews & Forbes Holdings Inc* 506 A2d 173 (Del 1986), which made clear that the court's review in this context is distinctively exacting.

[91]AW Tuch, 'Banker Loyalty in Mergers and Acquisitions' (2016) 94 *Texas Law Review* 1079, 1093-1098.

Investment banks that perform this advisory service often serve an additional agency role on behalf of the target by contacting prospective bidders, conducting an auction or otherwise attempting to elicit the best price, and executing the transaction.[92] As Section II noted, some investment banks furnish only these services; others—typically larger banks—also furnish financing to enable purchasers to complete M&A deals, including those for which the same bank also serves as an advisor to the target company's board.[93] Providing financing for an acquisition generally commands much higher fees than advising the board of an acquisition target.

The Delaware corporation statute permits a company to include a provision in its charter—its 'certificate of incorporation'—that exculpates directors from monetary liability stemming from breaches of duty, except for breaches of the duties of loyalty and good faith.[94] Thus, in a typical company, directors who breach their duties of care do not confront a risk of monetary liability, whether or not the breach occurs in the M&A context. The protection afforded by an exculpatory provision extends only to directors and not to officers or third-party providers of professional services, like investment banks. As discussed more fully below, the terms on which a target's board retains an investment bank may attempt to address and mitigate liability risks for the bank, including those stemming from its provision of advisory services to a target and financing to a bidder linked by the same M&A deal. In general, Delaware cases do not give effect to provisions in engagement agreements that through general or unspecific terms purport to relieve the bank of liability.[95]

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[92] Ibid at 1093-1095.

[93] Bratton & Wachter, above n 54 at 24 (describing practice of 'stapled financing' and conflicts it engenders).

[94] Del Code Ann tit 8, § 102(b)(7).

[95] *Rural/Metro I*, 88 A3d 54, 100-101 (Del Ch 2014). There is no clear English authority addressing the availability to an accessory of an exclusion clause that protects a primary

B. Accessory Doctrine Applied

The Delaware Supreme Court's 2015 opinion in *RBC Capital Markets LLC v. Jervis*[96] is a legal landmark for many reasons. To be sure, *RBC Capital* was not the first acknowledgment from a Delaware court that investment banks could be subject to accessory liability when the bank's conflicting interests had a substantial connection to breaches of fiduciary duty by a target's directors.[97] The precedential gravity of *RBC Capital* stems in part from its procedural status. Unusually, the case 'went the distance' through a full trial before the Court of Chancery and two lengthy opinions from that court to an appeal decided by the Delaware Supreme Court.[98] Although the bank as appellant expressly made no arguments on appeal requiring review of any finding of fact, the Supreme Court examined the record in its entirely, documenting its effort in an opinion dominated as much by a detailed factual narrative as by legal analysis. This underscores the settled and straightforward basics of this accessory tort under Delaware law. It also underscores the character and degree of the bank's departures from legally tolerable

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wrongdoer. For discussion of exclusion clauses when the primary wrong is a breach of contract, see Davies, above n 3 at 145.

[96] *RBC Capital LLC v Jervis*, 129 A3d 816 (Del 2015).

[97] Noteworthy predecessors are *In re El Paso Corp. Shareholder Litigation*, 41 A3d 432 (Del Ch 2012)(directors relied on advice from M&A advisor that owned 19% equity interest in prospective buyer; bank's team led by banker with large personal shareholding in buyer); *In re Del Monte Co. Shareholder Litigation*, 25 A3d 813 (Del Ch 2011)(M&A advisor to target surreptitiously assisted potential bidders in structuring joint bid, among other instances of problematic conduct). An earlier precedent questioned the general propriety of 'stapled financing', that is, acquisition financing offered by target's M&A advisor to prospective bidders. See *In re Toys "R" Us Shareholder Litigation*, 877 A2d 975 (Del Ch 2005). Still earlier authority recognized a claim of accessory liability against an advisor retained by a management group taking a company private. See *In re Shoe-Town Inc. Stockholders Litigation*, 1990 WL 13475 at * 7-8 (Del Ch Feb 12 1990).

