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## Civil Claims for Aiding and Abetting Tortious Conduct: Recent Developments

In April 2021, Maine joined most states and expressly recognized the civil claim of aiding and abetting a breach of a fiduciary duty. See *Meridian Medical Systems, LLC, et al. v. Epix Therapeutics, Inc., et al.*, 2021 ME 24.<sup>1</sup> *Meridian* imposed heightened pleading requirements for these claims, which may nonetheless saddle businesses and individuals that do not themselves owe fiduciary duties, but work with fiduciaries, with litigation costs and liability. Case law in Maine and elsewhere has developed since *Meridian*, but important legal issues remain unresolved two years later.

### Pleading an Aiding and Abetting Claim

*Meridian* holds that a claim for aiding and abetting a breach of fiduciary duty must allege with specificity that:

1. A fiduciary breached an underlying fiduciary duty<sup>2</sup> to the plaintiff, causing the plaintiff damages;
2. The defendant had actual knowledge that the fiduciary was committing a breach of fiduciary duty; and
3. The defendant provided substantial assistance in the commission of that tort.<sup>3</sup>

In recognizing this expansion of tort liability, the Court was careful to include several limitations widely adopted in other jurisdictions. First, the aider and abettor must have actual knowledge of the conduct constituting the underlying tort. Constructive knowledge is not enough. Mere constructive knowledge, the *Meridian* court explained, would cast too wide a net, making defendants out of parties involved in routine business transactions. Second, the aider and abettor must provide substantial assistance in the commission of the underlying tort. Third, a claim for aiding and abetting a breach of fiduciary duty must be pled with particularity. The *Meridian*

court explained that “the factual foundations of an alleged fiduciary relationship must be pled with specificity,” and “[t]he same logic extends to allegations of aiding and abetting a breach of those duties.”<sup>4</sup> Finally, of course, the complaint must allege a breach of an underlying fiduciary duty and resulting damages.

The *Meridian* court affirmed the dismissal for failure to state a claim for aiding and abetting a breach of fiduciary duty by the managers of a limited liability company, which had licensed technologies to the defendant. The plaintiff (assignee of the claims of the company) alleged that the defendant licensee engaged in misconduct that induced the company’s managers to breach their fiduciary duties to the company. The court found that none of the allegations stated a claim because (1) there was nothing inherently wrongful about the alleged conduct and (2) the plaintiff failed to make specific factual allegations of substantial and knowing assistance in committing the underlying alleged breaches of fiduciary duty.

### This Civil Claim Has ‘Teeth’

What is the impact of the *Meridian* decision? Few decisions apply *Meridian* as of September 2023, but claims for aiding and abetting a breach of fiduciary duty have teeth.

### *Klinges v. Pomerleau – U.S. District Court for the District of Maine*

In *Klinges v. Pomerleau, et al.*,<sup>5</sup> the plaintiff was a minority shareholder in a set of companies that had collapsed. She sued, among other parties, (1) her estranged brother, the majority shareholder of each company, and (2) the law firm that represented both her brother individually and the companies. The plaintiff asserted an aiding and abetting claim against the law firm based on its assistance to her estranged brother in allegedly (a) creating a new company in which plaintiff had no

interest and (b) using the existing companies' lending facilities to fund the new company. On cross-motions for summary judgment, the court (Torreson, J.) found that the estranged brother breached his fiduciary duties to the plaintiff as a matter of law by engaging in a "directors' conflicting-interest transaction" under the Maine Business Corporation Act. *See* 13-C M.R.S. §§ 871-874.<sup>6</sup> Thus, an underlying breach of fiduciary duty was established.

