

***AIDING AND ABETTING THE CONSUMER CLIENT:
USING THEORIES OF JOINT LIABILITY TO FIND A COLLECTABLE DEFENDANT***

By Stephen E. Goren

The responsibility for a terrorist's act does not rest solely with the terrorist. One need not act as a terrorist to suffer consequences. As the Taliban in Afghanistan have learned, conspiring, aiding and abetting, or otherwise acting in concert with wrongdoers can also give rise to punishment. The moral and legal foundations for a conspiracy case have been well understood by criminal lawyers. Civil litigators, however, are much less likely to invoke theories like civil conspiracy, aiding and abetting, or concert of action. These theories can and should be used more often in consumer cases.

All too often in consumer scams, the primary culprit is a corporate shell without substantial assets. To achieve justice for a consumer, the problem of the uncollectable defendant must be solved. Consider a cause of action using one of the common law theories creating joint and several liability, such as concert of action, civil conspiracy, or aiding and abetting.

Called "Concert of Action" by the Restatement (Second) of Torts, it is defined in §876:

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, or

(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.

See also, the scholarly discussion of civil aiding and abetting by Judge Wald in *Halberstam v. Welch*, 227 U.S. App. D.C. 167, 705 F.2d 472, 481-86 (D.C. Cir. 1983). These doctrines are not new. See, e.g. Burdick, *The Tort of Conspiracy*, 8 Col. L. Rev 117 (1908); Charlesworth,

Conspiracy as a Ground of Liability in Tort, 36 L. Q. Rev. 38 (1920); Prosser Handbook of the Law of Torts, (4th ed) at 293. Yet, the parameters have not been truly tested by modern consumer protection attorneys.

The power of these overlapping doctrines are not to be underestimated. Different courts have given different names to these joint and several liability theories. The most common names are civil conspiracy, concert of action, and aiding and abetting. At least one case has tried to define subpart (a) of section 876 as being a civil conspiracy and subpart (b) as corresponding to civil aiding and abetting. *Halberstram v Welch*, 705 F2d 472 (DC Cir 1983). Realistically, the terms have been used too loosely for too long by too many different courts to reach one consistent definition of any of the three words.

For purposes of this article, I will use the words interchangeably, despite a recognition that some courts have distinguished the three. See, e.g. *Dow Chemical Co v Malhum*, 1998 NV 42061 (1998) (distinguishing concert of action from civil conspiracy under Nevada law. Concert of action has a different standard requiring only a tort to be committed while acting in concert, unlike civil conspiracy which requires an intent to engage in unlawful activity. Aiding and abetting was separately analyzed as requiring knowing and substantial assistance of a tort and an awareness of its role in furthering the wrongful behavior); *Cousineau v Ford Motor Co*, 140 Mich App 19 (1985) (Concert of action requires Defendant to have acted tortiously and in concert with the entity causing harm; Civil conspiracy requires an agreement between the tortfeasors and an action by Defendant in furtherance of the conspiracy even if it is not a tortious action). The issue for the litigator is not how to distinguish the three, but how they can be used to build a legitimate claim against a collectible defendant.

THE LENDER

One good way to use the Concert of Action doctrine is to attack the source of the wrongdoer's money. Banks generally do not make loans without thoroughly understanding the intricacies of a business. In fact, most loan documents will require the culprit scam artist to continue acting in the same fashion as a condition of the loan. After all, a bank is making the loan on the condition that the money will be used in a certain fashion. Nonetheless, a detailed search of lender's liability law shows incredibly few cases in which a bank was ever sued as a co-conspirator. Even detailed textbooks on banking law do not adequately discuss the subject. There is inadequate case law to often determine whether the bank can be held liable. In part, this is the fault of the Plaintiff's bar. Plaintiffs too rarely try to sue the bank. That is a mistake.

Consider a hypothetical. Assume an individual (or corporation or bank) were acting as the financier to a drug cartel, lending money to help import illegal narcotics. So long as the financier knows that the money is to be used for illegal activities, no one would have trouble finding the financier part of an illegal conspiracy, and thus jointly and severally liable. It does not matter that the financier does not develop the scheme or control the activities. The shared desire to profit from a known illegal scheme is enough.

To make the hypothetical more interesting and realistic, assume that the financier is aware of the details of the borrower's business, as most lenders are in this day and age, but makes a mistake of law. The financier's wrongful belief that a business practice is legal does not free the financier of liability as a co-conspirator. For example, *In Daniel v First National Bank of Birmingham*, 227 F2d 353 (5th Cir 1955), the plaintiffs bought a tractor. A cash price was negotiated, but Plaintiff needed a loan. The dealer had the customer sign an agreement selling the tractor at a "time/price"

premium. After the deal was consummated, the commercial paper was assigned to the bank. Although the law recognized time/price sales as being an exception to the applicable usury laws, the court held that in deciding if the transaction was merely disguised usury, the “paper bag” in which the parties pack the transaction must be penetrated. In *Daniel*, the substance of the transaction was deemed to be usurious based on the nature of the negotiations and the method the higher “time/price” sale price was calculated. Defendant Bank, which knew the details of the transaction but believed (as did the trial judge) that the transaction was not usury, was nonetheless held liable to pay the statutory penalty for usury. See also, *FDIC v First Interstate Bank of Des Moines*, 885 F2d 423 (8th Cir 1989) (jury verdict against a bank for aiding and abetting securities fraud upheld when loan given to further an illegal scheme if bank had “conscious involvement in impropriety or constructive notice of it”).