[98] For this terminology, see *Amalgamated Bank v. Yahoo! Inc.*, 2016 WL 402540 at *17 (Del Ch Feb 2, 2016)(discussing *In re The Walt Disney Co. Derivative Litigation*, 907 A2d 693 (Del 2006) as instance that 'went the distance')).

conduct.

Engaged as its M&A advisor by the board of a long-time client, Rural/Metro Corp., the bank structured the sale process on an unusual two-track basis with the objective—not initially disclosed to its client—of enabling the bank to obtain a role in financing the sale and acquisition of another company. That this company was a direct competitor of Rural/Metro complicated the sale process and limited the number of bidders. The bank also, in the court's characterization, engaged in 'illicit manipulation' of the directors' deliberative process by altering its valuation analyses to cast a more favorable light on the bid favored by the bank. As a consequence, Rural/Metro sold for substantially less than it was worth, injuring its shareholders;[99] Rural/Metro's directors breached their fiduciary duties of care through the underpriced sale, their acquiescence in a flawed process, plus false statements made to Rural's shareholders concerning the deal.

*RBC Capital* articulates the elements of accessory liability in familiar terms. Focusing in particular on the requirement that the accessory knowingly participate in the primary breach, the court endorsed the Court of Chancery's statement that accessory liability requires the accessory to have acted with *scienter*, that is with 'an illicit state of mind', meaning with 'actual or constructive knowledge that their conduct was improper'.[100] One might wonder how close the *scienter* standard comes to *Twinsectra*'s subjective requirement that an accessory proceed with self-awareness of dishonesty, beyond knowledge that its conduct is dishonest. The 'manifest

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[99]Delaware characterizes such injuries as individual to shareholders, not injuries to the company that give rise to claims that must be brought in derivative suits.

[100]*RBC Capital LLC v. Jervis*, 129 A3d 816, 862, quoting *Wood v. Baum*, 953 A2d 136, 141 (Del 2008)(Del 2015) (internal quotation marks omitted). Although this language posits constructive knowledge as alternative to actual knowledge, the *scienter* requirement seems to obviate its significance.

intentionality' of the bank's conduct, according to *RBC Capital*, 'is demonstrative of the advisor's knowledge of the reality that the Board was proceeding on the basis of fragmentary and misleading information.'[101] This formulation turns on an objective assessment of whether an accessory acted with knowledge of the primary wrong, not the more subjective focus required by *Twinsectra*.

C. Further Implications

*RBC Capital* emphasizes the bank's authorship of breaches of duty committed by the target's directors: the bank 'knowingly induced' the breaches 'by exploiting its own conflicted interests to the detriment of Rural and by creating an informational vacuum'.[102] To be sure, the directors failed to exercise adequate oversight over the bank once they knew that it had entanglements with prospective bidders, but the bank's own conduct initiated the cascade of woes that followed.[103] Given its emphasis on damning factual specifics, *RBC Capital* leaves open whether liability follows when an advisor is subject to an undisclosed conflict and aware of breaches of the duty of care by directors, but overall the advisor's conduct is less problematic.[104]

A separate question is how best to characterize the relationship between a target corporation (or its directors) and an investment bank retained to act as an M&A advisor. To the

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[101] *RBC Capital LLC v Jervis*, 129 A3d 816, 863 (Del 2015).

[102] *RBC Capital LLC v. Jervis,* 129 A3d 816, 862 (Del 2015).

[103] This calls to mind the argument in *Tan* that the justification for accessory liability is even stronger when the primary wrongdoer is only hapless or careless.

[104] Recent examples lack the full factual development of *RBC Capital*. See *Singh v Attenborough,* 137 A.3d 151, at *2 n.7 (Del 2016)(characterizing bank's conduct in *RBC Capital* as duping board into breach of duty of care for bank's own motives; bank in instant case, in contrast, delayed its disclosure of prior pitch of advisory client to acquirer until merger agreement signed); *In re TIBCO Software Inc. Shareholders Litigation*, 2015 WL 6155894 (Del Ch Oct 20, 2015)(denying motion to dismiss; not wanting to jeopardize $47.4 million fee, advisor concealed from target board information that shares had been miscounted and that acquiror had relied on miscount in calculating consideration, resulting in bargain price for