The law firm also moved for summary judgment on both the "actual knowledge" and "substantial assistance" elements of the aiding and abetting claim. The court ruled against the law firm on both elements. The court found a dispute of fact regarding the law firm's actual knowledge of the underlying breach by the estranged brother, noting evidence that the law firm knew about the acrimonious history between the siblings and also knew that the plaintiff had no interest in the new entity.<sup>7</sup>

The court also found a dispute of fact regarding whether the law firm provided "substantial assistance" to the underlying breach of fiduciary duty. The law firm provided an opinion letter to the existing companies' lender stating the companies had properly authorized borrowing the funds that the estranged brother used to fund his new company. The law firm's opinion letter failed to mention that the transaction was, on its face, a directors' conflicting-interest transaction, which the plaintiff had neither approved, nor even knew about. The court found that, by that omission, a jury could find that the law firm "went beyond providing routine professional services and actively furthered" the breach of fiduciary duty by the estranged brother.<sup>8</sup>

The *Klinges* decision is important for many practicing attorneys, not just litigators of aiding and abetting claims. It provides a timely reminder that an attorney can be subject to civil liability for aiding and abetting a breach of fiduciary duty to a third party without there being a fiduciary duty between the attorney and the third party. Also note the limits of the law firm's efforts to characterize challenged conduct as "routine professional services" where the firm rendered faulty legal advice relied upon by a third party that damaged a plaintiff. The *Klinges* decision illustrates: (a) the peril of representing both a corporate entity and its controlling (but not sole) shareholder individually; (b) the need to understand who the client is with respect to a given action; and (c) the need to appreciate whether an action requested by a client could result in that client breaching one or more fiduciary duties the client owes to a third party.

### ***Marion v. Bryn Mawr Trust Co.: A Sister State Court Weighs In***

In *Marion v. Bryn Mawr Trust Co.*, decided earlier this year, Pennsylvania became the most recent state to expressly recognize liability for aiding and abetting another's tortious conduct.<sup>9</sup> The Pennsylvania Supreme Court cited *Meridian* and explored the policy arguments for and against extending liability to aiding and abetting the principal tortfeasor's conduct.<sup>10</sup>

The *Marion* court, like the *Meridian* court, imposed both actual knowledge and substantial assistance requirements for aiding and abetting claims. The *Marion* court reasoned that a scienter standard of actual knowledge would "deter overreaching lawsuits and forestall improper findings of liability in the absence of blameworthy conduct" and, citing *Meridian*, wrote that a "more lax state-of-mind requirement" would cast too wide a net of liability.<sup>11</sup>

The *Marion* court, again citing *Meridian* and "abundant decisional support" from other states, included a lengthy discussion of the pros and cons of extending liability to those that aid and abet another's tortious conduct.<sup>12</sup> Key to the *Marion* decision was the court's reasoning that policy considerations favored recognition of aiding and abetting liability: the "availability of this cause of action may help to deter secondary actors from contributing to fraudulent activities."<sup>13</sup> According to the court, "[m]any frauds, especially complex commercial frauds, cannot be perpetrated without the active assistance of secondary actors such as accountants, lawyers, bankers, analysts, etc."<sup>14</sup> The court also reasoned that "[r]ecognition of this tort could also help ensure victims of fraud are made whole" because "[i]t is not uncommon, again particularly in the context of complex commercial frauds, for the primary fraudster to be unable to fully compensate his victims."<sup>15</sup>

The Supreme Court of Pennsylvania also reasoned that the actual knowledge and substantial assistance elements "will not subject innocent actors to liability" because those requirements mean that "[u]nbiting or uncooperating actors will not face liability."<sup>16</sup> Perhaps that is true. But the *Marion* court, unlike the *Meridian* court, did not impose any heightened pleading requirement on an aiding and abetting claim (though fraud itself is subject in Pennsylvania to heightened pleading). Innocent actors may not be subject ultimately to liability but may incur substantial litigation costs defending claims that are not dismissed before discovery.

## The U.S. Supreme Court Weighs in On Civil Liability for Aiding and Abetting

Earlier this year, the Supreme Court issued its decision in *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023), which addressed civil liability for aiding and abetting acts of international terrorism. The Court (Thomas, J.) included a discussion of common law principles of civil aiding and abetting that are likely to be instructive to Maine practitioners and courts addressing aiding and abetting claims.