One of the best cases citing the Restatement and giving rise to bank liability was decided by the New Jersey Supreme Court. In *Judson v Peoples Bank*, 25 NJ 17, 134 A2d 761 (1957), Plaintiff sued after they were induced to sell their shares in a corporation for less than fair market value. Plaintiff was able to prove that flagrantly fraudulent misrepresentations induced a sale at a rock bottom price because of a false picture of imminent doom. Defendant People’s Bank was held to be jointly and severally liable for the scheme because it knew of the fraudulent conduct and yet helped develop the scheme and furnished the funds to accomplish the profitable deception. The key to holding the bank liable is that it not only lent money, but did so with knowledge of the improper nature of the scheme. This made the bank more than a lender. It was a “conspiratorial participant.” See also *Powell v HEF Partnership*, 793 F Supp 91 (D UT 1992); *MetgeI v Baehler*, 762 F2d 621 (8th Cir 1985); *Pereira v United Jersey Bank, NA*, 201 B.R. 644 (D NY 1996).

To hook a bank, you must plead and prove that the bank understood what was being done to the plaintiff, agreed to assist in the endeavor by lending money and that plaintiff was the victim of tortious or statutory wrongdoing. The bank's moral innocence and legal naivete do not provide a shield from liability. See, e.g., *Scholnick v Continental Bank*, 752 F Supp 1317 (E Dist Mich 1990) (Continental Bank was held liable for aiding and abetting a securities fraud, because it knowingly failed to warn investors of an inadequate pre-investment disclosure issued by a third party, even though Continental did not prepare or distribute the disclosure).

THE ADVERTISERS

Banks are not the only entity potentially liable for providing assistance. Consider the newspaper or television station that advertises the wrongful scheme. Now, in many cases the media placing the ad does not have sufficient knowledge of the wrongful act to be held liable for aiding and abetting. Certainly the First Amendment offers the media protection from their innocent acts in disseminating fraud schemes. However, to the extent the media publicizing the scam is aware of the fraudulent nature of what it is helping to sell to its readers, the First Amendment is not a strong shield. The Michigan's Consumer Protection Act is instructive and restates the law in many states:

"An act done by the publisher, owner, agent, or employee of a newspaper, periodical, directory, radio or television station, or other communications medium in the publication or dissemination of an advertisement [will not give rise to liability] unless the publisher, owner, agent, or employee knows or, under the circumstances, reasonably should know of the false, misleading, or deceptive character of the advertisement or has a direct financial interest in the sale or distribution of the advertised goods, property, or service. "

MCL 445.904 (1)(b).

Incredibly, few if any cases seem to test when a publisher reasonably should know of the deceptive character of an advertisement. Late-night television is full of ads from psychics. Do our television

networks and cable operators reasonably believe a phone call will put their viewers in touch with a "talented psychic" or are they content to accept ad dollars turning a blind eye to the gullible consumers who are regularly suckered? At what point after government officials have revealed a scam does it become improper to continue placing advertisements? These are fact specific questions without precise answers. This is an area that is are for talented plaintiff attorneys to help define answers.

THE PROFESSIONALS ADVISORS

We as lawyers are not beyond the reach of the doctrines giving rise to joint and several liability. Neither are accountants. *In re American Continental Corporation/Lincoln Savings and Loan Securities Litigation*, 794 F Supp 1424 (D. Az. 1992), held that lawyers' and accountants' inaction and silence made them liable for aiding and abetting a securities fraud and RICO scheme, because they breached their duty to disclose wrongdoing by their client savings and loan institution. See also, *Petro-Tech, Inc v Western Co*, 824 F2d 1349 (3rd Cir1987) (aiding and abetting a RICO violation gives rise to civil liability). If a lawyer were to knowingly help hide profits from a drug smuggling operation, wouldn't he be held to be part of the conspiracy? Perhaps then, if a payday loan company is deemed to be a loan sharking operation, then the lawyer who wrote up the inadequate Truth In Lending Act disclosures may share in the liability for the corporation's wrongdoing. After all, should a lawyer who knowingly helps establish an illegal business be able to escape liability by claiming a mistake in interpreting the law?

INDUCING BREACH OF FIDUCIARY DUTY

In addition, liability has been held to exist for inducing a breach of fiduciary duty. To establish a claim of aiding and abetting a breach of fiduciary duty, a plaintiff must show: (1) a

breach of fiduciary duty owed to another; (2) knowledge of the breach by the aider or abettor; and (3) substantial assistance or encouragement by the aider or abettor in effecting that breach. *SDK Investments, Inc. v. Ott*, No. CIV. A. 94-1111, 1996 WL 69402, at *12 (E.D. Pa. Feb. 15, 1996). This doctrine has special relevance regarding investment scams where investment advisors hold a fiduciary duty.

CONCLUSION

Lack of a collectability is still one of the most effective defenses to a lawsuit. The remedy is not always to tell your client that there is nothing that can be done to remedy the wrongdoing. Oftentimes, there are others who have made the wrongdoing possible. Careful attention should be paid to a clients legal rights under Restatement (Second) of Torts §876 to find additional defendants who are jointly and severally liable for conspiring, aiding and abetting, or acting in concert with the wrongdoer.