extent that the relationship—founded as it is in an engagement agreement—is contractual[105], the bank's obligations might be delimited by agreement. *RBC Capital* explicitly rejected the Court of Chancery's description of these relationships that positions M&A advisors as 'gatekeepers'.[106] This characterization, unmoored by any articulation of duty, lacks clarity and coherence with tort doctrine more generally. Additionally, *RBC Capital* does not explicitly characterize the relationship between target directors and their M&A advisor as fiduciary.[107] Instead, discussing the informational asymmetries that typify contracting between a bank and its client, the court emphasized the significance of disclosure to 'level the field' but also concluded with an unqualified assertion of an obligation 'not to act in a manner that is contrary to the interests of the board of directors ....'[108] This links the bank's liability back to basic tort doctrine by stressing the categorical obligation to refrain from intentionally wrongful conduct.

Finally, *RBC Capital* 'went the distance' in an additional and unusual respect. The bank, as the sole defendant not to settle prior to trial, confronted a judgment for $91,323,554.61, or $4.17/share, representing damages suffered by Rural's former shareholders. Relying on the Delaware statute governing contribution among tortfeasors[109], the bank sought a credit against the judgment for settlement amounts paid by other defendants—$5 million by another bank that served in a secondary role, and $6.6 million by two conflicted directors who played significant roles in the sale process. Resolving questions of first impression, the Court of Chancery apportioned responsibility as among the bank and the other defendants. To do so required

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acquiror).

105 See Bratton & Wachter, above n 54 at 7-8.

106 *Rural/Metro I*, 88 A3d 54, 88 (Del Ch 2014).

107 On justifications for so characterizing M&A advisors, see Tuch, above n 91.

108 *RBC Capital LLC v. Jervis*, 129 A3d 816, (Del 2015) 865 n 191.

109 Delaware Uniform Contribution Among Tortfeasors Act, Del Code tit 10 §§ 6301-08.

assessing the character of the bank's tort.

Although Delaware's contribution statute does not explicitly bar contribution on behalf of intentional tortfeasors, the court considered at length the type of intentional tort that accessory liability represents. The bank knowingly participated in (and to a considerable extent induced) the directors' breaches of duty, but its conduct was not criminal and was not intended to cause physical injury.[110] Its intentional tort thus lacked the moral gravity that should exclude the possibility of contribution. On the other hand, to the extent the bank misled its client's directors, it came to equity with unclean hands in its quest for contribution; to permit contribution (here in the form of settlement credit) would enable the bank to 'take[] advantage of the targets of its own misconduct.'[111] Calculating contribution in this light, the court exercised its discretion to reduce the judgment against the bank to $75.8 million, having allocated some measure of fault to two directors who had distinct personal interests in the sale.

## V. Conclusion

These contrasts help make the case for accessory liability as a worthy subject for further academic scrutiny. The comparative account in this paper also demonstrates the significance of taxonomic placement for substantive doctrine. The emphasis in US law on objective measures for accessory culpability fits well with tort law's general focus on legally-constructed reasonable persons, not the inward-looking reflections of individual actors. As Justice Holmes wrote: 'The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see

[110] *In re Rural/Metro Stockholders Litigation*, 102 A3d 205, 237 (Del Ch 2014), affd sub nom *RBC Capital LLC v. Jervis*, 129 A3d 816 (Del 2015)('*Rural/ Metro II*').

[111] *Rural/Metro II*, 102 A3d 205, 239. Thus, albeit the tortious character of the bank's wrong, equitable doctrine applied.

men as God sees them ….'[112] The paper's comparative account also highlights the interstitial function that accessory liability can serve, whether characterized as a tort or an equitable wrong. The prospect of accessory liability may deter conduct by actors situated to withhold facilitation necessary to the wrongdoing of others, especially when other constraints on problematic conduct are weak, as well as serving as an additional source of recovery for victims of wrongdoing. The comparative account also illustrates the independent character of accessory liability, which rationalizes outcomes—as in *Tan* and *RBC Capital*—in which an accessory's culpability differs from that of the primary wrongdoer.

[112] OW Holmes Jnr, *The Common Law* (Boston, Little Brown & Co. 1881) 108.