The Justice Against Sponsors of Terrorism Act imposes civil liability on anyone “who aids and abets, by knowingly providing substantial assistance ... [to] an act of international terrorism.”<sup>17</sup> The Court, looking to the “common-law tradition” for aiding and abetting claims, found that the statute’s use of the term aiding and abetting “refers to a conscious, voluntary, and culpable participation in another’s wrongdoing.”<sup>18</sup> The Court noted that the general requirements for aiding and abetting claims that assistance to the primary tortfeasor be “knowing” and “substantial” have been applied such that “a lesser showing of one demand[ed] a greater showing of the other,” and thus “less substantial assistance required more scienter before a court could infer conscious and culpable assistance.”<sup>19</sup>

The reasoning in *Taamneh* reflects the same policy concerns identified in *Meridian* and *Marion* regarding the appropriate extent of liability. Expect *Taamneh* to become persuasive authority in Maine with its wide-ranging survey of civil aiding and abetting cases and its “sliding scale” for analyzing knowing and substantial conduct “as part of a single inquiry designed to capture conscious and culpable conduct.”<sup>20</sup>

### Unresolved Legal Issues

Still unclear is whether *Meridian*’s requirement that an aiding and abetting claim be pled with particularity is limited to claims for aiding and abetting a breach of fiduciary duty, or whether the particularity requirement extends to all claims for aiding and abetting another’s tortious conduct.

*Meridian* described the actual knowledge and substantial assistance requirements as applying to aiding and abetting tortious conduct generally, but the decision was also clear that the heightened pleading requirement applied to claims for aiding and abetting a breach of fiduciary duty specifically. The court framed the heightened pleading requirement as flowing from the requirement that the “factual foundations of an alleged fiduciary relationship must be pled with specificity,”<sup>21</sup> which is because “it is often difficult to articulate exactly what proof is required to establish the existence of a fiduciary relationship in particular circumstances.”<sup>22</sup> And, of course, pleading a claim for aiding and abetting fraud would logically also be subject to the

heightened pleading requirement of M.R. Civ. P. 9(b). Is an aiding and abetting claim subject to a heightened pleading standard where the underlying tort has no heightened pleading requirement? The *Meridian* court noted the particularity requirement also addressed “concerns of litigation abuse and capturing ordinary corporate acts.” Those concerns exist for aiding and abetting claims beyond those based on breaches of fiduciary duty, which suggest imposing a heightened pleading requirement on all aiding and abetting claims. In the absence of judicial clarity, practitioners would be wise to treat all aiding and abetting claims as subject to heightened pleading requirements.

Another unsettled issue in Maine is the nature and quality of knowledge that constitutes “actual knowledge.” The *Meridian* court explained the actual knowledge requirement means that “the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides that assistance.”<sup>23</sup> The *Taamneh* court stated that the “knowing” requirement provided in the applicable statute required, at a minimum, “conscious, culpable conduct,” but that “if the assistance were direct and extraordinary, then a court might more readily infer conscious participation in the underlying tort.”<sup>24</sup> Though both *Taamneh* and *Meridian* were appeals from dismissals for failure to state a claim, *Klinges v. Pomerleau* decided a motion for summary judgment, so examined actual record evidence. The *Klinges* court found the record showed a reasonable factfinder could infer the law firm knew about the estranged brother’s breach of fiduciary duty. Practitioners should keep in mind that the “actual knowledge” standard is highly fact specific.

### Conclusion

The *Meridian* court expressly recognized civil liability for aiding and abetting another’s tortious conduct. The federal district court’s decision in *Klinges v. Pomerleau* demonstrates that this claim has teeth and can even expose an attorney and law firm to liability for aiding and abetting breaches of fiduciary duty to non-clients. More complaints are expected to include claims for aiding and abetting other tortious conduct and given the unresolved legal issues, vigorous motions practice will likely further develop the pleading standard and the definitions of actual knowledge and substantial assistance. As a matter of good practice, attorneys should be aware of and take affirmative steps to avoid, or at least minimize, the risk of civil liability for aiding and abetting a breach of fiduciary duty to a third party.

### ENDNOTES

1 The decision received attention by making new law in this field. See, e.g., Joshua Dunlap, “Aiding and Abetting, Conspiracy, and the Picture of Dorian Gray,” May 27, 2021, available at <https://www.jdsupra.com/legalnews/aiding-and-abetting-conspiracy->

and-the-6552806/. The *Meridian* court aptly characterized previous Maine law on aiding and abetting liability as “not entirely clear” and “sparse.” *Meridian*, 2021 ME 24, ¶ 17. In 1993, the Law Court reversed a dismissal that included a claim “for substantially assisting and encouraging the tortious actions of” other defendants. See *Barnes v. McGough*, 623 A.2d 144, 145 (Me. 1993), citing Restatement (Second) of Torts § 876 (“Persons Acting in Concert”) (1979). Yet, as the *Meridian* court noted, it was unclear whether the *Barnes* court adopted Sec. 876 of the Restatement “or whether the ruling was based on allegations of the defendants’ own direct commission of the torts, or a mixture of both.” *Meridian*, ¶ 15. Even before *Meridian*, courts applying Maine law have sometimes assumed the existence of aiding and abetting liability. See, e.g., *Goldenson v. Steffens*, 802 F. Supp. 2d 240, 269 (D. Me. 2011) (applying Maine law and denying motion to dismiss claims for aiding and abetting tortious conduct and civil conspiracy, without citation); *Forum Financial Grp. v. President, Fellows of Harvard Coll.*, 173 F. Supp. 2d 72, 97 (D. Me. 2001) (denying motion to dismiss claims for aiding and abetting tortious interference with prospective economic advantage, and aiding and abetting negligent and fraudulent misrepresentations, citing to *Barnes v. McGough* and Sec. 876 of the Second Restatement).

2 Maine courts “have described the salient elements of a fiduciary relationship as: (1) the actual placing of trust and confidence in fact by one party in another, and (2) a great disparity of position and influence between the parties at issue.” See *Bryan R. v. Watchtower Bible & Tract Soc. of New York, Inc.*, 1999 ME 144, ¶ 19, 738 A.2d 839 (internal quotation omitted) (noting existence of fiduciary relationships among business partners, families engaged in financial transactions, and corporate relationships). Also note that “it is often difficult to articulate exactly what proof is required to establish the existence of a fiduciary relationship in particular circumstances.” *Id.* ¶ 19, 738 A.2d 839.

3 See *Meridian*, 2021 ME 24, ¶ 28, 250 A.3d 122.

4 See *id.* at ¶ 27.

5 No. 2:19-cv-418-NT, 2022 WL 19005124 (Nov. 29, 2022). The author and his law firm represented another defendant in this matter, a financial institution, which had been dismissed from the case. See *id.* at n.3.

6 *Id.* at \*7.

7 *Id.* at \*13.

8 *Id.* at \*14.

9 Maine’s neighboring states take different approaches. Massachusetts has long recognized claims for aiding and abetting tortious conduct, see, e.g., *Massachusetts Port Auth. v. Turo Inc.*, 166 N.E.3d 972, 981 (Mass. 2021), in contrast to New Hampshire, where aiding and abetting liability appears limited to interference with custodial rights and does not, for now, extend to aiding and abetting a breach of fiduciary duty. See *In re Felt Mfg. Co., Inc.*, 371 B.R. 589, 614 (Bankr. D.N.H. 2007) (predicting that the New Hampshire Supreme Court would recognize a claim for

aiding and abetting a breach of fiduciary duty).

10 See *Marion v. Bryn Mawr Tr. Co.*, 288 A.3d 76, 78 (Pa. 2023).

11 *Id.* at 91.

12 *Id.* at 86.

13 *Id.* at 86.

14 *Id.*

15 *Id.*

16 *Id.* at 87.

17 18 U.S.C. § 2333(d)(2).

18 598 U.S. 471, 493, citing *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983).

19 598 U.S. at 492.

20 *Id.* at 504.

21 *Meridian*, 2021 ME 24, ¶ 27, citing *Bryan R. v. Watchtower Bible & Tract Soc’y of N.Y., Inc.*, 1999 ME 144, ¶ 21, 738 A.2d 839.


22 *Bryan R.* at ¶ 21, 738 A.2d 839.

23 *Meridian*, 2021 ME 24, ¶ 18 (quoting *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983)).

24 *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 492 (2023).

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